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

Date of decision: 14th OCTOBER, 2024

IN THE MATTER OF:

\+ **ARB.P. 325/2023**

ADITYA BIRLA FINANCE LIMITED .....Petitioner

Through: Mr. Puneet Singh Bindra, Ms. Charu Modi, Mr. Sachin Sharma and Mr. Rishabh Gupta, Advocates.

versus

SHOMUK ENGINEERING AND CONSULTANCY SERVICES AND ORS. .....Respondents

Through: Mr. Pankaj Agarwal and Mr. Neelaksh, Advocates.

\+ **O.M.P.(I) (COMM.) 26/2023 & CCP(O) 38/2024, I.A. 26307/2023, I.A. 9598/2024**

ADITYA BIRLA FINANCE LIMITED .....Petitioner

Through: Mr. Puneet Singh Bindra, Ms. Charu Modi, Mr. Sachin Sharma and Mr. Rishabh Gupta, Advocates.

versus

SHOMUK ENGINEERING AND CONSULTANCY SERVICES AND ORS. .....Respondents

Through: Mr. Pankaj Agarwal and Mr. Neelaksh, Advocates.

CORAM:
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT (ORAL)

1. It is the case of the Petitioner that the Petitioner extended a 'term loan' Facility and a 'Line of Credit' Facility to the Respondent No. 1 as the principal borrower and Respondents No.2 to 4 as co-borrowers. It is stated

that the Respondents failed to comply with the terms of the loan agreement, the account of the Respondents herein was declared as Non-Performing Assets (NPA). It is stated that the Petitioner, being an NBFC, issued a demand notice dated 28.10.2022 under Section 13(2) of the SARFAESI Act, 2002 to the respondents No. 1 to 4 seeking an amount of Rs.24,97,11,863/-. Material on record indicates that when the Petitioner visited the premises which were given as security for the loan Agreement, it was found that they are in possession of third parties, who claim themselves to be tenants of the said property. Petitioner, thereafter, approached this Court by filing O.M.P.(I) (COMM.) 26/2023 with the following prayers:

> "*a. Pass an order directing the-Respondents, jointly and/ or severally, to furnish security for the outstanding dues under the Facility Agreements, amounting to an aggregate of INR 25,93,23,826.67 (Rupees Twenty-Five Crores Ninety-Three Lakhs Twenty-Three Thousand Eight Hundred Twenty-Six and Paisa Sixty-Seven Only) due as on 18.01.2023, by way of bank guarantee, for securing compliance of their obligations under the Facility Agreements.*
>
> *b. Pass an order restraining/ prohibiting the Respondents from selling, disposing, alienating, or creating any third-party interest in any of their movable and immovable assets including the assets 1nentioned herein below, pending the furnishing of security in terms of prayer (a) above.*
>
> *1. 5 A, Palm Avenue within Municipal Ward no. 85, Police Station Karaya, Kolkata, 700019*
>
> *2. Premises no.6 E, Keyatala Road, P.S. Lake, Ward no. 86, Kolkata- 700029*
>
> *3. Premises No. 112 B, Dr. Meghnad Saha Sarani, P.S.*

Lake, Kolkata- 700029

4. Mouza - Dhapa, J.L. No. 2, R.S. 236, Pargana - Magura, Touzi no. 46B 2, under Police Station-Pragati Maidan

And other assets of Respondent Nos. 1 to 4 to secure the interest of the Petitioner for the entire due and outstanding of INR 25,93,23,826.67 (Rupees Twenty-Five Crores Ninety Three Lakhs Twenty-Three Thousand Eight Hundred Twenty Six and Paisa Sixty-Seven Only) as due on 18.01.2023.

c. Direct the Respondents to file an affidavit in accordance with the provisions of Order XXI Rule 41 (Form 16A Appendix E) including but not limited to disclosing on oath the list of 1novable and immovable assets currently owned by the Respondents, along with the status of encumbrance of such assets.

d. Direct Freezing of Bank Account(s) of the Borrowers including (i) Bank Account No.05932320000545 of HDFC Bank; (ii) Bank Account No.01 052000006743 of HDFC Bank creating Charge of the Outstanding amount mentioned above;

e. Direct the Respondents to disclose the true and current position of their financials on oath for the past 3 years.

f. Pass the reliefs as sought in prayers (a) to (e) in the nature of ex-parte ad-interim/interim relief(s)."

