

2023:BHC-OS:15041



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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL ARBITRATION PETITION (L) NO.8654 OF 2022

WITH

COMMERCIAL ARBITRATION APPLICATION (L) NO.3908 OF 2023

Tata Motors Finance Solutions Limited ... Petitioner / Applicant
Vs.
Naushad Khan c/o. Nazbul Hoda Khan ... Respondent

AND

COMMERCIAL ARBITRATION PETITION (L) NO.25821 OF 2022

Tata Motors Finance Solutions Limited ... Petitioner
Vs.
Parveen Travels Pvt. Ltd. and another ... Respondents

Mr. Chetan Kapadia, Senior Advocate a/w. Ms. Vidisha Rohiya, Ms. Ami Brahmabhatt and Ms. Bhavna Dube Patil i/b. Jay & Co. for Petitioner in CARBPL/8654/2022 and for Applicant in CARAPL/3908/2022.

Dr. Abhinav Chandrachud a/w. Mr. Gaurav Jangle and Ms. Kunjita Shah i/b. IV Merchant & Co. for Petitioner in CARBPL/25821/2022.

Ms. Anita Castellino a/w. Ms. Vibha Mishra and Mr. Mehul Thakkar i/b. Md. Jamil Khan for Respondent in CARBPL/8654/2022 and CARAPL/3908/2022.

Ms. Anita Castellino a/w. Ms. Vibha Mishra, Md. Jamil Khan, Ms. Zia Sayed and Mr. Kevin Gala and Ms. Jayshri Chavan i/b. Mr. Mehul Thakkar for Respondent in CARAPL/25821/2022.

CORAM : MANISH PITALE, J.

Reserved on : 18TH OCTOBER, 2023

Pronounced on: 20TH DECEMBER, 2023

ORDER :

. The respondents in these proceedings have raised a fundamental objection regarding jurisdiction of this Court to entertain the two petitions filed under Section 9 of the Arbitration and Conciliation Act, 1996 (Arbitration Act) and an application under Section 11 thereof, on the ground that the petitioner - applicant in these proceedings is a

'financial institution' covered under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), further claiming that the petitioner ought to proceed under the SARFAESI Act and that the remedy of arbitration cannot be invoked by the petitioner at all.

2. The respondents claim that the petitioner ought to approach the Debts Recovery Tribunal (DRT) by invoking the provisions of the SARFAESI Act and that the law laid down by the Supreme Court in the case of *Vidya Drolia and others Vs. Durga Trading Corporation* reported in **(2021) 2 SCC 1**, makes it amply clear that in the face of the statutory remedy with special tribunal available to the petitioner, resort to arbitration proceedings is barred, notwithstanding an arbitration clause contained in the agreement executed between the parties.

3. Brief reference to facts would give the backdrop in which the present proceedings have been initiated. The petitioner had advanced loan facilities to the respondents for purchase of vehicles and accordingly, Loan-cum-Hypothecation-cum-Guarantee Agreements were executed between the petitioner and the respondents. Each of the agreements contained an arbitration clause, which reads as follows:-

“21. Arbitration

21.1. All disputes differences and / or claims arising out of this Agreement or as to the construction, meaning or effect hereof or as to the rights and liabilities of the parties hereunder shall be settled by arbitration to be held in Mumbai in accordance with the Arbitration and Conciliation Act 1996, or any statutory amendments thereof and shall be referred to a sole arbitrator to be appointed by the Lender. In the event of death, refusal, neglect, inability or incapability of the person so appointed to act as an arbitrator, the Lender may appoint a new arbitrator. The proceedings will be conducted in English. The award of the arbitrator shall be final and binding on parties concerned.”

