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

+ **O.M.P. (I) (COMM) 439/2017**

Date of decision: 7th December, 2017

LALIT MOHAN MADHAN & ORS. Petitioners
Through: Mr.Raman Kapur, Sr. Adv. With
Mr.Manish Kumar and Mr.Ram Pal Singh,
Adv.

versus

RELIANCE CAPITAL LTD. Respondent
Through: Mr.Rajat Katyal, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioners praying for the following reliefs:-

“a)restrain the respondent from in any way taking any action in furtherance of legal notice dated 28.06.2017 and Possession Notice dated Nil of September, 2017 and/ or any coercive action against the Petitioners in furtherance to legal notice dated 28.06.2017 and Possession Notice dated Nil of September, 2017 and/ or also restrain the respondent from recovering the alleged amount of Rs. 6,47,64,476/- or any amount from the

Petitioners till the disposal of OMP No. 804/2011 between the parties.”

2. The facts giving rise to the present petition can be summarized as follows:-

(a) The petitioners had availed loan from the respondent for a sum of Rs.3.35 crores. As a security for this loan, the petitioners created an equitable mortgage in their commercial property at Plot no.11, Community Centre, Zamroodpur, New Delhi-110048 (hereinafter referred to as the ‘property’). Certain disputes and differences arose between the parties and the same were referred to the arbitration resulting in an arbitration award dated 29th June, 2011. The same has been challenged by the petitioners before this Court in OMP No.804/2011 and the petition has been admitted for hearing vide order dated 17th May, 2012. It is listed for hearing on 21st March, 2018. In terms of Section 36 of the Act, therefore, the arbitral award is not enforceable at this present stage.

(b) During the pendency of the above objection petition, the respondent has issued a notice dated 28th June, 2017 under Section 13(2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) against the property. In the said notice, the respondent claims the amount outstanding as Rs.6,47,64,476/-. The respondent has also

issued a possession notice dated September, 2017 claiming possession of the said property.

3. Learned senior counsel for the petitioners submits that the impugned notices under section 13(2) and 13(4) of the SARFAESI Act are liable to be stayed by this Court inasmuch as, the liability under the loan agreement has been adjudicated in form of an arbitral award, which is pending challenge before this Court in the above mentioned OMP. Till the above objection petition is decided by this Court, no further action for recovery of the alleged loan amount can be taken by the respondent. It is further submitted that, in any case, the arbitral award grants only a sum of Rs.2,83,51,875/- along with interest @9% per annum w.e.f. 21st June, 2011 whereas the notice under Section 13(2) of the SARFAESI Act has been issued by the respondent claiming an amount of Rs.6,47,64,476/- as outstanding loan amount. Referring to Section 2(1) (ha) of the SARFAESI Act, learned senior counsel for the petitioners submits that 'debt' has been assigned the same meaning as in Section 2(g) of The Recovery of Debts Due to Banks and Financial Institutions Bankruptcy Act, 1993 (hereinafter referred to as the 'Debt Recovery Act'). He submits that under Section 2(g) of the Debt Recovery Act, 'debt' is an amount due from any person payable under a decree or order of any Civil Court or any arbitration award or under mortgage. He submits that as the amount under arbitration award is yet to be

finalized/determined due to pendency of the objections, there is no debt due in terms of Section 2(1) (ha) of the SARFAESI Act.

4. He further submits that the bank, having taken action under the Arbitration and Conciliation Act, 1996, cannot now resort to the SARFAESI Act for making any recovery against the petitioners as the Arbitration and Conciliation Act is an alternate procedure prescribed by law and Section 5 of the Arbitration and Conciliation Act provides for the Act to be a complete code in itself. He submits that in view of the adjudication under the arbitral award, there is no amount which can be recovered from the petitioners as a loan under the original agreement and, therefore, Section 2(g) of the Debt Recovery Act and equally Section 2 (1) (ha) of the SARFAESI Act would not be applicable. He further places reliance on the judgment of the Full Bench in *HDFC Bank Ltd. vs. Satpal Singh Bakshi 2012 SCC Online Del 4815* and submits that having provided for arbitration agreement in the loan agreement, the matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable and, therefore, once having invoked arbitration, the respondent cannot fall back on the procedure prescribed under the SARFAESI Act or under the Debt Recovery Act for making recovery under the original loan agreement. He submits that the Full Bench decision of this Court has been approved by the

Supreme Court in *M.D.Frozen Foods Exports Pvt. Ltd. and Ors. vs. Hero Fincorp Ltd.* AIR 2017 SC 4481.

