IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: November 18, 2022

\+ ARB.P. 1105/2021

HERO FINCORP. LIMITED

..... Petitioner

Through: Mr. Ajay Kohli and Ms. Dipeeka Prasad, Advs.

versus

TECHNO TREXIM (I) PVT. LTD. & ORS.

..... Respondents

Through: Mr. Uttam Datt and Ms. Sonakshi Singh, Advs. for R-1
Mr. Rishi Raj Sharma and Mr. Rajiv Singh, Advs. for R-2 to R-4

AND

\+ ARB.P. 1186/2021

HERO FINCORP. LIMITED

..... Petitioner

Through: Mr. Ajay Kohli and Ms. Dipeeka Prasad, Advs.

versus

TECHNO TREXIM (I) PVT. LTD. & ORS.

..... Respondents

Through: Mr. Rishi Raj Sharma and Mr. Rajiv Singh, Advs. for R-2 to R-4

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J

1. At the outset, I may state that since the captioned petitions being Arb. P. 1105/2021 and Arb. P. 1186/2021 arise from the same

factual matrix, and have been filed by the same petitioner against the same respondents, I shall proceed to decide the petitions together. The present petitions have been filed by the petitioner under Section 11(5) of the Arbitration and Conciliation Act, 1996 with the following prayers:-

> *"The Petitioner Company, therefore, respectfully prays as follows:*
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> *a) In terms of the Arbitration Clause/Article No.12.10 contained in the Master Facilities Agreement dated 26.12.2017 and further in terms of Clause 31 of the Deeds of Guarantee all dated 26.12.2017, this Hon'ble Court may kindly be pleased to Appoint a "Sole Arbitrator", to adjudicate the claims and disputes between the Petitioner and the Respondents.*
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> *b) Cost of the Petition be awarded to the Petitioner and against the Respondents.*
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> *c) Any other/further order, which this Hon'ble Court may deem fit and proper, under the facts and circumstances of the case may also be passed in the interest of justice."*

2. The petitioner is a Non-Financial Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 34, Basant Lok, Vasant Vihar, New Delhi-110057. The petitioner company is engaged *inter-alia* in the business of rendering finance/loan facilities, to the intending borrowers.

3. The respondent No.1 is a company incorporated under the Companies Act 1956, having its registered office at 806, Devika Tower, 6, Nehru Place, New Delhi- 110019.

4. The Directors and authorised representatives of the respondent

No.1 approached the petitioner requesting the grant of a Secured Term Loan. The petitioner inter-alia sanctioned a Loan Facility namely Loan against Property (hereinafter, LAP) for an amount of ₹ 32.00. Crore (also known as Secured Term Loan) and another loan namely Lease Rental Discounting Loan Facility (hereinafter, LRD) for an amount of ₹ 55.00 Crore in favor of respondent No.1, vide Sanction Letters bearing Reference No. 2692023 and Reference No.2691828 dated December 20, 2017, respectively. Two Master Facilities Agreements and two Supplementary Agreements with regard to LAP and LRD were executed between the respondent No.1 as borrower and the petitioner as lender on December 26, 2017. Arb. P. 1105/2021 has been filed with respect to LAP of ₹ 32 Crore and Arb. P. 1186/2021 has been filed with respect to LRD of ₹55 Crore.

5. The respondent Nos.2 to 4 agreed to guarantee the due repayment of the loans as well as to adhere to the terms, conditions and covenants envisaged in the Agreements by the respondent No.1, in their personal and individual capacity and respondent Nos. 5 to 7 in their respective corporate capacities. The respondent Nos.2 to 7 agreed to guarantee inter-alia the repayment of the said loan facilities as well. Consequently, the respondent Nos.2 to 7 executed separate Deeds of Guarantee; all dated December 26, 2017, in favor of the petitioner, thereby guaranteeing both the loan facilities.

6. Thereafter, upon execution of the Facilities Agreements, the said loans were disbursed by the petitioner Company, vide Loan Account/Agreement No. HCFDELLRD000002120728 and Loan Account/Agreement No. HCFDELLRD00002120727, in favor of the

respondent No.1, with a term/tenure of 180 months, and are accordingly, repayable by respondent No.1 by way of monthly installments, including a principal moratorium period of 24 months. The monthly installments was payable with effect from/upon the expiry of the principal moratorium period of 24 months from the date of first disbursement.

