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

Date of decision: 04th November, 2022

\+ ARB.P. 453/2021

BELL FINVEST INDIA LIMITED & ORS..... Petitioners
Through: Mr. Sanjeev Bhandari with Mr.Ravi Data and Mr. Kunal, Advocates.

versus

A U SMALL FINANCE BANK LIMITED ..... Respondent
Through: Mr. Shivam Singh, Advocate with Mr. Abhinav Singh, Mr.Manish Kumar and Mr. Avi Srivastava, Advocates.

CORAM:
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" for short), the petitioners seek appointment of an arbitrator to adjudicate upon the disputes that are stated to have arisen with the respondent from Rupee Facility Agreement dated 26.04.2019 („Rupee Facility Agreement").

2. Notice on this petition was issued on 07.04.2021; whereupon counter-affidavit dated 05.07.2021 was filed by the respondent.

3. Mr. Sanjeev Bhandari, learned counsel for the petitioner has premised his submissions on section 11 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 („SARFAESI Act‟ for short), which, counsel submits, creates a statutory arbitration agreement between the parties. For completeness, it may be recorded that the Rupee Facility Agreement in itself does not contain an arbitration clause.

4. The essential submissions made on behalf of the petitioners in support of their petition under section 11 of the A&C Act are the following:

4.1 That petitioner No. 1 is a Non-Banking Finance Company („NBFC‟ for short) registered with the Reserve Bank of India, and is accordingly a „financial institution‟ within the meaning of section 2(1)(m)(iv) of the SARFAESI Act, which entitles the petitioners to invoke arbitration under section 11 of the SARFAESI Act, since the latter provision amounts to a statutory arbitration agreement for settlement of disputes "*amongst ... the bank, or financial institution, or asset reconstruction company or qualified buyer …*" . The submission is that since the dispute in the present case is between petitioner No. 1, an NBFC, and the respondent, which is a bank, and they are both entities referred to in section 11 of the SARFAESI Act, their *inter-se* disputes are amenable to arbitration under section 11;

4.2 That the proceedings filed by the respondent before the learned Debt Recovery Tribunal, Jaipur („DRT, Jaipur‟ for short) by way of O.A. No. 1442/2019, which were filed after declaring petitioner No. 1‟s assets/accounts as a non-performing asset („NPA‟ for short) on 18.12.2019, and all other consequential and related proceedings, including the issuance of show cause

notice for declaring petitioner No. 1 as „wilful defaulter", cannot stand in the way of the petitioners invoking the remedy in arbitration. It is stated that *vide* invocation notice dated 08.02.2021, the petitioners have invoked arbitration; and since by its reply dated 15.02.2021 the respondent has failed to agree to the appointment of a sole arbitrator from a panel of three arbitrators proposed by the petitioners in the invocation notice, the present petition seeking court intervention for seeking such appointment is maintainable.

5. On the other hand, opposing the appointment of an arbitrator, Mr. Shivam Singh, learned counsel for the respondent submits, that the petition deserves to be dismissed on the following grounds:

5.1 That the respondent"s claim against the petitioners is simply for recovery of a debt due by petitioner No. 1 to the respondent; and the dispute is a simple debtor-creditor dispute, with petitioner No. 1 being a "borrower" within the meaning of section 2(1)(f) of the SARFAESI Act. It is submitted that even though petitioner No. 1 is a "financial institution" as defined under section 2(1)(m) of the SARFAESI Act, it also comes within the ambit of a "borrower" since the respondent has extended financial assistance to petitioner No. 1;

5.2 That the respondent has invoked proceedings under section 13 of the SARFAESI Act for enforcement of a „security interest" created by petitioner No. 1 in its favour, by reason of petitioner No. 1 having defaulted in payment of installments due against an outstanding loan. The remedy available to petitioner No. 1 against such proceedings initiated by the respondent is under

section 17 of the SARFAESI Act, which remedy would lie before the learned DRT, Jaipur;