5. On the other hand, the counsel for the respondent submits that SARFAESI Act provides for an alternate remedy /procedure to the financial institutions for making recovery of the loan amount. He submits that under Section 17(2) of the SARFAESI Act, remedy against the notice under Sections 13(2) and 13(4) of the Act has been provided. Further referring to Sections 34, 35 and 37 of the SARFAESI Act, he submits that SARFAESI Act would take primacy over all other acts though at the same time, the application of other Acts is not barred. He submits that a reading of the above provisions would show that the financial institutions can proceed against the secured assets for recovery of its dues without invoking the adjudicatory procedure under the Arbitration Act and equally where the adjudicatory procedure under the Arbitration Act has been invoked, it would not bar the financial institutions from seeking its alternate remedy under Section 13 of the SARFAESI Act.

6. I have considered the submissions made by the learned senior counsel for the petitioners and counsel for the respondent. In *M.D. Frozen Foods (supra)*, the Supreme Court has discussed the interplay between the SARFAESI Act and the Arbitration Act and I may quote paragraphs 30 onwards of that judgment where question no.A framed by the Court was answered.

“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 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 v. 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 for the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In Transcore V. Union of India & Anr. (Supra) 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. v. Orissa Rural Development Corporation Limited*, the Full Bench of the Delhi High Court in *HDFC Bank Limited v. Satpal Singh Bakshi* (supra) 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 *M/s. Deccan Chronicles Holdings Limited v. Union of India* following the overruled decision of the Orissa High Court in *Subash 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. (emphasis supplied)”

7. The Supreme Court has, therefore, held that the arbitration proceedings and SARFAESI Act proceedings can go hand in hand. It has held that the provisions of SARFAESI Act

are a remedy in addition to the provisions of the Arbitration Act. The two Acts are cumulative remedies to the secured creditors. While SARFAESI Act proceedings are in nature of enforcement proceeding, the arbitration proceedings would be in form of an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debt, the secured creditor can proceed against other assets in execution against the debtor, after determination of pending outstanding amount by a competent forum i.e. in this case the arbitration.

8. In *Transcore vs. Union of India (2008) 1 SCC 125*, while discussing the interplay between the Debt Recovery Act and the SARFAESI Act, the Supreme Court emphasized that the remedies for recovery under the Debt Recovery Act and SARFAESI Act are complementary to each other and, therefore, doctrine of election has no application.

9. As the SARFAESI Act and the Arbitration /Debt Recovery Act are held to be complementary in nature and the doctrine of election has been held to be not applicable, it cannot be said that if a party has invoked one remedy, it is debarred from invoking the other during the pendency of the first one. Under the SARFAESI Act, specially under Section 13 thereof, the secured creditor will proceed against the security given for the loan. If the amount recovered from the secured asset is less than the amount claimed as due by the financial institution, it would necessarily have to go for an adjudication proceeding

before proceeding against the other assets of the debtor. However, that does not mean that if it has invoked the adjudicatory process for determination of its loan amount, it stands denuded of recovering its loan from the secured assets in accordance with law i.e. SARFAESI Act.

10. In the present case, the arbitral award has not become enforceable because of pendency of the objection petition under section 34 of the Act. The adjudicatory process is therefore, still not complete. As observed above, the respondent, having initiated its remedies under the SARFAESI Act, which are complementary in nature, therefore, cannot be faulted.

11. As far as the submission of the learned senior counsel for the petitioners that the amount claimed in the notice under section 13(2) of the SARFAESI Act being more than the amount awarded under the arbitral award, in my view, is a submission which the petitioner can take under section 17 of the SARFAESI Act in a proper proceeding.

12. In *Kanaiyalal Lalchand Sachdev Vs. State of Maharashtra, (2011) 2 SCC 782*, the Supreme Court held that the party aggrieved of an action under Section 13(4) of the SARFAESI Act would have a remedy under Section 17 of the Act and therefore, petition under Article 226 / 227 of the Constitution would not be available. In the present case, as observed, the petitioners can take the issue of the amount claimed in the notice under Section 13(2) of the SARFAESI Act

before Debt Recovery Tribunal under Section 17 of the Act and therefore, has an equally efficacious remedy.

13. In my view, therefore, the petitioners have not been able to make out any *prima facie* case in its favour for the relief as claimed.

14. In view of the above, I find no merit in the present petition and the same is dismissed with no order as to costs.

DECEMBER 07, 2017
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NAVIN CHAWLA, J



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