7. As per the terms mutually agreed upon between the petitioner and the respondent Company, the repayment of the said loans were inter-alia secured as under: -

"

I. Pledge of 100% of fully paid up Equity Shares of "Techno Trexim India Private Limited (the Respondent No.1 Company), together with all accretions thereon present and future. The said shares were pledged by the Respondent Nos.3, 5, 6 and 7 and an Unattested Memorandum of Pledge dated 26.12.2017 was executed in this regard, between the Petitioner Company, the Respondent No.1, the Respondent No.3 for self and as karta of V.K. Chhabra [HUF] as well as by the Respondent Nos.5, 6 and 7. The number of shares pledged by the Respondents mentioned in. the present sub-para, are detailed in Schedule-! of the said Memorandum;

II. Creation of exclusive charge and Mortgage of Immoveable Property being "UM House, Plot No.35, Sector-44, Gurgaon, Haryana"; together with all appurtenances and buildings thereon", owned by the Respondent No.1 Company as more fully described in the Memorandum of Deposit of Title Deeds dated December 29, 2017 executed by the respondents No.1

III. Creation of Exclusive Charge by way of Hypothecation and Escrow of/over the current and future Rent Receivables, being received/to be received by the respondent No.1

Company, in respect of its immoveable property being "UM House, Plot No.35, Sector-44, Gurgaon, Haryana" more fully described in the Deed of Hypothecation of Lease Rentals/Receivables, executed between the Respondent No.1 Company and the petitioner Company;

IV. Creation of Exclusive Charge by way of Hypothecation and Escrow of the Current and Future Receivables from "UM Autocomp Private Limited."

8. Mr. Ajay Kohli, learned counsel for the petitioner stated that the securities are to secure the repayment of LAP as well as the LRD Loan facility. He also stated that the respondents are bound by the Master Facilities Agreements as well as the Supplementary Agreements and the Supplementary Agreements must be read in conjunction with the Master Facilities Agreements dated December 26, 2017.

9. He submitted that the respondent failed to adhere to the terms of repayment of the loan facilities and committed defaults, which qualified as an Event of Default, which entitled the petitioner to recall the loan facilities.

10. He submitted that the petitioner vide notice dated June 03, 2021, called upon the respondents to pay to the petitioner, jointly/ severally, the total outstanding dues of ₹35,75,84,376.20/- and ₹60,82,54,537.33/- as on May 31, 2021 in respect of the said loan facilities.

11. According to him, the respondents failed to pay the amount, despite receipt of the notice. Thereafter the petitioner invoked the Arbitration Clauses vide Notice dated June 22, 2021, sent to the

respondents by the petitioner as contemplated in Clause 12.10 of the Master Facilities Agreements dated December 26, 2017 and in Clause 31 of the Deeds of Guarantee also dated December 26, 2017. The clauses read as under:

Clause 12.10 of the Master Facilities Agreements:-

"12.10· Dispute Resolution

All claims, disputes, differences or questions of any nature arising between the parties, whether during or after the termination of this Agreement, in relation to the construction, meaning or interpretation of any term used or clause of this Agreement or as to the rights, duties, liabilities of the parties arising out of this Agreement, shall be referred to the arbitrator appointed by HFCL. The arbitration proceedings shall be conducted in accordance with the Arbitration and Conciliation Act, 1996 and the proceedings shall be held at New Delhi. Pending the giving of the award including interim award, the Borrower shall be liable to perform its obligation under this Agreement in keeping with the provisions of this Agreement. The arbitral award shall be final and binding on the parties."

Clause 31 of Deeds of Guarantee

"31. In the event of any claim, difference, dispute or controversy arising under this Guarantee or out of or in connection with this Guarantee, any transaction, entered into or effected pursuant to this Guarantee, including without limitation, the execution, validity, enforcement, breach, performance, interpretation, implementation, alleged material breach, termination or expiration of this Guarantee, and I or transaction(s) entered into pursuant to this Guarantee, such claim, difference, dispute or controversy shall be settled as per the mechanism of arbitration laid down in the Facility Agreement. Guarantors hereby agrees and acknowledge"

12. He submitted that the petitioner vide the said notice dated June 22, 2021, had duly intimated the respondents that it has appointed Mr. Anuj Sehgal, Advocate, as the Sole Arbitrator, to adjudicate the afore referred claims/disputes and called upon the respondents to accord concurrence to the said appointment, within a period of 30 days from the receipt of the said notice. However despite receipt of the said notice, the respondents have failed/avoided to accord concurrence to the said appointment. Further, till date, no such reply/response has been received by the petitioner from the respondents. The period of 30 days granted to the respondents to accord concurrence has thus already expired.

