

2022 SCC OnLine Del 3357

In the High Court of Delhi at New Delhi
(BEFORE N.B. KRISHNA, J.)

ARB.P.62/2022

Diamond Entertainment Technologies Pvt. Ltd. and
Others ... Petitioners;

Versus

Religare Finvest Limited through its Authorised
Officer ... Respondent.

And

O.M.P.(I) (COMM.) 9/2022 and I.A. 437/2022

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Others ... Petitioners;

Versus

Religare Finvest Limited through its Authorised
Officer ... Respondent.

ARB.P.62/2022, O.M.P.(I) (COMM.) 9/2022 and I.A. 437/2022⁵

Decided on October 14, 2022, [Reserved on 23.08.2022]

Advocates who appeared in this case :

Mr. J.S. Bakshi, Sr. Advocate with Mr. Praveen K Sharma & Mr.
Abhishek Mohan, Advocates.

Mr. Sanjeev Singh, Ms. Ridhi Pahuja, Mr. Dhruv Chawla & Ms. Garima
Saxena, Advocates.

Mr. J.S. Bakshi, Sr. Advocate with Mr. Praveen K Sharma & Mr.
Abhishek Mohan, Advocates.

Mr. Sanjeev Singh, Ms. Ridhi Pahuja, Mr. Dhruv Chawla & Ms. Garmia
Saxena, Advocates.

The Judgment of the Court was delivered by

N.B. KRISHNA, J.:—

ARB.P.62/2022

1. A Petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed for appointment of the Arbitrator to adjudicate the disputes between the parties.

2. It is submitted that a loan Agreement dated 10.01.2012 was executed between the petitioners and the respondents. They entered into a supplementary Agreement dated 27.01.2014 bearing Loan Account no. (s) XMORPNG00051190 having a Loan amount of Rs. 9,45,98,691/-. The instalments were to be paid till 15.02.2028 by the

petitioner and according to the petitioner, an excess payment was made as it has made a payment of Rs. 11,33,07,673/- against the loan amount till June, 2021 which is in an overflow of Rs. 2,21,47,810/-. It is claimed that there was no default in the account in view of the overflow.

3. It has been explained that petitioner no. 1 and 2 are a Private Limited Company while the petitioner no. 3 is a limited Company. The petitioner no. 4 is the wife of petitioner no. 5 and a co-borrower and petitioner no. 5 is the Director of the Petitioner no. 1, 3 and 6. The petitioner no. 7 is the guarantor.

4. It is asserted that respondent is making demand of balance loan amount which has been calculated incorrectly. Moreover, petitioner no. 7 has been made a party even though he was not a party to the loan transaction. The petitioners, except petitioner no. 7 had availed a Loan against the property/SME loan facility from RFL on 14.01.2012 which was restructured on 27.01.2014.

5. The respondent Bank has illegally and arbitrarily declared the account of the applicants as Non-Performing Asset (*hereinafter referred to as "NPA"*) with effect from 30.06.2021 in total violation of the RBI norms for declaring any account as NPA. It is asserted that despite all the payments having been made, the respondent has shown only Rs. 10,01,59,512/- in their statement and thus, there is an error in the Statement of Account to the tune of Rs. 92,68,162/- as the receipts have not been shown correctly. It is also asserted that the respondent had not disbursed the total amount of Rs. 10 Crore and only Rs. 9.60 Crore was disbursed while Rs. 40,00,000/- was withheld, however, interest was charged on the full amount of Rs. 10 Crore for 21 months.

6. The respondent Bank made a demand of Rs. 5,72,24,893.47/- as outstanding balance amount along with the interest and charge accruing to the Loan Accounts after 02.07.2021 vide its Notice of Demand under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter referred to as "SARFAESI Act"*). The petitioner gave a reply dated 12.09.2021 raising several objections under Section 13(3A) of the SARFAESI Act. It is also asserted that as per the RBI guidelines issued from time to time, the rate of interest has been reduced for the category of loan taken and an excess amount of Rs. 1,63,12,289/- has been charged as interest.