4. The loan amounts were secured by way of hypothecation of

vehicles in respect of which the loan amounts were advanced. The petitioner claims that although, initially, the respondents did make payment of installments, but subsequently, they started committing defaults. The parties entered into correspondence regarding repayment of outstanding amounts by the respondents. When the petitioner noticed that one of the vehicles was sold by the respondents, the petitioner was constrained to invoke the arbitration clause. Since the petitioner apprehended that the respondents would continue using the vehicles despite committing defaults and the vehicles may even be disposed off, the present petition under Section 9 of the Arbitration Act and the application under Section 11 thereof were filed before this Court.

5. The respondents appeared and resisted the prayers made in the petition and in the application. The aforementioned fundamental objection regarding jurisdiction was raised, on the basis of which, the respondents prayed for dismissal at the threshold of the petitions and the application.

6. Since the respondents raised objection of jurisdiction, going to the very root of the matter, this Court is referring to the arguments made on behalf of the respondents first and then reference would be made to the submissions made on behalf of the petitioner.

7. Ms. Anita Castellino, learned counsel appearing for the respondents in the petition as well as in the application submitted that the petitioner was notified as a financial institution by the central government under the provisions of the SARFAESI Act by issuing notification dated 27.08.2018. It was submitted that the moment the petitioner stood notified as a financial institution under Section (2)(1)(m) (iv) of the SARFAESI Act, the entire mechanism available under the said Act became available to the petitioner. This being a statutory remedy, wherein the DRT exercises exclusive jurisdiction, as per the law

laid down by the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*), notwithstanding the existence of arbitration clause under the agreements executed between the parties, the disputes were rendered non-arbitrable. On this basis, it was submitted that the present petitions and the application filed under the provisions of the Arbitration Act are barred by law, and therefore, this Court cannot exercise jurisdiction to entertain the same.

8. The learned counsel for the respondents invited attention of this Court to Section 2(1)(m) of the SARFAESI Act, which defines 'financial institution', as also Section 34 thereof, which specifically provides that, no civil court would have jurisdiction to entertain any suit or proceeding in respect of a matter which the DRT or the appellate tribunal is empowered to determine. It was submitted that since arbitration proceedings are civil proceedings, they are also barred by operation of Section 34 of the SARFAESI Act.

9. The learned counsel further referred to the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act), particularly Section 2(h) thereof, which defines 'financial institution'. Reference was also made to Section 18 of the RDDB Act, which specifies that, no court or other authority shall be entitled to exercise jurisdiction in relation to the matters specified in Section 17 of the RDDB Act, such powers being exercised by the DRT.

10. On this basis, it was submitted that by operation of the aforesaid statutes in the light of the petitioner being notified as a financial institution by notification dated 27.08.2018, the remedy of resolution of disputes through arbitration is no longer available to the parties before this Court. The learned counsel for the respondents specifically relied upon judgements of the Supreme Court in the case of the *Authorized Officer, State Bank of India Vs. M/s. Allwyn Alloys Pvt. Ltd. and others*,

(2018) 8 SCC 120; *Bank of Rajasthan Ltd. Vs. VCK Shares and Stock Broking Services Ltd.*, **(2023) 1 SCC 1**; and judgement of the Delhi High Court in the case of *Bell Finvest India Limited and ors. Vs. A U Small Finance Bank Limited*, **AIR 2023 Delhi 32**.

11. Reliance was placed on behalf of the respondents on judgements of this Court in the case of *Mantras Green Resources Limited and others Vs. Canara Bank* [judgement and order dated **03.03.2023** passed in **Commercial Arbitration Application (L) No.12570 of 2021**] and *Naresh J. Doshi and others Vs. Reserve Bank of India*, **2021 SCC OnLine Bom.11655**.

12. It was further submitted on behalf of the respondents that in the agreements executed between the parties, there is a reference to the RDDB Act as well as the SARFAESI Act and that the petitioner itself has retained its right to proceed under the aforesaid statutes. On this basis, it was submitted that the petitioner cannot be permitted to turn around and claim that despite the aforesaid stipulations in the agreement, it is entitled to invoke arbitration.

