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

Date of Decision: 19th March 2024

+ ARB.P. 771/2023

ADITYA BIRLA FINANCE LTD.

..... Petitioner

Through: Mr. Aman Vasisth and Mr. Mahdip
Datta Parashar, Advocates.

versus

ANJALI NAG AND ORS

..... Respondents

Through: None.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

By way of the present petition under section 11 of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen between the parties

2. Notice on this petition was issued on 07.08.2023.
3. As recorded in last order dated 31.01.2024, since no reply has been filed by respondents Nos.1 to 3 and they have chosen not to be represented, the said respondents have been set *ex-parte*.
4. As recited in para 4 of the petition, no relief has been sought by the petitioner against respondents Nos.4 and 5, who are *pro-forma* parties.
5. In response to the query made by the court *vide* last order dated 31.01.2024 as to the maintainability of the present petition, since the



petitioner had already invoked its remedy under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act'), the court has heard Mr. Aman Vasisth, learned counsel appearing for the petitioner, at length.

6. Mr. Vasisth argues, that what the petitioner is invoking by way of the present petition filed under section 11 of the A&C Act is the arbitration agreement comprised in clause 25 of 03 separate Deeds of Personal Guarantee, all dated 27.01.2022, executed by respondents Nos.1 to 3 in favour of the petitioner. Mr. Vasisth submits, that though a financial facility was availed by respondents Nos.4 and 5 from the petitioner, proceedings under section 9 of the A&C Act are pending before the Bombay High Court against respondent No.4 (which is the sole proprietorship concern of respondent No.2); and respondent No.5 is undergoing Corporate Insolvency Resolution Process before the National Company Law Tribunal, Kolkata.
7. Counsel submits, that the petitioner is seeking reference to arbitration of the petitioner's claims against respondents Nos.1 to 3, who (latter) had furnished personal guarantees to the petitioner against the financial facility extended by the petitioner to respondents Nos.4 and 5.
8. Mr. Vasisth has drawn attention to Invocation Notice dated 10.01.2023 ('Invocation Notice'), which was issued by the petitioner only to respondents Nos.1 to 3, invoking clause 25 of the Deeds of Personal Guarantee furnished by the said respondents.
9. For completeness, it is pointed-out, that an earlier Joint Legal Demand Notice dated 02.12.2022 ('Joint Demand Notice') was also



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issued by the petitioner, again, *only* to respondents Nos.1 to 3 invoking their respective personal guarantees.

10. However, no reply is stated to have been received either to the Joint Demand Notice or to the Invocation Notice from the said respondents.
11. Mr. Vasisth argues, that it is the settled position of law, that parallel proceedings are maintainable under the A&C Act as well as under the SARFAESI Act, since proceedings under the SARFAESI Act are not *adjudicatory* in nature and are only *enforcement* proceedings in respect of a debt.
12. In the present case, counsel submits, the debt owed by respondents Nos.1 to 3 to the petitioner would first be required to be adjudicated, and under clause 25 of the Deeds of Personal Guarantee, parties have agreed to have such adjudication referred to arbitration.
13. At this point, it is necessary to extract the provision of the arbitration agreement between the parties, which is comprised in the aforementioned clause 25 of the Deeds of Personal Guarantee, which reads as under :

“25. All claims or disputes arising out of or in relation to this Guarantee shall be settled by Arbitration. The Arbitration tribunal shall consist of a sole arbitrator to be appointed by the Lender. All Parties to this Guarantee 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 as mentioned in the Schedule 1 Part C hereinbelow. Parties agree that the courts as mentioned in the Schedule 1 Part C hereinbelow shall have the exclusive jurisdiction to exercise all powers under the Arbitration and Conciliation Act, 1996.”



14. Regardless of what is stated in the aforementioned clause, in view of the settled position of law as stated by the Supreme Court in ***Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.***¹, it is not contended by the petitioner that they had the right to unilaterally appoint a Sole Arbitrator in the matter.
15. However, attention is drawn to the decision of the Supreme Court in ***M.D. Frozen Foods Exports Pvt. Ltd. & Ors. vs. Hero Fincorp Ltd.***², in particular to the following paragraphs of that judgment :

“11. A perusal of the impugned order and the submissions made by the learned Counsel for the parties have thrown up the following legal issues for determination:

A. Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?

* * * * *

“16. Another plea which was sought to be advanced is that the NBFCs stand on a different footing, and that it is not as if ipso facto, all NBFCs are included within the ambit of the Act, but only such of the NBFCs as are notified by the Central Government. Further, it was stated that the RDDB Act does not include in its term the NBFC. These factors were stated to be material to exclude the security interest created prior to the application of the Act.

* * * * *

“30. The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have

¹ (2020) 20 SCC 760

² (2017) 16 SCC 741



incorporated such a clause, the answer was given in the affirmative. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.

* * * * *

“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.”

(emphasis supplied)

16. Mr. Vasisth also submits, that in fact a view on the matter has already been taken in a matter concerning the self-same petitioner in the decision of a Co-ordinate Bench dated 01.12.2023 in ARB. P. No.251/2023 titled ***Aditya Birla Finance Ltd. vs. Shri Jagannath Memorial Educational Trust and Ors.***, in which it has been held as follows :

“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.

* * * * *

“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.”