7. The petitioner apprised the Bank that Ms. Surjeet Kaur had filed a suit for partition bearing no. CS(OS) 280 of 2021 against some of the defendants and vide Order dated 07.06.2021, a *status quo* has been Ordered with respect to title and possession of property bearing no. B-47, Greater Kailash Part-I, New Delhi-110048 by the High Court of Delhi. Despite the *status quo* Order, the respondent issued a Possession

Notice on 22.09.2021 and took symbolic possession of the subject property without following the procedure under Section 13(3A) of the SARFAESI Act.

8. The objections filed by the petitioner were rejected by the respondent on 24.09.2021 without providing the reasons. It is asserted that the Loan Agreement dated 10.01.2012 contains an Arbitration Clause 10.1, according to which the disputes are to be referred to Arbitration. Notice of Invocation of Arbitration dated 08.11.2021 was issued by the petitioner to which vide reply dated 06.12.2021, the respondent refused to appoint the Arbitrator, by taking an objection that an Arbitration Award has already been made in respect of the loan account.

9. It is asserted that the Arbitration Award was given a go by and the Account was regularized by the respondent Bank and the instalment was being paid regularly by the petitioner. The disputes have again arisen in respect of the outstanding amounts on 30.06.2021 when the account was declared as NPA.

10. The petitioner had preferred a Writ Petition vide WP(C) No. 13043 of 2021 challenging the Notice under Section 13(2) of the SARFAESI Act. The counsel for the respondent withdrew the Notice under Section 13(4) of the SARFAESI Act and the petition was accordingly disposed of. However, the respondent again filed a petition under Section 14 of the SARFAESI Act before the Court of learned CMM, South East District, Saket Court, New Delhi by concealing the factum of withdrawal of Notice under Section 13 (4) of the SARFAESI Act. The learned CMM appointed a Receiver vide Order dated 06.12.2021 in respect of suit property.

11. It is submitted that *status Quo* Order has been continued by the High Court of Delhi and the Order has not been modified to allow respondent to take possession of the property. It is thus, submitted that arbitrable disputes have arisen in respect of the Loan Agreement. Hence, the present petition has been filed seeking appointment of an independent Arbitrator.

12. The respondent in its reply has taken a preliminary objection that petitioners are estopped from seeking appointment of an Arbitrator since the disputes in respect to the present loan account has already been adjudicated and an Arbitration Award dated 09.06.2015 has already been made by the learned sole Arbitrator. The Arbitration Award dated 09.06.2015 was not challenged by the petitioners within the stipulated period of three months as provided under Section 34(3) of the Arbitration and Conciliation Act, 1996. The Award has not been set aside. Hence, the Award has attained finality as has been held in the case of *M.P. Housing and Infrastructure Development Board v. K.P. Dwivedi*, 2021 SCC OnLine SC 1171.

13. The second objection taken is that the petitioner by way of present petition, is challenging the lawful recovery proceedings initiated by the respondent under the SARFAESI Act. Section 34 provides for a bar on jurisdiction of Civil Courts to entertain any suit or proceedings wherein the Hon'ble Debts Recovery Tribunal (*hereinafter referred to as* "Hon'ble DRT") is empowered to adjudicate. Furthermore, in regard to Section 34 of the SARFAESI Act, any person aggrieved against any measure taken by the Secured Creditor under Section 13(4) of the SARFAESI Act, the remedy available is to approach the Hon'ble DRT and not the Civil Court. Reliance has been placed on *Jagdish Singh v. Heeralala*, (2014) 1 SCC 479.

14. It is further submitted that against the lawful recovery action initiated by the respondent, the petitioner approached the Hon'ble DRT-1 vide SA No. 423/2021 under Section 17 of the SARFAESI Act, 2002. All the allegations challenging the SARFAESI actions initiated by the respondent were raised in its SA but after considerations of the facts and circumstances, the Hon'ble DRT vide Order dated 10.01.2022 has dismissed the SA.