13. On the other hand, Mr. Chetan Kapadia, learned senior counsel appearing for the petitioner in Commercial Arbitration Petition (L) No.8654 of 2022 and for the applicant in Commercial Arbitration Application (L) No.3908 of 2023, as also Dr. Abhinav Chandrachud, learned counsel appearing for the petitioner in Commercial Arbitration Petition (L) No.25851 of 2022, submitted that the objection regarding jurisdiction raised on behalf of the respondents is based on a misreading of the position of law and also that, the same is based on erroneous appreciation of the facts in the present proceedings.

14. It was submitted that there could be no dispute about the petitioner being notified as a financial institution by notification dated

27.08.2018, issued by the central government under the provisions of the SARFAESI Act. But, it was emphasized that the petitioner stood notified as a 'financial institution' only under Section 2(1)(m)(iv) of the SARFAESI Act, 'for the purposes of the SARFAESI Act'. According to the learned senior counsel appearing for the petitioner, the respondents were wrongly presuming that the aforesaid notification had resulted in the petitioner being notified as the financial institution even under the RDDB Act. The definitions of 'financial institution' under the SARFAESI Act and the RDDB Act were referred to and it was submitted that the petitioner could not be said to be a financial institution notified under the RDDB Act. Thus, the petitioner can approach the DRT only under the provisions of the SARFAESI Act, upon crystallization of the debt recoverable, only to utilize the mechanism and machinery provided under the SARFAESI Act for recovery of dues. It was emphasized that the provisions of the SARFAESI Act do not provide a mechanism for determination of the debt due, which in the facts of the present case is an exercise to be carried out only in the arbitral proceedings, in the light of the arbitration clause contained in the agreements executed between the parties. As the provisions of the RDDB Act are not available to the petitioner, there is no question of the petitioner approaching the DRT for determination of the debt due, and therefore, the contention raised on behalf of the respondents regarding jurisdiction, deserves to be rejected.

15. The learned senior counsel appearing for the petitioner in these proceedings relied upon judgement of the Supreme Court in the case of *M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited*, **(2017) 16 SCC 741** to contend that the proceedings under the SARFAESI Act and the arbitration proceedings could go hand in hand, with the arbitration proceedings being the adjudicatory process and the SARFAESI proceedings being the enforcement proceedings. It was

emphasized that a proper reading of the judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*), would show that the law laid down in **M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited** (*supra*) was not overruled and the contention sought to be raised to the contrary on behalf of the respondents was not sustainable. In this regard, reliance was placed on judgement of the Delhi High Court in the case of *Diamond Entertainment Technologies Private Limited and others Vs. Religare Finvest Limited through its Authorized Officer*, **2023 SCC OnLine Del. 95**.

16. The learned senior counsel appearing for the petitioner sought to distinguish the judgements of this Court in the case of **Mantras Green Resources Limited and others Vs. Canara Bank** (*supra*) and **Naresh J. Doshi and others Vs. Reserve Bank of India** (*supra*). Additionally, reliance was placed on judgment of this Court in the case of *Bank of Baroda Vs. Gopal Shriram Panda and another*, **2021 SCC OnLine Bom 466**. Having contended that the objection regarding jurisdiction raised on behalf of the respondents was unsustainable, the learned senior counsel for the petitioner submitted that in the light of the material placed on record, a strong *prima facie* case was made out for grant of interim measures as prayed in the petitions filed under Section 9 of the Arbitration Act and it was contended that since arbitration had been invoked, this Court may also allow the application filed under Section 11 of the Arbitration Act.

17. The learned senior counsel appearing for the petitioner submitted that mere reference to the RDDB Act and the SARFAESI Act in the agreements executed between the parties, cannot lead to a conclusion that the dispute resolution mechanism of arbitration would not be available. It was submitted that the SARFAESI Act concerns

enforcement process and reference to the RDDB Act is only to the extent that, if in future there is a change in law and the petitioner is included in the definition of the 'financial institution' under the RDDB Act, then the petitioner would be at liberty to exercise the rights available under the RDDB Act.