(emphasis supplied)

17. It is argued, that as held in *Shri Jagannath Memorial Educational Trust* (supra), though notification dated 05.08.2016 issued by the Department of Financial Services, Ministry of Finance, Government of India notifies the petitioner/Aditya Birla Finance Ltd. as a ‘financial institution’ within the meaning of section 2(1)(m)(iv) read with section 31A of the SARFAESI Act, by reason of which all provisions of the SARFAESI Act apply to the petitioner (subject ofcourse to the ingredients of specific sections being fulfilled), *there is no such notification* under the Recovery of Debts and Bankruptcy Act, 1993 (‘RDB Act’) designating the petitioner as a ‘financial institution’ or ‘bank’ or ‘banking company’.
18. In the circumstances, it is argued, that the remedy of filing a recovery proceedings under the RDB Act is simply not available to the petitioner. The remedy for *adjudication* of the debt owed by respondents Nos.1 to 3 to the petitioner is available *only* by way of



the arbitration mechanism contained in clause 25 of the Deeds of Personal Guarantee.

19. At this stage, it would be appropriate to refer to the enunciation of the law on the point by the Supreme Court in ***Vidya Drolia & Ors. vs. Durga Trading Corporation***³, where the Supreme Court has held as follows :

“56. In M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. [(2017) 16 SCC 741], and following this judgment in Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd. [(2018) 14 SCC 783], it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

“57. In Transcore [(2008) 1 SCC 125], on the powers of the Debt Recovery Tribunal (“DRT”) under the DRT Act, it was observed: (SCC p. 141, para 18)

“18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable

³ (2021) 2 SCC 1



properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002.”

“58. Consistent with the above, observations in Transcore [(2008) 1 SCC 125] 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 (2012 SCC OnLine Del 4815), 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. (2012 SCC OnLine Del 1815) has been referred to in M.D. Frozen Foods Exports (P) Ltd. [(2017) 16 SCC 741], but not examined in light of the legal principles relating to non-arbitrability. The decision in HDFC Bank Ltd. (2012 SCC OnLine Del 4815) 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 of 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.”

(emphasis supplied)



The above observations made by the Supreme Court in *Vidya Drolia* (supra) are however clearly *not applicable* to the present factual matrix since there is no notification under the RDB Act designating the petitioner/Aditya Birla Finance Ltd. as a ‘financial institution’ or ‘bank’ or ‘banking company’ (even though the petitioner is a ‘financial institution’ within the meaning of the SARFAESI Act).

20. Decision of this Bench in *Bell Finvest India Ltd. & Ors vs. A.U. Small Finance Bank Ltd.*⁴ also has no application to the present case, since in that matter the ‘financial institution’ had a remedy under the RDB Act, which is not the case here.
21. Accordingly, the petitioner’s reliance on *M.D. Frozen Foods* (supra), to argue that proceedings under the SARFAESI Act and under the A&C Act can co-exist is the correct iteration of law, based on the facts of the present case.
22. Furthermore, the above view of the law has also been taken by Co-ordinate Benches of this court in *Hero Fincorp. Limited vs. Techno Trexim (I) Pvt. Ltd. & Ors.*⁵ and judgment dated 10.01.2024 passed in Rev. Petition No.296/2022 in ARB. P. No.62/2022 titled *M/s. Diamond Entertainment Technologies Pvt. Ltd. & Ors. vs. Religare Finvest Ltd. through its Authorized Officer*.
23. In the opinion of this court therefore, in the facts of the present case, since the petitioner/Aditya Birla Finance Ltd. has not been notified as

⁴ AIR 2023 Del 32

⁵ MANU/DE/4581/2022



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a ‘financial institution’ or ‘bank’ or ‘banking company’ under the RDB Act, there is *no bar* on parallel proceedings to co-exist under the A&C Act as well as the SARFAESI Act.

24. Though no specific ‘seat’ of arbitration has been designated in clause 25 of the Deeds of Personal Guarantee, Mr. Vasisth draws attention to Schedule-1, Part-C of the General Terms of the Deeds of Personal Guarantee, which stipulates Delhi as the ‘venue’ of arbitration; and also provides that courts in Delhi would have jurisdiction over the disputes between the parties. This court is also unable to discern any contrary indicia in the Deeds of Personal Guarantee to suggest that parties had intended any ‘seat’ or place other than Delhi to which the arbitration proceedings would be anchored.
25. Upon a conspectus of the averments contained in the petition, and the submissions made, this court is also satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also, that the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in Invocation Notice dated 10.01.2023, do not appear *ex-facie* to be non-arbitrable.
26. Accordingly, the present petition is allowed and **Ms. Aruna Tiku, Advocate (Cellphone No.: +91 98-101-04685)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties; with arbitration proceedings to be conducted under the aegis of the Delhi International Arbitration Centre, New Delhi (‘DIAC’), in accordance with applicable rules.



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27. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
28. The learned Arbitrator shall then proceed with the arbitral proceedings in accordance with the rules and regulations of DIAC and subject to arbitrator's fee and arbitration costs, as may be applicable.
29. 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 merits, in accordance with law.
30. A copy of this order be communicated *forthwith* to the Co-ordinator, DIAC, for information and compliance.
31. A copy of this order be communicated by the Registry *via* e-mail to the learned Arbitrator, as also to learned counsel for the parties.
32. The petition is allowed and disposed-of in the above terms.
33. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MARCH 19, 2024

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