13. He stated that it is the judicial mandate that the Sole Arbitrator/ Arbitrator are either appointed by the mutual consent of the parties or in the absence thereof, through the Court. In support of this submission, he has relied upon the judgment of the Supreme Court in the case of ***Perkins Eastman Architects DPC Limited v. HSCC (India) Limited***, ***(2019) SCC Online SC 1517*** and the judgment of this Court in the case of ***Proddatur Cable TV Digi Services v. Siti Cable Network Limited*** being ***OMP(T)(COMM) 109 of 2019***.

14. According to him, the cause of action for filing the present petition firstly arose on December 20, 2017 when the subject facilities were sanctioned by the petitioner in favor of respondent No.1. It again arose on December 26, 2017 when the subject Facility Agreements were executed between petitioner and respondent No.1 and the Deeds of Guarantee were executed by respondent Nos.2 to 7. It again arose on June 03, 2021 when owing to the commission of defaults in the

repayment of the outstanding dues, the petitioner Company "recalled" the said loan facilities and called upon the respondents to pay/deposit the total outstanding dues. It again arose when despite the said Notice, the respondents failed/avoided to repay the outstanding dues in respect of the said loan facilities, and further on June 22, 2021 when the petitioner invoked the arbitration clause(s) to adjudicate the claims/dispute and sought the concurrence of the respondent to the said appointment. It again arose when despite expiry of 30 days period as contemplated in the said notice, the respondents failed /avoided to accord their concurrence to the said appointment, and as such the cause of action is still subsisting.

15. Mr. Kohli has stated that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 ('SARFAESI' for short), Arbitration and Conciliation Act, 1996, Recovery of Debts and Bankruptcy Act, 1993 ('RDB Act', for short) and the doctrine of election have no applicability in the present cases. In support of his submission, he has relied upon the judgment of the Supreme Court in the case of ***Transcore v. Union of India; (2008) 1 SCC 125***, wherein it was held that, there are three elements to the doctrine of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice between one of them. If any one of the three elements is not present, the doctrine will not apply.

16. He has also relied upon the judgment of the Supreme Court in the case of ***M.D. Frozen Foods Exports Pvt. Ltd. v. Hero Fincorp Ltd.; (2017) 16 SCC 741***, wherein it was held that, 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 SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand. Reliance is also placed on the judgment of the Supreme Court in the case of ***Indiabulls Housing Finance Ltd. v. Deccan Chronicals, (2018) 14 SCC 783.***

17. With the above submissions and the judgments relied upon by him, he also stated that the petitioner is a NBFC and is not covered under the provisions of the RDB Act.

18. He submitted that the liability of the respondents, are ₹38,02,55,952.62/- for the LRD and ₹62,91,35,884.00/- for the LAP as on September 16, 2021.

19. He submitted that the entire loan transaction captured in the Facilities Agreements read with Supplementary Agreements as well as the Deeds of Guarantee executed by respondent Nos.2 to 7 are intrinsically related and arising out of the same transaction. The same has been culled out in Clause 31 of the Deeds of Guarantee executed by respondent Nos.2 to 7, which I have reproduced in paragraph 11 above which contemplates that all claims, differences, disputes or controversies arising under or out of or in connection with the said guarantees as well as transactions entered into or effected shall be adjudicated as per the mechanism of Arbitration as laid down in the Facilities Agreements.

20. He submitted that the present petitions are maintainable under Section 34 of the SARFAESI Act and there is no bar to the same. He stated that the judgment of the Supreme Court in ***Vidya Droliya v. Durga Trading Corporation, Civil Appeal No. 2402/2019*** relied upon by the counsel for the respondents is being quoted out of context and the said judgment in fact supports the contentions of the petitioner herein.