18. Heard learned counsel for the parties and perused the material on record. The fundamental objection regarding jurisdiction deserves consideration in the present proceedings. There can be no doubt about the fact that if the law laid down by the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*) applies in the present proceedings, the petitions as well as the application will have to be dismissed, for the petitioner to be relegated to appropriate remedies under the SARFAESI Act. In order to consider the rival submissions, it would be appropriate to refer to the relevant provisions of the SARFAESI Act as well as the RDDB Act.

19. The relevant provisions of the SARFAESI Act are as follows:-

“2. Definitions.-(1) In this Act, unless the context otherwise requires,-

(a) to (l) ...

(m) “financial institution” means-

- (i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);
- (ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);
- (iiia) a debenture trustee registered with the Board and appointed for secured debt securities;

- (iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be;
- (iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;

17. Application against measures to recover secured debts.-

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

34. Civil court not to have jurisdiction.- No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

20. The relevant provisions of the RDDDB Act are as follows:-

“2. Definitions.- In this Act, unless the context otherwise requires,-

- (a) to (g) ...
- (h) “financial institution” means-
 - (i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);
 - (ia) the securitisation company or reconstruction company which has obtained a certificate of registration under sub-section (4) of section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of

- Security Interest Act, 2002 (54 of 2002);
- (ib) a debenture trustee registered with the Board and appointed for secured debt securities;
 - (ii) such other institution as the Central Government may, having regard to its business activity and the area of its operation in India, by notification, specify;

18. Bar of jurisdiction.- On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17:

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Law (Amendment) Act, 2012 (1 of 2013) under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.”

21. On 27.08.2018, the Ministry of Finance of the Central Government issued notification including the petitioner as a 'financial institution' under Section 2(1)(m)(iv) of the SARFAESI Act. The relevant portion of the said notification reads as follows:-

“
 MINISTRY OF FINANCE
 (Department of Financial Services)
 NOTIFICATION
 New Delhi, the 27th August, 2018

S.O.4176 (E).- In exercise of the powers conferred under the sub-clause (iv) of clause (m) of sub-section (1) of section 2 read with section 31A of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), the Central Government hereby specifies the following Non-Banking Financial Companies including Non-Banking Financial Companies-Deposit Taking, which are covered under clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934) and are registered with Reserve Bank of India, having assets worth five hundred crore rupees

and above as per their last audited balance sheet, as 'Financial Institution', and hereby directs in the public interest that all provisions of the said Act, shall apply to such financial institutions with the exception that the provisions of sections 13 to 19 shall apply only to such security interest which is obtained for securing repayment of secured debt with principal amount of one crore rupees and above, namely:-

S. No.	Name of the Non-Banking Financial Company
1 to 5	...
6	Tata Motors Finance Solutions Limited

22. Thus, the petitioner, from the date of issuance of the notification, is indeed recognized as a financial institution. But, it is crucial that Section 2(1)(m)(iv) of the SARFAESI Act specifies that an institution, which is notified by the central government, shall be a 'financial institution for the purposes of this Act'. The words used in the aforesaid provision make it very clear that when an institution or a non-banking financial company like the petitioner is notified as a financial institution, it is only for the purposes of the SARFAESI Act.

23. This is distinct from the definition of 'financial institution' under Section 2(h) of the RDDB Act. It is undisputed that the petitioner is not notified as a financial institution by the central government upon exercising power under Section 2(h)(ii) of the RDDB Act. This aspect goes to the very root of the matter while considering the rival submissions. The petitioner in the present case, upon being notified as a financial institution under Section 2(1)(m)(iv) of the SARFAESI Act can approach the DRT, but obviously only for enforcement purposes. The object of the SARFAESI Act is to provide for a quick enforcement mechanism for recovery of dues. It goes without saying that the enforcing mechanism is to be triggered on the basis of a crystallized or determined amount or quantum. There is substance in the contention raised on behalf of the petitioner that the provisions of the SARFAESI