15. It is asserted that the petitioners are indulging in multiplicity of litigation before various forums in an attempt to delay the lawful recovery proceedings initiated by the respondent Bank.

16. The third objection taken is that this matter pertains to Statutes creating special right or liabilities providing mechanism for the determination of the same in the specific Court of Law and the disputes raised are not arbitrable. For this reference has been made to *Vidya Drolia v. Durga Trading Corporation*, (2021) 2 SCC 1. It is further claimed that the petitioner has concealed the material facts and the present petition is not tenable.

17. On merits, the averments made are controverted and has been asserted that recovery of loan proceedings has been legally initiated and the present petition is not maintainable.

Submissions heard.

18. The first objection taken on behalf of the respondent is that the petitioner had earlier defaulted in payment of instalments and vide Award dated 09th June 2015, the issue has already been adjudicated and an Order was made for recovery of loan amount along with the interest at the rate of 18% p.a. from June, 2015 till actual date of payment by the respondents in addition to cost of Rs. 150,000/-. It is argued that once the dispute already stands arbitrated and adjudicated, the second arbitration in respect of the same loan account is not maintainable.

19. The first aspect under consideration is whether the second arbitration petition is maintainable in respect of the Contract in regard

to which the petitioner has already invoked arbitration and an Award has already been delivered on 9th June 2015. The basic question is whether there can be multiple arbitration proceedings from the same contract.

20. The Hon'ble Supreme Court in its decision in *Dolphin Drilling Ltd. v. Oil and Natural Gas Corporation Ltd.*, (2010) 3 SCC 267 : AIR 2010 SC 1296 had observed that reference of the disputes to arbitration can be only of such disputes that might be in existence when the Arbitration clause is invoked by one of the parties and Notice is given to the other. It cannot be said that invocation of arbitration is a one time measure and it cannot be held that once the Arbitration clause is invoked, the remedy of arbitration is no longer available in regard to other disputes that may arise in future. While it may not be prudent to consider multiple arbitrations from the same contract, but in a situation where a cause of action arises subsequent to invocation of the first arbitration, the party cannot be shut out since the cause of action has arisen subsequent to invocation of the first arbitration, though, an endeavour ought to be made that in case of multiple arbitrations, reference may be made to the same Arbitrator.

21. In *Gammon India Ltd. v. National Highways Authority of India*, (2020) 272 DLT 32, this Court held that all the claims that have arisen on the date of invocation of arbitration must be referred to arbitration. It would not be permissible for the parties to refer only some disputes and not all which may have arisen on a given date. A reference was made to *Dolphin Drilling* (supra) to endorse that multiple arbitration may get invoked provided the cause of action arise at different times.

22. The argument of the learned counsel for the respondent that second arbitration petition is not maintainable may be correct in principle but in given situations as explained in the above mentioned judgments, it is a settled proposition of law that once the disputes have been adjudicated between the parties by a competent forum, the same operates as res-judicata unless challenged and shall be binding on all the parties. However, it has been explained in the present case that after the Award was made, the same was not acted upon and thus not challenged. The restructuring of loan was done by the respondent under which the petitioner was regularly paying the instalments. The only dispute that has arisen is in respect of the interest payable for the default period. It is the assertion of the petitioner that the dispute under consideration, though, arising from the Loan Agreement is absolutely independent and has not been adjudicated by the previous Award.

23. Essentially, the petitioner is asserting that there was an earlier Loan Agreement under which the loan amounts have been regularly paid though disputes have arisen in regard to the final payment of the

entire loan amount along with the interest. In the case of *Mayawati Trading Pvt. Ltd. v. Pradyut Deb Burman*, (2019) 8 SCC 714, the Supreme Court observed that primarily disputes are to be examined by the Arbitrator and are not for the court to be examined within the limited scope available for appointment of arbitrator under Section 11 (6) of the A&C Act, 1996. Therefore, while considering the application under Section 11, the court has to consider if *prima facie* there exist arbitral disputes. Whether the earlier Award dated 09th June 2015 would operate as *res judicata* and a bar to the present proceedings, involves mixed question of fact and law, which the parties are at liberty to agitate before the learned Arbitrator.