21. He submitted that the District Magistrate, Gurugram vide order dated April 06, 2022 allowed the petition filed by the petitioner under Section 14 of the SARFAESI Act. He also submitted that the petitioner in compliance with the order of the DRT, Chandigarh in *S.A No.152-153/2022* dated June 29, 2022, took possession of second and third floor of the mortgaged property on August 12, 2022.

22. He stated that, there is no applicability of the 'doctrine of election' in the proceedings under SARFAESI Act/RDB Act. Furthermore, he stated that the Central Government has not notified the petitioner which is an NBFC for the purpose of applicability of the RDB Act.

23. He contended that under Section 17(1) of the SARFAESI Act, the jurisdiction of is only to decide whether any one or more measures taken by the secured creditors are in accordance with Section 13(4) and therefore, proceedings under SARFAESI Act and Arbitration and Conciliation Act can go hand in hand.

24. In support of his submission, he has relied upon the judgment of the Supreme Court in the case of ***Chrolo Controls India Pvt. Ltd. vs Severn Trent Water Purification Inc and Ors., (2013) 1 SCC 641***,

wherein, it was held that, even third parties who are not signatories to the arbitration agreement can be joined in arbitration.

25. He has also relied upon the judgment of this court in the case of ***Vistrat Real Estates Pvt. Ltd. v. Asian Hotels North Ltd. ARB P.1124 of 2021,*** wherein, this Court had allowed the petition and appointed an arbitrator to adjudicate the dispute between the parties.

26. Mr. Uttam Datt, the learned counsel for the respondent No. 1 stated that the petitioner however has suppressed from this Court that it has already taken steps for recovery of the aforesaid amounts by initiating proceedings under Section 13 (2) of the SARFAESI Act, vide Possession Notice dated October 22, 2021 and has taken symbolic possession of the immovable property i.e. Plot/Property Bearing No. 35-P, area measuring 5139 sq. mts. (6146.244 sq. yds.) situated at Sector-44, Gurgaon, Haryana, which is alleged to be mortgaged in favour of petitioner.

27. He submitted that the respondent No.1 does not admit the claims of the petitioner or the proceedings initiated under SARFAESI Act, and reserves its right to challenge/contest the same. He also submitted that it is an admitted fact that the value of the afore-said immovable property is ₹97.32 crore, which is more than adequate to satisfy the alleged principal outstanding amounts being claimed by the petitioner. In support of his submission he has placed a copy of the Notice under Section 13(2) of SARFAESI Act dated June 23, 2021.

28. He has submitted, the Possession Notice dated October 22, 2021 under SARFAESI Act, stating as under;-

"The Borrower having failed to repay the amount, Notice is

hereby given to the Borrower and the public in general that the undersigned has taken possession Property describe herein below in exercise of powers conferred on him under sub-section (4) of section 13 of Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 on ***22nd day of October, 2021****.*

The Borrower in particular al1.d the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of HFCL for an amount of ***Rs. 98,04,68,644.58/- (Rupees Ninety Eight Crores Four Lakhs Sixty Eight Thousand Six Hundred Forty Four And Fifty Eight Paisa Only) as on 22.06.2021*** *along with the applicable interest and other charges."*

29. He submitted that the respondents have a right to challenge the action taken by the petitioner under Section 13(4) of SARFAESI Act by filing a petition before Debt Recovery Tribunal under Section 17 of the said Act. Further under Section 34 of SARFAESI Act the jurisdiction of Civil Court is barred in relation to all matters in which DRT has jurisdiction. He also stated that the issues relating to alleged outstanding dues under Master Facilities Agreements dated December 26, 2017 and Deeds of Guarantee dated December 26, 2017 will be exclusively decided by DRT in a petition filed by the respondents under Section 17 of the said Act.

30. He also submitted that the Three-Judge Bench of the Supreme Court in the case of ***Vidya Droliya (Supra)*** held that the Court while exercising jurisdiction under Section 11 of the Arbitration & Conciliation Act, 1996 is permitted to examine the arbitrability of a dispute, and can refuse the appointment of arbitrator for non-arbitrable

disputes. It is further held that claims of banks and financial institutions covered by RDB Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of DRT by necessary implication.