5.3 That the attempt of petitioner No. 1 to draw a distinction between the proceedings pending before the learned DRT, Jaipur and the disputes sought to be referred to arbitration, is a false distinction, inasmuch as both disputes arise from the same Rupee Facility Agreement and from the same transaction, under which the respondent had advanced to petitioner No. 1 a credit facility of Rs. 10 crores; and, it is noteworthy that petitioner No. 1 has failed to bring on record any agreement, other than the Rupee Facility Agreement, from which the present disputes may be said to arise. It is argued, that as held by the Hon"ble Supreme Court in ***Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya***[1] it is impermissible to bifurcate a cause of action or the subject matter of an action, making only one part of a dispute arbitrable. It is pointed-out that this principle has been affirmed in the recent decision of Hon"ble Supreme Court in ***Vidya Drolia vs. Durga Trading Corpn.***[2];

5.4 That section 11 of the SARFAESI Act consciously omits the word „borrower" from its ambit, with the aim and intent that only where two lenders (both being financial institutions) have *inter-se* disputes *in relation to a common borrower*, in that event the *inter-se* disputes between such lenders are referable to arbitration under section 11 of the SARFAESI Act. The

[1](2003) 5 SCC 531, paras 12 and 13
[2](2021) 2 SCC 1, para 28

submission is that if every dispute between a lender and a borrower, who (latter) happens to be a financial institution, seeking a money decree and enforcement of a security interest becomes arbitrable under section 11, that would render the entire mechanism provided under the SARFAESI Act and under the Recovery of Debts and Bankruptcy Act, 1993 („RDB Act" for short) irrelevant and would nullify the mandate for establishing the DRT in the first place. If this were the position, no action could be brought before the DRT against a financial institution that has offered security as a borrower;

5.5 That the interpretation of section 11 of the SARFAESI Act must turn upon the „fourfold test" for a non-arbitrable dispute as laid down in *Vidya Drolia* (supra), and must also be in consonance with the settled position of law as enunciated in *Vidya Drolia*, namely that a litigant cannot exercise the „doctrine of election" to select arbitration as an alternative remedy if it is inconsistent with mandatory and special statutes. In the present case, petitioner No. 1 has also participated in the proceedings before the learned DRT, Jaipur and is now attempting to elect arbitration, which is impermissible in terms of the law laid-down in *Vidya Drolia;*

5.6 That the present dispute is a simple case of credit default on the part of petitioner No. 1, against which the respondent is entitled to enforce the security interest created it its favour under the SARFAESI Act, which is a special legislation for securitization and reconstruction of financial assets and for enforcement of security interests. The respondent has invoked its remedies

before the learned DRT, Jaipur, which tribunal is seized of the matter and hearings before it are at the final stages;

5.7 That other things apart, in any case, the Rupee Facility Agreement confers exclusive jurisdiction for all disputes upon courts in Jaipur and, even if there is an arbitration agreement between the parties by operation of section 11 of the SARFAESI Act, in line with the view taken in ***Aarka Sports Management Pvt. Ltd. vs. Kalsi Buildcon Pvt. Ltd.,***[3] since there is no covenant stipulating any „seat" of arbitration, the seat of arbitration is required to be determined as per section 2(1)(e) of the A&C Act read with section 20 of the Code of Civil Procedure, 1908. In the present case, the loan in question was sanctioned by the Mansarovar Branch, Jaipur; the registered office of the respondent is at Jaipur; and no part of the cause of action has arisen in Delhi. Therefore, the disputes between the parties have no territorial basis in Delhi and this court accordingly has no territorial jurisdiction to entertain the present petition even on that count;

5.8 That if the dispute was arbitrable, the petitioners ought to have availed remedies under the A&C Act; but instead, the petitioners themselves have chosen to approach the Civil Court in Rohini by way of Civil Suit bearing C.S. No. 247/2020, and have therefore „elected" the remedy of a civil forum and thus abandoning arbitration.

[3](2020) 271 DLT 194

6. Before proceeding further to decide the contentions raised on merits, a peculiar circumstance that has arisen in the present matter needs to be addressed. That peculiar circumstance is this: while the petitioner asserts that there is an arbitration agreement with the respondent created by section 11 of the SARFAESI Act, the respondent disputes it. However, the respondent says, that *if there were to be* an arbitration agreement between the parties by reason of section 11 of the SARFAESI Act, the territorial jurisdiction over such arbitral proceedings would have to be decided upon a conjoint reading of section 2(1)(e) of the A&C Act and section 20 of the CPC. Now, on point of fact, the Branch Office of the respondent which has dealt with petitioner No.1 is situate at Delhi (see Schedule 4 to the Rupee Facility Agreement); and the agreement itself was stamped and executed at Delhi. Accordingly, it cannot be said that the agreement and the transaction between the parties has no territorial basis in Delhi, within the jurisdiction of this court. Besides, none of the parties has seriously argued that this court does not have territorial jurisdiction to entertain the present petition. In view of the circumstances obtaining in the case, this court has proceeded to decide the parties‟ contentions on merits.