2. On 02.02.2023, while issuing notice in O.M.P.(I) (COMM.) 26/2023, this Court came to the conclusion that the Petitioner has made out a prima facie case in its favour and granted interim injunction in favour of the Petitioner herein.

3. The Petitioner also filed ARB.P. 325/2023 seeking appointment of Arbitrator in terms of Clause 25.17 of the Facility Agreement (Term Loan) and Clause 32.17 of the Facility Agreement (Line of Credit), which are both identical and both dated 28.04.2021 and the same reads as under:

> "*All claims or disputes arising out of or in relation to this Agreement shall be settled by arbitration. The arbitration tribunal shall consist of a sole arbitrator to be appointed by 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 in Delhi shall have the exclusive jurisdiction to exercise all powers under the Arbitration and Conciliation Act, 1996.*
>
> *Notwithstanding anything contained hereinabove, in the event the legal status of the Facility Provider changes or in the event of the law being made or amended so as to bring the Facility Provider under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the "DRT Act"), to proceed to recover dues from the Borrower(s) under the DRT Act, the arbitration provisions hereinbefore contained shall, at the option of the Facility Provider, cease to have any effect and if arbitration proceedings are commenced but no arbitral award is made, then at the option of the Facility Provider such proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date of the making of the law or the date when amendment becomes effective or the date when the Facility Provider exercises the option of terminating the mandate of arbitrator, as the case may be. Provided that neither a change in the legal status of the Facility Provider nor a change in law as referred to in this sub paragraph above, will*

result in invalidating an existing award passed by an arbitral tribunal constituted pursuant to the provisions of this Agreement . "

4. Notice in the Arbitration Proceedings was issued on 18.04.2023.

5. During the pendency of the proceedings, a settlement agreement was entered into between the parties on 26.07.2023. The settlement agreement is extracted here and the same reads as under:

" *SETTLEMENT AGREEMENT*

This Settlement Agreement is entered into on this the 26th day of July 2023, at Kolkata.

BETWEEN

Aditya Birla Finance Limited, having its registered office at Indian Rayon Compound, Veraval, Gujarat-362266, through its Authorised Representative Mr. Shubham Singh authorized vide Letter of Authority dated 09.06.2023, annexed herewith as AnnexureA. (Hereinafter collectively referred to as "FIRST PARTY").

AND

1. Shomuk Engineering and Consultancy Services, having its registered office at 224, AJC Bose Road, Suit No 614, Kolkata, West Bengal- 700017, through its Sole Proprietor Aniruddha Banerjee.

2. Mr. Aniruddha Banerjee S/o Mr. Sobhakar Banerjee, R/o Flat-401, 4th Floor, Premises No. 6E, Keyatala Road, Kolkata, West Bengal- 700029

3. Mrs. Subharti Banerjee W/o Mr. Aniruddha Banerjee, Rio 3rd Floor, Flat-301 Premises No. 6E, Keyatala Road, Kolkata, West Bengal- 700029

4. Shomuk Consultancy Services Pvt. Ltd. having

Registered Address at SA, Palm Avenue, Kolkata, West Bengal-700019 through its Authorised Representative Mr. Shubham Singh, authorized vide Board Resolution dated 91 17 h June 2023, annexed herewith as Annexure -B. (Hereinafter collectively referred to as "SECOND PARTY").

(The "First Party" and "Second Party" shall hereinafter jointly be referred to as the "Parties" and individually as "Party").