24. The second objection taken is that the respondent has already invoked proceedings under the SARFAESI Act and the disputes being raised now are not arbitrable. The core question which thus arises is whether the adjudication of the disputes raised between the parties is barred before the Civil or an alternate forum once the proceedings under the SARFAESI Act has been commenced.

25. The SARFAESI Act was brought into force to address the concerns of recovery of large debts in NPAs. The very rationale was to provide an expeditious procedure where there was a security interest. The Full Bench of Orissa High Court in *Sarthak Builders Pvt. Ltd. v. Orissa Rural Dev. Corpn. Ltd.*, 2014 SCC OnLine Ori 75 made a reference to the Division Bench Judgment of Uttarakhand High Court in *Unique Engg. Works v. Union of India*, 2003 SCC OnLine Utt 107 to observe that the SARFAESI Act was enacted by the Parliament to remedy a situation and provide a measure against secured interest. The key feature of SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance, was covered under Section 2(1)(f) of the SARFAESI Act as the borrower. Not only this, the definition clauses dealing with debt securities, financial assistance, financial assets, etc., clearly convey the legislative intent that the SARFAESI Act applied to all existing agreements irrespective of the fact whether the lender was as notified “financial institution” on the date of the execution of the Agreement with the borrower or not.

26. The SARFAESI Act sets out an expeditious, procedural methodology, enabling the Bank to take possession of the property for non-payment of dues without the intervention of the Court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act, does not mean that it is substantive in character or has created an altogether new right. To accept the argument of the appellants would imply that they have an inherent right to delay the enforcement against the security interest.

27. The various provisions of the SARFAESI Act make this position explicit. Section 35 and 37 of the Act reads 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 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, 1959(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.

28. In *Mathew Varghese v. M. Amritha Kumar*, (2014) 5 SCC 610, the Supreme Court made a reference to Section 37 to observe that the remedy created under the SARFAESI Act was in addition to the provisions of the recovery of debt under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ((*hereinafter referred to as "RDDB Act"*)). Section 35 provides that the provisions of SARFAESI Act would have over-riding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, conjoint reading of Section 35 and 37 would lead to the irresistible conclusion that the provisions of RDDB Act are not inconsistent with the provisions of the SARFAESI Act and the application of both the Acts would be complementary to each other.

29. This aspect was fully explained by the Supreme Court in *Transcore v. Union of India*, (2008) 1 SCC 125 wherein it was observed that the doctrine of election applies only if there is one remedy. However, 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. There is no repugnancy or inconsistency between the two remedies and therefore the doctrine of election does not apply.

30. In *M.D. Frozen Foods Exports Pvt. Ltd. v. Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190, a reference was made to the aforesaid judgments to conclude that the application under the SARFAESI Act is an addition to and not derogation to the provisions of RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act.

31. It is thus evident from the observations made in the aforesaid judgments that the SARFAESI Act and RDDB Act are complementary to each other and merely because proceedings in the SARFAESI Act have been initiated would not be a ground to oust the jurisdiction of the RDDB Act.

32. The other aspect which calls for some consideration is whether

the jurisdiction of RDDB (which is alternate to the Civil Court) gets barred and whether the arbitration proceedings can be initiated. The Full Bench of Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 was confronted with this very issue and it was observed that the jurisdiction of Civil Court is barred from matters covered by the RDDB Act in the sense that instead of the recovery being sought through the Civil Court, it has to be filed before the Debt Recovery Tribunal, implying thereby that the remedy of recovery still exists. It was further explained that once the remedy of recovery remains the parties still have the freedom to choose the forum alternate to and the regular Court or DRT as the case may be for adjudicating 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 the alternative forum. A claim of money by a Bank or financial institution cannot be treated as a right in *rem* and thus, taking it out of the realm of arbitrability.