31. Mr. Rishi Raj Sharma, the learned counsel for the respondent Nos.2, 3 & 4, stated that arbitration proceeding cannot be invoked against the respondent Nos.2, 3 and 4, as the Master Facilities Agreements dated December 26, 2017 were entered into between the petitioner and respondent No.1. The respondent Nos.2 to 7 as guarantors, are not parties to the Master Facilities Agreements.

32. He submitted that the interim moratorium is in place qua respondent Nos. 2, 3 and 4, under Section 96 of Insolvency and Bankruptcy Code, 2016 ('IBC' for short) in the proceedings instituted by Union Bank of India against the respondents before the NCLT, New Delhi vide Orders dated August 23, 2021 and therefore, no legal proceedings can be initiated against the respondents till such time the interim moratorium is in place.

33. He also submitted that the petitioner had entered into separate, independent and distinct agreements with respondent Nos. 2 to 7 as guarantors i.e. Deeds of Guarantee dated December 26, 2017 and that respondent No.1 as borrower is not party to the same and therefore, the cause of action giving rise to· arbitration proceedings will be different for the borrower i.e. respondent No. 1 and for the guarantors respondents Nos. 2 to 7.

34. According to him, the petitioner is supposed to invoke separate arbitration proceedings since the Deeds of Guarantee dated December

26, 2017 to which the principal borrower is not a party, are separate, independent and distinct from Master Facilities Agreement dated December 26, 2017.

35. He submitted that the petitioner had suppressed material facts of SARFAESI action that has already been taken by the petitioner against the respondents for recovery of alleged outstanding dues and has taken symbolic possession of the immovable property.

36. He also submitted that the dispute which is the subject matter of the present petitions is exclusively within the jurisdiction of the DRT under the SARFAESI Act and that, under Section 34 of the Act, the jurisdiction of the Civil Court is barred in relation to all the matters in which DRT has jurisdiction. Therefore, the invocation of the arbitration cannot undermine the statutory rights of the respondents to seek remedies available under the SARFAESI Act.

37. In support of his submissions he has relied upon the judgment of the Supreme Court in ***Vidya Droliya (supra),*** wherein, it is held that the Court while exercising jurisdiction under Section 11 of the Arbitration and Conciliation Act, 1996 is permitted to examine the arbitrability of a dispute, and can refuse the appointment of arbitrator for non-arbitrable disputes. It is further held that claims of banks and financial institutions covered by DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of DRT by necessary implication.

38. In support of his above-submission he has placed reliance upon the judgments of the Supreme Court in the case of ***Transcore (supra), M.D. Frozen Foods Exprot Pvt. Ltd (supra) and Indiabulls Housing***

Finance Ltd.(supra).

39. He submitted that the claim of the petitioner is non-arbitrable, as there is a prohibition against waiver of jurisdiction by necessary implication.

40. He has sought dismissal of the petition.

ANALYSIS AND FINDINGS:

41. Having heard the learned counsel for the parties and perused the record, the only issue which arises for consideration is whether the petitioner is entitled to appointment of an Arbitrator for adjudicating the disputes arising with the respondents with regard to non-payment of loan facilities advanced by the petitioner to the respondent No.1, for which the respondent Nos. 2 to 7 stood as guarantors. The loan facilities were advanced to respondent No.1 in terms of Master Facilities Agreements and Supplementary Agreements dated December 26, 2017 as LRD and LAP for ₹32 Crore and ₹55 Crore respectively. The Deeds of Guarantee were also executed on the same day by the respondent Nos. 2 to 7 guaranteeing the loans as advanced to respondent No.1. I have already reproduced the arbitration clauses contained in the agreements, i.e., the Master Facilities Agreement and Deeds of Guarantees in paragraph 11 above.

42. I may at this stage, state that as far as respondent Nos. 2 to 4 are concerned, this Court had in order dated April 29, 2022 observed as under:

> *"1. Petitioners seek reference of disputes emanating out of the Masters Facilities Agreement dated 26.12.2017 and Deed of*

Guarantee also dated 26.12.2017 to a sole Arbitral Tribunal.

2. Petitioner had entered into a Masters Facility Agreement with respondent no. 1.

3. Learned counsel appearing for the respondents no. 2 to 4 submits that an interim moratorium is in place qua said respondents under Section 96 IPG initiated by Union Bank of India against respondents no. 2 to 4.