7. While extensive submissions have been made by learned counsel appearing for the parties based on the averments contained in the petition, in the opinion of this court, the relevant aspects of the matter on which the decision of the present petition hinges, are the following:

7.1 Under the Rupee Facility Agreement the status of petitioner No. 1 has been expressly defined as that of a “borrower”; and the

respondent is the "lender", with petitioners Nos. 2 to 4 being the "guarantors";

7.2 The fact that petitioner No. 1 is an NBFC is also expressly acknowledged in the Rupee Facility Agreement, without in any way detracting from its position as a borrower;

7.3 The Rupee Facility Agreement does not contain any arbitration provision;

7.4 The disputes between the parties have admittedly arisen by reason of default on the part of petitioner No. 1 to repay the loan due under the Rupee Facility Agreement;

7.5 It is also not in dispute that a „security interest", as defined in section 2(1)(zf) of the SARFAESI Act, was created by petitioner No. 1 in favour of the respondent as part of the loan transaction comprised in the Rupee Facility Agreement; to enforce which, the respondent has taken steps under the SARFAESI Act by moving an Original Application before the learned DRT, Jaipur. Although other related proceedings are also stated to have been filed *inter-alia* by the petitioners before the learned Debt Recovery Appellate Tribunal, New Delhi, the details of those proceedings are not relevant for purposes of the present decision, except to notice that the *petitioners as well as the respondent* are locked in various legal proceedings under the SARFAESI Act and the RDB Act;

7.6 The present petition under section 11 of the A&C Act is premised upon a notice dated 08.02.2021 invoking arbitration issued by the petitioners to the respondent, based not upon any

independent arbitration agreement but relying upon section 11 of the SARFAESI Act;

7.7 The contentions raised in the invocation notice have, of course, been disputed and denied by the respondent *vide* its reply dated 15.02.2021.

7.8 The issue of arbitrability of disputes in cases where special statutes govern the field has been enunciated by the Hon"ble Supreme Court in the seminal decision in *Vidya Drolia* (supra), the following portions whereof squarely cover the present case, both on the issue of „doctrine of election" and „non-arbitrability" of certain kinds of disputes:

> *"53. Dhulabhai case [Dhulabhai v. State of M.P., (1968) 3 SCR 662 : AIR 1969 SC 78] is not directly applicable as it relates to exclusion of jurisdiction of civil courts, albeit we respectfully agree with the order of reference [Vidya Drolia v. Durga Trading Corpn., (2019) 20 SCC 406] that Condition 2 is apposite while examining the question of non-arbitrability. Implied legislative intention to exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and further lays down that all questions about the said right and liability shall be determined by the court or tribunals so empowered and vested with exclusive jurisdiction. Therefore, mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non-arbitrability. Conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred.*

"54. ***Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum****. In Transcore v. Union of India [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116], this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the DRT Act") is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms : (Transcore case [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , SCC p. 162, para 64)*

> *"64. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant*

and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

"55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available ***only if*** *the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative.* ***Conversely, and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied****. This requires examining the "text of the statute, the legislative history, and "inherent conflict" between arbitration and the statute's underlying purpose" [Jennifer L. Peresie, "Reducing the Presumption of Arbitrability" 22 Yale Law & Policy Review, Vol. 22, Issue 2 (Spring 2004), pp. 453-462.] with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed.* ***In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed****.* ***When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable****.*

"56. In M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805], and following this judgment in Indiabulls Housing Finance Ltd.

v. Deccan Chronicle Holdings Ltd. [Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783 : (2018) 4 SCC (Civ) 703], ***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 [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116], 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 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 [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] 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 [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566], 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. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] has been referred to in M.D. Frozen Foods Exports (P) Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805], but not examined in light of the legal principles relating to non-arbitrability. The decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. <u>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</u>. **<u>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</u>**."*