33. It is thus evident that the SARFAESI Act does not oust the jurisdiction of the recovery by a Civil Court/DRT. Furthermore, a choice of forum continues to exist with the parties who may elect to approach the Civil Court/DRT as the case may be, or may choose to take their civil disputes for adjudication to the Arbitration. It may thus, be concluded that merely because the proceedings under the SARFAESI Act has been initiated, arbitration of disputes does not get per se barred.

34. Further, in *M.D. Frozen Foods* (supra) it was explained 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 the determination of the pending outstanding amount by a competent forum. Therefore, the provisions of the SARFAESI Act are a remedy in addition to the adjudication under the Arbitration and Conciliation Act, 1996 as an alternate forum to Civil Court/DRT.

35. The objection taken on behalf of the respondent in regard to nonarbitrability of the disputes in view of the SARFAESI Act, is without merit.

36. In view of the above discussion, it has been shown that there exist arbitrable disputes referable to the arbitration. Accordingly, Justice Jayant Nath (Retd.), High Court of Delhi (8527959494) is hereby appointed as the independent Arbitrator to adjudicate the disputes between the parties.

37. The parties are at liberty to raise their respective objections before the Id. Arbitrator.

38. The fees of the learned Arbitrator would be fixed in accordance with the IV Schedule to A&C Act, 1996 or as consented by the parties.

39. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996.

40. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Order to them by the Registry of this Court.

41. The petition is accordingly allowed in the above terms.

O.M.P.(I) (COMM.) 9/2022

1. A petition under Section 9 of the Arbitration and Conciliation Act, 1996 has been filed on behalf of the petitioner for interim relief of protection/safeguarding the subject property bearing no. B-47, Greater Kailash Part-I, New Delhi-110048.
2. It is submitted in the application that the petition under Section 11 has already been filed. During the pendency of the said proceedings, interim injunction was granted for maintaining the *status quo* with respect to the title and possession of the suit property.
3. It is asserted that during the pendency of the Arbitration proceedings, the right, title and possession of the property requires to be protected for which a prayer is made that a *status quo* order may be granted.
4. The factual matrix giving rise to the present petition has already been mentioned in the above discussed Section 11 petition. It is further stated in the application that in the Civil Suit for partition and possession of 50% of the residential property bearing no. B-47, Greater Kailash Part-I, New Delhi-110048 in CS(OS) 280/2021 filed in Delhi High Court, titled as *Mrs. Surjeet Kaur v. Sardar Raja Singh Oberoi* by Mrs. Surjeet Kaur against some of the defendants, the parties have been directed to maintain a *status quo* in respect of title and possession of the suit property till the next date of hearing. The interim order has been continued by the Court vide its Order 08.12.2021.
5. It is further asserted that since the *status quo* Orders have been granted against the subject property by this Court, the initiation of proceedings by the respondent Bank under the SARFAESI Act shall amount to contempt of the Court and the said Orders have already been brought to the notice of the respondent. It is further submitted that there is an over flow in the account of the petitioner by an amount of Rs. 2,21,37,810/- as the repayment period is still 2028.
6. In the circumstances, interim protection is sought by way of

direction to the respondent Bank to maintain the *status quo* during the pendency of the petition under Section 11 of the Arbitration and Conciliation Act, 1996 for appointment of the arbitrator.

7. Submissions heard.

8. The petition under Section 11 of the A&C Act, 1996 has been decided. An Arbitrator has been appointed as mentioned above. The *status quo* Orders have already been directed to be made by this Court in CS (OS) 280/2021 vide its Order dated 08.12.2021. In view of the *status quo* Order already operating in respect of the property and the application under Section 11 of the A&C Act, 1996 having already been allowed where an Arbitrator has been appointed to adjudicate the disputes, no further protection/directions are required under Section 9 of the A&C Act, 1996.

9. The parties are at liberty to seek interim protection if the need be, by moving an appropriate application before the learned Arbitrator.

10. The application is accordingly disposed of.

^s 2022:DHC:4271

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