WHEREAS the First Party being a Non-Banking Finance Company ("NBFC") has made available loan facilities to the Second Party in accordance with Facility Agreements dated 28 .04.2021 , entered between the First Party and Second Party for tem1 loan and for Line of Credit amounting to an aggregate of Rs.23, 18,00,000/(Rupees Twenty-Three Crores Eighteen Lakhs only).

WHEREAS the Second Party defaulted in making payment of the outstanding amounts and therefore, the First Party was constrained to issue notice under Section 13(2) of the SARFAESI Act, 2022 issued on 28.10.2022 take steps in furtherance to the same.

WHEREAS disputes and difference had arisen between the Parties to this Settlement and therefore, Aditya Birla Finance Limited ("ABFL" or "First Party") filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996 OMP (I) (OMM) No. 26 of 2023 against the Second Party before the Hon'ble High Court of Delhi and received an interim order dated 02.02.2023 whereby the Second Party was restrained to create any third party interests over the secured properties and the specific bank accounts as mentioned in the prayer of the said petition of the Second Party were freezed.

WHEREAS owing to the disputes and differences which had arisen between the Parties to the Settlement Agreement, the First Party invoked the arbitration and filed a petition under Section 11 of the Arbitration & Conciliation Act, 1996 being Arb. Petition No. 325 of 2023 wherein notice was issued by order dated 18.04.2023 passed by the Hon'ble High Court of Delhi.

WHEREAS the First Party is in the possession of the properties secured I mortgaged as recorded in the Second Supplemental Memorandum of Entry dated 28.04.2021 entered into between the Parties to the Settlement Agreement and is also having Order dated 02.02.2023 passed by Hon'ble High Court of Delhi in OMP (I) (OMM) No. 26 of 2023 in its favour. AND WHEREAS the parties hereto confirm and declare that they have voluntarily and of their own will without any force or coercion etc. arrived at Settlement Agreement on the following terms a conditions.

1. These Consent Terms are being entered into between the First Party and the Second Party to record the understanding arrived at between the parties towards settlement of the disputes which have arisen between them on account of the default towards non-payment of the liabilities by the Second Party and consequently for closure of loan facilities .

2. That an amount of Rs. 24,97,11,863.75/- (Rupees Twenty-Four Crores NinetySeven Lakhs Eleven Thousand E1ght Hundred Sixty-Three and Seventy-Five Paisa Only) due as on 18.10.2022 is outstanding and payable by the Second Party towards the loan availed by them from the First Party herein under the loan accounts facilities HCFKO 1 TEROOOO 10005 72, bearing no . HCFK01TER00001000574, HCFK01 TER00001 000571 , HCFK01LOC00001000575, MINACS0168101 granted vide Sanction Letter dated 28.04.2021.

3. Now in terms of the settlement arrived between the Parties i.e ., the First Party and the Second Party, the Second Party in discharge of its liabilities towards the outstanding loan facilities availed by them, the Second Party agree and undertake to pay the First Party an amount of Rs. 18,00,00,000/- (Rupees Eighteen Crores only) towards settlement and closure of their outstanding liability owed to the First Party in full by 30thSeptember 2023 in 5 installments in the following manner;

a. The first installment of Rs. 5 Crores (Rupees Five ***Crores only) has been received by the First Party in two parts i.e., initially an amount of Rs. 1,00,00,000/(Rupees One Crore only) vide Demand Draft dated 26 .06.2023 bearing No. 513245, drawn on ICICI bank for and the remaining amount of first installment of Rs. 4 ,00,00,000/- (Rupees Four Crores only) vide Demand Draft dated 27.06.2023 bearing no . 613249 , drawn on ICICI bank, which is acknowledged by the first party.***

b. The second installment of Rs 7,00,00,000/- (Rupees Seven Crores only) should be paid by the Second party to the First Party and thus , credited in the respective loan account on or before 31.07.2023 .