4. List for consideration on 18.05.2022 date already fixed.

5. None appears for respondents no. 5 to 7."

43. In so far respondent Nos. 5 to 7 are concerned, despite service, they have neither appeared in the proceedings nor any reply has been filed. In fact, I find that this Court in order dated on August 30, 2022, has stated as under:

"1. No-one appears for respondent Nos. 5 to 7, though served.

2. Counsel for the parties to file their note of submissions along with the judgments they want to rely on or before September 9, 2022.

3. List on September 13, 2022."

Therefore, I shall proceed with the present petitions in their absence.

44. Respondent No.1 Company who had taken the loans has filed its reply. The case of the respondent No.1 as contented by Mr. Datt is primarily that as the petitioner has initiated the proceedings under the SARFAESI Act by issuing a notice under Section 13 (2) of the said Act and has taken symbolic possession of the immoveable property,

i.e., plot / property no. UM House Plot No. 35, Sector – 4, Gurgaon, Haryana, the present petitions seeking appointment of an Arbitrator is not maintainable and the amounts due and payable by the respondent No.1 can be recovered from auctioning off the said property and hence no arbitration is required. Though, he states that the respondent No.1 does not admit the claim of the petitioner or the proceedings initiated under the SARFAESI Act, the subject matter of the present petitions falls exclusively within the jurisdiction of the DRT under the SARFAESI Act. The respondent No.1 intends to challenge the proceedings initiated by the petitioner before the DRT under the provisions of Section 17 of the said Act.

45. In so far as the plea of the learned counsel for the respondent Nos. 2 to 4 is concerned, he reiterates the submission as was noted in the order dated April 29, 2022 that an interim moratorium is in place qua the said respondents under Section 96 of the IBC initiated by the Union Bank of India against the said respondents. Mr. Kohli does concede to the fact in view of the moratorium the petitioner cannot now claim an appointment of an arbitrator for adjudicating the disputes against the said respondents.

46. So it needs to be considered whether an arbitrator needs to be appointed for adjudication of disputes between the petitioner and the respondent Nos. 1, 5, 6 and 7.

47. In so far as the plea of Mr. Datt with regard to the initiation of proceedings under the SARFAESI Act is concerned, he has relied upon the Judgment in the case of ***Vidya Droliya (supra),*** more specifically paragraphs 36 and 47 to contend that the claim of the banks and

financial institutions come under the RDB Act and are not arbitrable and there is a prohibition of waiver of jurisdiction of DRT by necessary implication. Paragraphs 36 and 47 of the Judgment read as under:

> *"36……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 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.*
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> **** **** ****
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> *47……..We have also set aside the Full Bench decision of the Delhi High Court in the case of HDFC Bank Ltd. which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."*

48. Suffice to state, it is the submission of Mr. Kohli that the petitioner herein, an NBFC, has not been notified by the Central Government under the provisions of RDB Act. So, in that sense, reliance placed by Mr. Datt on the judgment of the Supreme Court in ***Vidya Droliya (supra)*** has no applicability in the facts of this case. Rather I find this issue is covered by the Judgment of the Supreme Court in ***Transcore (supra),*** wherein the Supreme Court in paragraphs 64 and 66 has held as under:

> *"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.*
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> **** **** ****
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> *66. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of the NPA Act is recovery by non-adjudicatory process. A secured asset*

> *under the NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of the NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceed on the basis that security interest in the bank/FI needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, the NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor."*

49. Similarly in ***M.D. Frozen Foods Exports Pvt. Ltd. (supra),*** the Supreme Court was concerned with an issue whether proceedings under the SARFAESI Act can be initiated simultaneously when the parties are in the arbitration. The Supreme Court held in the affirmative by holding in paragraphs 32 to 34 as under:

> *"32. The aforesaid is not a case of election of remedies as was sought to be canvassed by the 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 v. 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 (P) Ltd. v. Orissa Rural Dev. Corpn. Ltd., the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v. 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 Ltd. v. Union of India following the overruled decision of the Orissa High Court in Subhash Chandra Panda v. State of Orissa does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

50. In ***Indiabulls Housing Finance Ltd. (supra),*** the Supreme Court after considering the judgments in ***Transcore (supra)*** and ***M.D. Frozen Foods Exports Pvt. Ltd. (supra)*** has observed as under:-