Act are complimentary to the provisions of the RDDB Act and that, the SARFAESI Act does not contain a mechanism for determination or crystallization of the amounts due. Thus, the bar of jurisdiction contained in Section 34 of the SARFAESI Act pertains only to the matters which the DRT or the appellate tribunal is empowered to undertake as per the SARFAESI Act. An application under Section 17 of the SARFAESI Act pertains only to measures undertaken for recovery of secured debts and when any person, including a borrower, is aggrieved by any measures referred to in Section 13(4) of the SARFAESI Act taken by the secured creditor. Section 13 of the SARFAESI Act, in turn, pertains to enforcement of a security interest. Thus, the entire mechanism and machinery of the SARFAESI Act pertains to enforcement and not to the anterior process of determination of the debt due. That exercise is within the domain of the mechanism and machinery provided under the RDDB Act. Once this definition is taken into account, it becomes clear that the objection pertaining to jurisdiction raised on behalf of the respondents cannot be sustained.

24. In the present case, the mechanism and machinery under the RDDB Act is not applicable and available to the petitioner, and therefore, the exercise of determining and resolving disputes pertaining to the debt due, falls within the process of arbitration to which the parties have agreed by incorporating arbitration clauses in the said agreements. In this context, Section 37 of the SARFAESI Act assumes significance, as it provides that, the application of other laws is not barred. It is specifically provided therein that the provisions of the SARFAESI Act and the rules made thereunder are in addition to statutes specifically named in the said provision and 'any other law for the time being in force'. Thus, the Arbitration Act and the SARFAESI Act operate in tandem.

25. This aspect has been elaborately discussed and laid down by the Supreme Court in the case of **M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited** (*supra*). The relevant portion of the said judgement reads as follows:-

“28. These observations, thus, leave no manner of doubt and the issue is no more *res integra*, especially keeping in mind the provisions of Sections 35 and 37 of the SARFAESI Act, which read as under:

“35. ***The provisions of this Act to override other laws.***–

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

* * * *

37. ***Application of other laws not barred.***– The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.”

29. The aforesaid two Acts are, thus, complimentary to each other and it is not a case of election of remedy.

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 incorporated such a clause, the answer was given in the affirmative. 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.

31. The discussion in the impugned order refers to a judgment of the Full Bench of the Delhi High Court in *HDFC Bank Limited vs. Satpal Singh Bakshi* opining that an arbitration is an alternative to the RDDB Act. In that context, the learned Single Judge has rightly held that this Full Bench judgment does not, in any manner, help the appellants but, in fact, supports the case of the respondent. The jurisdiction of

the Civil Court is barred for matters covered by the RDDB Act, but the parties still have freedom to choose a forum, alternate to, and in place of the regular courts or judicial system for deciding their inter se disputes. All disputes relating to the “right in personam” are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. A claim of money by a bank or a financial institution cannot be treated as a “right in rem”, which has an inherent public interest and would thus not be arbitrable.

32. The aforesaid is not a case of election of remedies as was sought to be canvassed by learned senior counsel for the appellants, since the alternatives are between a Civil Court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an arbitral tribunal has been elected. The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In *Transcore vs. Union of India* it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is what has been envisaged under the SARFAESI Act and the two Acts are cumulative remedies to the secured creditors.

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.

34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in *Sarthak Builders Pvt. Ltd. vs. Orissa Rural Development Corporation Limited*, the Full Bench of the Delhi High Court in *HDFC Bank Limited vs. Satpal Singh Bakshi* and the Division Bench of the Allahabad High Court in *Pradeep Kumar Gupta vs. State of U.P.* lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in *Deccan Chronicles Holdings Limited vs. Union of India* following the overruled decision of the Orissa High Court in *Subash Chandra Panda vs. State of Orissa* does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand.”