(emphasis supplied)

7.9 Furthermore, to answer as to what types of disputes are intended to be covered by the statutory arbitral mechanism comprised in section 11 of the SARFAESI Act, the earlier decision of the Hon"ble Supreme Court in *M/s. Transcore vs. Union of India & Anr.*,[4] may be referred to. In that decision the Hon"ble Supreme Court clarifies that the arbitral mechanism contemplated under section 11 is applicable to financial institutions for their *inter-se* disputes *but not to a dispute with a borrower, even if the borrower is a financial institution*. The relevant portion of *Transcore* (supra) in this regard is extracted below:

> *"21. Section 11 deals with resolution of disputes relating to securitisation, reconstruction or non-payment of any amount due between the bank or FI or securitisation company or reconstruction company. It further states that such disputes shall be resolved by conciliation or arbitration.* ***It is important to note that the dispute contemplated under Section 11 of the NPA Act is not with the borrower****. ... .*
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> *"30. The point to be noted is that* ***the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower****.* ***On the contrary, the NPA Act deals with the rights of the secured creditors inter se****. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallised and that his account is classified as non-performing asset in the hands of the bank/FI."*
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> (emphasis supplied)

[4](2008) 1 SCC 125

7.10 Though, as expressed above, much has been argued on behalf of the petitioners to distinguish the aforesaid position, in the opinion of this court, such arguments do not warrant digression from the settled legal position in *Vidya Drolia* (supra) and *Transcore* (supra), which clearly say: *firstly,* that the *SARFAESI Act does not deal with disputes between a secured creditor and a borrower; but deals with the rights of the secured creditors inter-se;* and *secondly,* that the SARFAESI Act provides an additional procedural dispensation, which affords a complementary remedy to that available under the RDB Act for financial institutions against borrowers. Also, claims covered by the RDB Act are non-arbitrable, with a prohibition against waiver of jurisdiction under those statutes by necessary implication. Accordingly, disputes that would be covered by section 11 of the SARFAESI Act are those which deal with the rights of secured creditors *inter-se,* since the SARFAESI Act proceeds on the basis that the liability of the borrower has been crystallized and the borrower‟s account has been classified as a non-performing asset in the hands of the financial institution;

7.11 Though petitioner No. 1 is a financial institution, for the purposes of the present *lis* between the parties, petitioner No. 1 dons the hat of a *borrower* within the meaning of section 2(1)(f) of the SARFAESI Act, which definition takes within its fold "*any person*", which would also mean and include a borrower which happens to be a financial institution. It is noteworthy that section 11 conspicuously omits the word *borrower* from its

text, which is a clear indication, as enunciated by the Hon‟ble Supreme Court, that a financial institution which happens to be a borrower *vis-a-vis* the institution with which a dispute arises, cannot resort to arbitration as a remedy;

7.12 The remedy of arbitration provided in section 11 of the SARFAESI Act cannot override the special remedies stipulated under the set of special laws, *viz.* the SARFAESI Act and the RDB Act; and therefore even statutory arbitration cannot derogate from a remedy available to a lender for enforcing a security interest and the „doctrine of election‟ is simply not available;

7.13 Quite clearly, matters covered by *special laws,* which create *special rights,* to be adjudicated and enforced by *special forums,* under *special procedures,* in this case the DRT, are non-arbitrable; and therefore, the remedies available to a lender for enforcing a security interest cannot be encroached upon by any arbitral mechanism.

8. For completeness it may reiterated, that the borrower continues to have a remedy against any unlawful crystallisation of a debt or wrongful enforcement of a security interest under the provisions of the SARFAESI Act and the RDB Act.

9. In the present case, the prayer seeking reference of disputes to arbitration, especially when such disputes are already subject matter of proceedings before the DRT, Jaipur and the DRAT, New Delhi, is therefore, wholly misconceived.

10. As a sequitur, in the opinion of this court, the present petition is bereft of any merit; and the same is accordingly dismissed.

11. Pending applications, if any, also stand disposed of.

ANUP JAIRAM
BHAMBHANI, J

NOVEMBER 04, 2022
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