> ***i. The Second Party is willing to pay the said amount from selling off one of the secured properties, ie. the immovable property i.e ., Plot of land measuring 5 Cottahs 3 Chittaks and 27 Sq. ft. together with a three storied building thereon with covered area of 8837 sq. ft. (Ground Floor- 3303 sq. ft First Floor - 2767 Sq. ft. and Second Floor - 2767 Sq. ft .) situated at Mw1icipal Premises No. 5 A Palm Avenue within Municipal Ward No. 85, Police Station Karaya, Kolkata 700019 in the District of South***

24 Parganas which is mortgaged to and in possession of First Party.

ii. It is agreed between the parties that the sale of the immovable property mentioned herein above shall be done by executing a tri-partite agreement between the Second Party, the purchaser and the First Party.

iii. That the payment of the present installment shall not be contingent upon the sale of the above-mentioned property and that the Second Party shall be liable to pay the installment within the stipulated time irrespective of the sale of such property.

c. The third installment of Rs. 1,25,00,000/- (Rupees One Crore Twenty-Five Lakhs only) should be paid by the Second Party to the First Party and thus, credited in the respective loan account on or before 30.09.2023.

i. The Second Party is willing to pay the said amount from selling off another secured property i.e., the immovable property i.e., the entire Third Floor flat of the said building admeasuring Super Built up area of 1500 Sq. ft ., a bit more or less comprising of three bed rooms, two toilets/privy, one drawing-cumdirung room, one kitchen and one balcony (52 years old building and complete mosaic flooring) lying and situated at the Premises No. 122 B, Dr. Meghna Saha Saran, P .S. Lake, Kolkata - 700029 mortgaged and in possession of the first party.

ii. it is agreed between the parties that the sale of the immovable property mentioned herein above shall be done by executing a tri-partite

agreement between the Second Party , the purchaser and the First Party.

iii. That the payment of the present installment shall not be contingent upon the ale of the above-mentioned property and that the Second Party shall be liable to pay the installment within the stipulated time irrespective of the sale of such property .

d. The fourth installment of Rs. 1,00,00,000/- (Rupees One Crores only) should be paid by the Second Party to the First Party and thus , credited in the respective loan account on or before 30.09.2023.

i. The Second Party is willing to pay the said amount from selling off another secured property i.e., the immovable property of the 42.4 (Forty Two Point Four) decimal in the total land comprised in the R.S. Dag No. 1002, recorded under Khatian No. 207, lying and situated at Mouza- Dhapa, J.L. No.2, R.S . 236 , Pargana - Magura, Touzi No. 46B 2, under Police Station - Pragati Maidan (Formerly under Tiljala Police Station, in the District of South 24 Parganas, under Sub - Registry Office at Sealdah) together with 50 (fifty) years old R . T . Shed multiple structure measuring about 5000 sq . ft. standing thereon with cemented flooring, the said total land having shown delineated with RED border in the site plan/map annexed with its deed of conveyance dated 05.04.2017 being deed no . I-1425 of 2017 along with all easement rights thereto, which property is mortgaged and in possession of First Party.

ii. It is agreed between the parties that the sale of the immovable property mentioned herein above shall be done by executing a tri-partite

agreement between the Second Party, the purchaser and the First party.

iii. That the payment of the . present Installment shall not be contingent upon the sale of the above mentioned property and that the Second Party shall be liable to pay the installment within the stipulated time irrespective of the sale of such property.

e. The fifth installment of Rs. 3, 75 ,00,000/- (Rupees Three Crores Seventy-Five Lakhs only) should be paid by the Second Party to the First Party and thus, credited in the respective loan account on or before 30.09.202 .