26. The respondents have specifically contended that the judgement

of the Supreme Court in the case of **M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited** (*supra*) has been overruled by subsequent judgement of a larger Bench in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*). The following portion of the said judgement is emphasized upon:

“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” 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 Private Limited v. Hero Fincorp Limited*, and following this judgment in *Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited*, 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*, on the powers of the Debt Recovery Tribunal (DRT) under the DRT Act, it was observed:

“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* 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*, 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.* has been referred to in *M.D. Frozen Foods Exports Private Limited*, but not examined in light of the legal principles relating to non-arbitrability. Decision in *HDFC Bank Ltd.* 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.”

27. This Court is of the opinion that a proper appreciation of the above-quoted portion of the judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*), indicates that the claims of banks and financial institutions covered under the RDDB Act are non-arbitrable and therefore, even if there is an arbitration clause, the same would be rendered ineffective. The reference to the RDDB Act, referred to as the DRT Act in the judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*), makes it clear that all those banks and financial institutions, specifically covered under the said Act, would not be entitled to opt for arbitration as a forum for determination of disputes, notwithstanding existence of an arbitration clause.

28. As noted hereinabove, the petitioner is notified as a ‘financial institution’, only under Section 2(1)(m)(iv) of the SARFAESI Act, for the purposes of the said Act and only in that context, can the petitioner approach the DRT for the purposes of enforcement. As laid down by the Supreme Court in the case of **M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited** (*supra*), while arbitration is an adjudicatory process, the proceedings under the SARFAESI Act are enforcement proceedings. It is only after the adjudicatory process of arbitration in the present case leads to determination and crystallization of the debt due to the petitioner, that the petitioner would be able to resort to the enforcement process under the SARFAESI Act.

29. The Delhi High Court in the case of **Diamond Entertainment Technologies Private Limited and others Vs. Religare Finvest**

Limited through its Authorized Officer (*supra*) has also taken an identical view after taking into account the judgement of the Supreme Court in the case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*). It is specifically held that even though the Supreme Court in the said case of **Vidya Drolia and others Vs. Durga Trading Corporation** (*supra*) overruled the judgement of the Full Bench of the Delhi High Court in the case of *HDFC Bank Ltd. vs. Satpal Singh Bakshi*, **2012 SCC OnLine Del 4815**, the law enunciated by the Supreme Court in the case of **M. D. Frozen Foods Exports Private Limited Vs. Hero Fincorp Limited** (*supra*) is still good law. This Court agrees with the aforesaid view taken by the Delhi High Court in the case of **Diamond Entertainment Technologies Private Limited and others Vs. Religare Finvest Limited through its Authorized Officer** (*supra*).

30. This Court is of the opinion that reliance placed on behalf of the respondents on judgements in the case of **Mantras Green Resources Limited and others Vs. Canara Bank** (*supra*), **Authorized Officer, State Bank of India Vs. M/s. Allwyn Alloys Pvt. Ltd. and others** (*supra*), **Bank of Rajasthan Ltd. Vs. VCK Shares and Stock Broking Services Ltd.** (*supra*), and **Bell Finvest India Limited and ors. Vs. A U Small Finance Bank Limited** (*supra*) is misplaced.

31. In the case of **Mantras Green Resources Limited and others Vs. Canara Bank** (*supra*), the loan facility was taken from a bank, which is admittedly covered under the RDDB Act and the bank was a party to the said proceedings. In the present case, the provisions of the RDDB Act are not available to the petitioner and the petitioner is certainly not a bank.

32. In the case of **Authorized Officer, State Bank of India Vs. M/s. Allwyn Alloys Pvt. Ltd. and others** (*supra*), the Supreme Court set

aside the order of the High Court and remanded the matter back to the High Court on the ground that a civil suit cannot be filed in respect of the subject matter to be determined by the DRT under Section 17 of the SARFAESI Act. But in the present case, the petitioner has not undertaken any measure under the SARFAESI Act and therefore, the bar under Section 34 of the said Act would not apply in the facts and circumstances of the present case.