18. Insofar as Question (i) is concerned, the Court categorically held that merely because remedy under the Arbitration Act was invoked was no ground to debar the respondent from taking recourse to the SARFAESI Act"……

51. I find that even the Supreme Court in the case of ***Vidya Droliya (supra)*** in paragraph 35 while referring to ***M.D. Frozen Foods Exports Pvt. Ltd. (supra)*** and ***Indiabulls Housing Finance Ltd. (supra)*** held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act (SARFAESI Act) as it sets out an expeditious procedural methodology enabling the financial institutions to take possession and sell acquired properties for non-payment of dues, as such powers obviously cannot be exercised through arbitral proceedings.

52. Having said that, the plea of the counsel for the respondent No.1 is that the value of the immoveable property is more than adequate to satisfy the alleged principal / outstanding amounts that are being claimed by the petitioner. This submission would not bar the initiation of arbitration proceedings for the simple reason that, if any recovery is made by the petitioner through the process of SARFAESI Act, surely the factum can be brought to the notice of the Arbitrator. This I say so, because there may be an eventuality where the complete amount as due and payable may not be recovered through process initiated under the SARFAESI Act.

53. The plea of learned counsel for the respondent No.1 that the respondents have a right to challenge the action taken by the petitioner under Section 13 (4) of the SARFAESI Act by filing a petition before the DRT under Section 17 of the Act and that under Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court is barred in relation to matters in which DRT has jurisdiction. To answer this submission, I must reiterate it is the case of the petitioner that it is an NBFC and

has not been notified by the Central Government under the RDB Act. In that sense, proceedings under the RDB Act cannot be initiated by the petitioner. The reference to DRT in the submission of the counsel for the respondent No.1 is with regard to the fact that SARFAESI Act under Section 17 provides DRT as a Forum. However the mandate of the DRT under Section 17 of the SARFAESI Act is limited to examining whether the action initiated by the petitioner is in accordance with Section 13 (4) of the Act and nothing more. So, in that sense, the proceedings are not under the RDB Act, but under SARFAESI Act.

54. Having said that, even if the petitioner intends to take action under Section 17 of the Act by filing a petition before DRT that would still not preclude the initiation of arbitration proceedings by the petitioner in accordance with law.

55. A reference has been made by the counsel for the petitioner to the Judgment in ***Vidya Droliya (supra)*** to contend that the scope of Section 11 of the Arbitration and Conciliation Act, 1996 is only to examine the arbitrability of the disputes and the Court can refuse the appointment of an arbitrator for non-arbitrable disputes. Suffice to state in view of the provisions of Clauses 12.10 and 31 of the Facilities Agreements and the Deeds of Guarantees respectively, i.e., the arbitration clauses, any dispute between the parties has to be resolved through the process of arbitration. That apart, the petitioner has invoked the arbitration clause and called upon the respondents to accord their concurrence to the appointment of the arbitrator, to which no response has been given even after expiry of 30 days. Therefore, it

is clear that disputes have arisen between the parties. Clause 12.10 of the Master Facilities Agreements binds the respondent No.1 and Clause 31 of the Deeds of Guarantee bind the respondent Nos. 2 to 7, and as such they can be referred to arbitration. Since the case of the respondent Nos. 2 to 4 is that an interim moratorium has been put in place, which fact Mr. Kohli has conceded, surely the respondent Nos. 2 to 4 cannot be relegated to the process of arbitration in these petitions. But there is no impediment to refer respondent Nos. 1, 5, 6 and 7 being the borrower and corporate guarantors respectively, to the process of arbitration. As such, they are referred to arbitration.

56. Accordingly, this Court appoints Justice Indu Malhotra (Retd.), (Mobile No. 9810026757) a former Judge of the Supreme Court as the Arbitrator, who shall adjudicate the disputes (in these petitions) between the parties, through claims and counter-claims (if any).

57. The fee of the learner Arbitrator shall be as per the Fourth Schedule of the Arbitration and Conciliation Act, 1996. The learned Arbitrator shall give disclosure under Section 12 of the Act.

58. The petitions are disposed of.

59. Let a copy of this order be sent to the learned Arbitrator.

V. KAMESWAR RAO, J

NOVEMBER 18, 2022*/aky/jg*