4 . The mode of payment shall be RTGS. The payments will be made by the Second Party to the below mentioned bank account details of the First Party;

Account No- 00600350111308,
IFSC Code - HDFC0000060,
Bank & Branch - HDFC Bank, Fort Branch

5. That on the receipt of the monies as stipulated in Clause 3 above, the First Party agrees that it shall release the mortgaged properties in the following manner: -

a. On receipt of the first installment of an amount of Rs. 5 Crores (Rupees Five Crores only) by the First Party, no mortgaged property shall be released.

b. On receipt of the second installment ofRs. 7 Crores (Rupees Seven Crores only) on or before 31.07.2023 by the First Party as stated above, the property specified in Clause 3 (b) (i) above shall be released and possession handed over to the *proposed purchaser with the consent of the Second Party along with the title deeds of the respective property.*

c . Simultaneously, the First Party shall grant permission (mere licence) to Mr. Aniruddha Banerjee S/o Mr. Sobhakar Banerjee to reside at one of the mortgaged properties i.e., Flat No. 301 on the entire 3rd Floor, Flat No. 401 on the entire 4th floor of the said Building having an aggregate super built up area of 3820 sq ft. alongwith two servant rooms on the g round floor and three covered car parking spaces on the ground floor of the said building constructed on the land comprised in the said property being 6E, Keyatala Road, Police Station, Lake Kolkata. It is expressly agreed between the parties that Mr. Aniruddha Banerjee shall not claim any equity or create any third party rights over the said property and it si merely a right to stay with no additional right. It is further agreed that the title deed in relation to this property mortgaged to the First Party shall remain in the custody of the First Party till such time till the balance amounts contemplated in Clause 3 above remain unpaid.

d . On receipt of the third installment of Rs . 1 .25 Crores (Rupees One Crores Twenty -Five Lakhs only) on or before 30.09 .2023 as stated above, the property specified in Clause 3 (c) (i) above shall be released and possession handed over to the proposed purchaser with the consent of the Second Party along with the title deeds of the respective property.

e. On receipt of the fourth installment of Rs . 1 Crore (Rupees One Crore only) on or before 30.09.2023 , the property specified in Clause 3 (d) (i) above, shall be released and possession *handed over to the proposed purchaser with the consent of the Second Party along with the title deeds of the respective property.*

f. On receipt of the fifth installment of Rs. 3 .75 Crores (Rupees Three Crores Seventy-Five Lakhs only) on or before 30.09.2023, the First Party shall release, and handover possession of the property mentioned in clause 5 (c) above to Mr. Aniruddha Banerjee S/o Mr. Sobhakar Banerjee.

6. After receipt of the entire amount as per Clause 3 above by the First Party , the First Party shall close the loan accounts facilities bearing No. HCFK01TER00001000574, HCFK01TER00001000572, HC FK01TER00001000571 , HCFK01LOC00001000575, MINACS0168101, as settled in its books and shall issue "No Dues Certificate" to the Second Party.

7 . In the event , the Second party fails to make timely payment of any of the aforesaid installments, this settlement/ consent terms shall stand cancelled along With all its covenants and parties shall be relegated to the positions prior to this Settlement Agreement and the parties shall be free to take appropriate legal actions including but not limited to reviving the proceedings as mentioned above. The Second Party shall become liable for payment of the original amount of INR Rs. 24,97,11,863.75/- (Rupees Twenty-Four Crores Ninety-Seven Lakhs Eleven Thousand Eight Hundred Sixty-Three and Seventy-Five Paisa Only) due as on 18.10.2022 along with further interest as applicable. Further, the mortgaged properties shall remain in the possession of the First Party. Further, in case of default by the Second Party

in complying with the terms of the present Settlement Agreement, the interim reliefs as available to the First Party received vide Order dated 02.02.2023 in OMP (I) (Comm) No. 26/2023 shall be restored and the Second Party agrees to the restoration and applicability of such interim relief(s) and would not object to the same.

8. Upon receipt of the full and final amount of Rs. 18 Crores, the First Party undertakes to withdraw the petition being OMP (I) (Comm) No. 26/2023 and Arb. Petition No. 325 of 2023 pending before the Hon'ble High Court of Delhi.