33. Judgement in the case of **Bank of Rajasthan Ltd. Vs. VCK Shares and Stock Broking Services Ltd.** (*supra*) was also in the context of the RDDB Act and as noted hereinabove, the RDDB Act and the SARFAESI Act are complimentary statutes and they may have the same forum of DRT, but the issues to be determined under the RDDB Act are distinct from the issues, that would arise in the proceedings under the SARFAESI Act, which is a statute concerned only with enforcement.

34. In the case of **Bell Finvest India Limited and ors. Vs. A U Small Finance Bank Limited** (*supra*), the Court was concerned with proceedings under Section 11 of the SARFAESI Act, which covers disputes between a bank or financial institution or asset reconstruction company and admittedly, in the present case, the Court is not concerned with such a dispute. Thus, all the aforesaid judgements on which the respondents have placed reliance are distinguishable.

35. As regards the contention raised on behalf of the respondents that arbitration cannot be resorted to as the petitioner has referred to the RDDB Act and SARFAESI Act in the agreement itself, reserving liberty to invoke the provisions of the said statutes, this Court finds that mere reference to the said statutes cannot inure to the benefit of the respondents. As noted hereinabove, the SARFAESI Act is concerned only with the enforcement process after the adjudicatory process through

arbitration is completed. Therefore, reference to the SARFAESI Act in the agreements cannot be a bar for the petitioner to invoke arbitration. The reference to RDDB Act in the agreements is limited to the extent that, if in future, there is a change in law and the petitioner is included under the definition of 'financial institution' under the RDDB Act, the petitioner has reserved its right to proceed under the RDDB Act. As on today, the petitioner is admittedly not notified as a 'financial institution' under the RDDB Act, and therefore, the adjudicatory process of arbitration is clearly available to the petitioner, in the light of the above-quoted arbitration clause in the agreements executed between the parties. Thus, the said contention raised on behalf of the respondents is also without any substance.

36. A perusal of the above-quoted arbitration clause indicates that in case of disputes arising between the parties, the adjudicatory process of arbitration has to be resorted to. The petitioner, in the present case, has indeed invoked arbitration. This Court finds that there are arbitrable disputes that have arisen between the parties and that therefore, both the petitions under Section 9 and the application under Section 11 of the Arbitration Act can certainly be entertained.

37. In the light of the above, the objection regarding jurisdiction raised on behalf of the respondents is rejected.

38. The petitioner has claimed interim measures in the backdrop of the material placed on record to indicate the defaults on the part of the respondents in repayment of loans advanced for purchase of vehicles. The subject vehicles were hypothecated with the petitioner. The respondents have not been able to dispute the fact that they have indeed defaulted. In such a situation, there is enough material placed on record on behalf of the petitioner to show that, unless interim measures, as prayed on behalf of the petitioner, are granted, there is likelihood of the

respondents dealing with the subject vehicles, including creating third party rights, which would unnecessarily complicate the matters, pending resolution of disputes through arbitration.

39. Therefore, a strong *prima facie* case is made out by the petitioner for grant of interim measures. This Court finds that unless appropriate interim measures are granted, the petitioner is likely to suffer grave and irreparable loss, thereby indicating that the balance of convenience is in favour of the petitioner.

40. In view of the above, the petitions filed under Section 9 deserve to be partly allowed.

41. Consequently, in Commercial Arbitration Petition (L) No.8654 of 2022, the following interim measures are granted:-

- (a) Pending initiation, hearing and final disposal of the arbitral proceedings and for a period of four weeks thereafter, the respondent by themselves, their officers, employees, servants and / or agents or otherwise howsoever be restrained by an order and injunction, from in any manner dealing with, selling, transferring, disposing of, or alienating or encumbering or hypothecating or charging or parting with possession of or transferring or creating any right, title or interest or license in favour of anyone else in respect of the said hypothecated vehicles as more particularly described in Table-III and also to disclose their current location and whereabouts;
- (b) Pending initiation and disposal of the arbitration proceedings, Court Receiver, High Court, Bombay is appointed as Receiver in respect of 29 commercial

vehicles (subject matter of the present petition), particularly described in Table-III with all powers under Order XLI, Rule 1 of the Code of Civil Procedure, 1908. The respondent is directed to handover possession of the aforesaid vehicles to the Court Receiver, failing which the Court Receiver shall take physical possession of vehicles. Thereupon, the Court Receiver shall handover the vehicles to the petitioner, to be dealt with by the petitioner for satisfaction of its dues;