9. On the fulfillment of the conditions of this settlement agreement I consent terms, the Parties hereto state that they have no further claims against each other and all the past, present and future disputes and differences have been amicably settled by the Parties hereto*.*

10 . That the Parties undertake before the Hon'ble Court to abide by the terms and conditions set out in this Settlement Agreement and not to dispute the same hereinafter in future unless a party is breaching the terms agreed upon.

11. The Parties have entered into this Settlement Agreement on their own volition and consent, and without any undue influence or coercion of any kind.

12. That the Parties undertake that they are bound by this Settlement Agreement/ Consent Terms and further undertake to abide by the terms and conditions set out in the agreement and not to dispute the same hereinafter in future either themselves or through any third party."

(emphasis supplied)

6. A joint application, being I.A. No.20927/2023 was filed by the parties seeking modification of the Order dated 02.02.2023 and this Court, vide Order dated 19.10.2023, passed the following Order:

> "*1. Ibis is a joint application filed by the parties seeking modification of order dated 02.02.2023.*
>
> *2. Learned counsel for the parties Jointly submit that vide order dated 02.02.2023, this Court had directed the freezing of all the bank accounts of the respondent as set out in para 10 of the application including the two bank accounts maintained with HDFC Bank, i.e.. Bank Account No.05932320000545 and Bank Account No.01 052000006743.*
>
> *3. They submit that the parties have now entered into a settlement and therefore, pray that in order to enable the respondents to abide by the terms of the settlement, the order dated 02.02.2023 be modified by permitting the respondents to operate their aforesaid bank accounts only for the purposes of making payments as set out in para 12 of the application. Learned counsel for the respondent assures the Court that the respondents will abide by the terms of the settlement and will accordingly make the due payment to the petitioner on or before 31.10.2023.*
>
> *4. In the light of this stand taken by the parties, the application is allowed by modifying the order dated 02.02.2023 and by directing that the respondents will be free to operate the bank accounts for the purpose of making payments as set out in para 12 of the application.*
>
> *5. The application stands disposed of."*

7. It is stated by the learned Counsel for the Respondents that the

Respondents have substantially complied with the settlement agreement and only 5.5 crores are left to be paid now. He further states that the Respondents are taking efforts to ensure that settlement agreement is complied with in toto.

8. Material on record shows that vide letter dated 19.06.2024, the Petitioner issued a notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 and Section 13(8) of the SARFAESI Act. Material on record further shows that the Respondents herein filed I.A. No.33134/2024 seeking a direction to restrain the Petitioner from proceeding ahead in terms of notice under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 and Section 13(8) of the SARFAESI Act and directing the Petitioner to abide by the Settlement Agreement dated 28.07.2023. A co-ordinate Bench of this Court vide Order dated 16.07.2024 held that the Respondents have acknowledged their liability to pay the outstanding amount and have undertaken before this Court that they will pay the full amount. The Coordinate Bench of this Court, after quoting various Orders of this Court wherein the Respondents have undertaken to pay the amount and after noting the failure on the part of the Respondents to comply with their obligation under the Settlement Agreement, dismissed the application filed by the Respondents.

9. The settlement agreement has not been complied with and the amount is still due and payable. Material on record indicates that even as per settlement agreement entered into between the parties, since the Respondents have failed to abide by the terms of the settlement, in terms of Clause 7 of the Settlement Agreement, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the Parties.

10. Accordingly, Mr. Davinder Singh, Adv. (Mob. No.9810039326) is appointed as the Arbitrator to adjudicate upon the disputes between the Parties.

11. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

12. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

13. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.

14. Order dated 02.02.2023 shall continue to be in operation till a view is taken by the learned Arbitrator under Section 17 of the Arbitration Act.

15. The Petitions are disposed of along with all the pending applications, if any.

SUBRAMONIUM PRASAD, J

OCTOBER 14, 2024
Rahul