- (c) Pending initiation and disposal of the arbitration proceedings, bank account No.917020082460959 of the respondent with AXIS Bank, Bodhgaya Branch, shall be attached and the said bank shall not allow withdrawal to the extent of the amounts claimed by the petitioner.

41. In view of the above, the following interim measures are granted in Commercial Arbitration Petition (L) No.25821 of 2022:-

- (a) Pending hearing and final disposal of this arbitration proceeding making of the arbitral award and until final execution of the arbitral award, the Hon'ble Court be pleased to pass an order of injunction, *inter alia*, restraining the respondents by themselves, their servants, assigns, employees, agents, representatives, officers, or any other person/s claiming through or under them or under any instrument, whatsoever, from in any manner selling, alienating, transferring, parting with the possession of, encumbering, dealing with, disposing of or creating any third party rights or interest of whatsoever nature and in any manner whatsoever in respect of their hypothecated commercial vehicles (more particularly

described at Exhibit B);

- (b) Pending hearing and disposal of arbitral proceedings, Court Receiver, High Court, Bombay is appointed as Receiver in respect of the hypothecated vehicles, more particularly described at Exhibit B. The respondents shall handover physical possession of the said vehicles to the Court Receiver, failing which the Court Receiver is authorized to take physical possession of the vehicles. Thereupon, the Court Receiver shall handover possession of the said vehicles to the petitioner, to be dealt with by the petitioner for satisfaction of its dues. In order to assist the Court Receiver, the respondents shall disclose the location of the hypothecated vehicles to the Court Receiver.

41. As regards application filed under Section 11 of the Arbitration Act i.e. Commercial Arbitration Application (L) No.3908 of 2023, it is placed on record that the petitioner had appointed an arbitrator in January, 2022. But, the respondent raised an objection under Section 16 of the Arbitration Act. In the light of the objection raised on behalf of the respondent, the arbitrator conveyed his non-acceptance. As a consequence, the applicant filed the aforesaid application.

42. There is no dispute about the fact that there is an arbitration clause in the agreements executed between the applicant and the respondent. The arbitration clause is quoted hereinabove. The jurisdiction clause in the agreement specifies that, 'the Courts in Mumbai shall have jurisdiction', thereby indicating that the place of arbitration is Mumbai. The dispute raised by the petitioner is clearly arbitrable and therefore, this Court is inclined to exercise jurisdiction under Section 11 of the Arbitration Act.

43. Considering the nature of disputes, this Court is inclined to appoint an advocate practising in this Court as the sole arbitrator. Accordingly, Mr. Shanay Shah is appointed as the sole arbitrator. The details of the sole arbitrator are as follows:-

Advocate Shanay Shah

17-A, 4th floor, Surya Mahal,
Burjorji Bharucha Marg, Kala Ghoda,
Fort, Mumbai - 400 023.

Mobile No.99874 83450.

Email id - shahshanay@hotmail.com

44. Learned Arbitrator is requested to communicate his consent and disclosure statement in terms of Section 11(8) and 12(1) of the aforesaid Act to the Prothonotary and Senior Master of this Court, within three weeks from today.

45. The statement of claim shall be filed within two weeks of appearance of the parties before the learned Arbitrator. Needless to say that the learned Arbitrator shall proceed with the arbitration in accordance with law.

46. The fees of the learned Arbitrator shall be fixed in terms of the Fourth Schedule to the aforesaid Act.

47. All questions are kept open for decision of the learned arbitrator.

48. Commercial Arbitration Application (L) No.3908 of 2023 is also disposed of accordingly.

(MANISH PITALE, J.)