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

Reserved on: 05th January,2023

% ***Pronounced on: 10th January, 2023***

\+ **REV. PETITION 296/2022 In ARB.P.62/2022**

M/S DIAMOND ENTERTAINMENT TECHNOLOGIES PRIVATE LIMITED & ORS.

..... Petitioners

Through: Mr. J.S. Bakshi, Sr. Advocate with Mr. Praveen Sharma, Mr. Abhishek Mohan and Mr. N. Bakshi, Advocates.

versus

RELIGARE FINVEST LIMITED THROUGH ITS AUTHORIZED OFFICER

..... Respondent/ Review Petitioner

Through: Mr. Dhruv Chawla, Ms. Ridhi Pahuja and Mr. Lokesh Mittal, Advocates.

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGEMENT

NEENA BANSAL KRISHNA, J.

Rev. Petition 296/2022

1. A review petition under Order XLVII read with Section 114 and 151 of the CPC has been filed on behalf of the petitioner (who was the respondent in the main petition) seeking review of the Order dated 14.10.2022 allowing the petition under Section 11 Arbitration and Conciliation Act, 1996 (*hereinafter referred to as "the Act, 1996"*) and an Arbitrator was appointed for adjudication of the disputes.

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2. It is submitted that the respondent (who was the petitioner in the main petition) therein had mislead the Court by relying on the Full Bench Judgement of Delhi High Court titled as *HDFC Bank Ltd. Vs. Satpal Singh Bakshi reported in 2012 SCC OnLine Del 4815*, which has been overruled by the Supreme Court in the case titled as *Vidya Drolia and Ors. Vs. Durga Trading Corporation reported in (2021) 2 SCC 1.* The law as laid down in *HDFC (Supra)* is no longer good law. It has been held in *Vidya Drolia (supra)* that there is a prohibition against the waiver of jurisdiction of Debt Recovery Tribunal (DRT) by necessary implication under Section 34 and 35 of the SARFAESI Act and any claim against the measures taken by the Financial Institutions under the said Act are not arbitrable. In the impugned Order, this objection was taken by the respondent but has been specifically considered and rejected by placing reliance on *HDFC (Supra)*.

3. It is submitted that the cause of action arose on the issuance of the Demand Notice 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, 2002"*) dated 12.07.2021, then on 22.09.2021 when the petitioner herein issued the Possession Notice and thereafter on 06.12.2021 when the respondent filed the application under Section 14 of the SARFAESI Act, 2002 before the learned CMM, Saket and obtained orders thereunder. The entire basis for the respondent to approach this Court arose from the measures taken by the respondent under the relevant provisions of the SARFAESI Act, 2002 against which the statue itself provides for efficacious remedy under Section 17 of the SARFAESI Act, 2002. Hence, invocation of arbitration in regard to the matters covered under the SARFAESI Act, 2002 is manifestly illegal

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and under no circumstances can the same be held to fall within the ambit of the Arbitration and Conciliation Act, 1996.

4. Further, the respondent herein had assailed the Order passed in the original application filed by the Bank under Section 19 of The Recover of Debts and Bankruptcy Act, 1993 (*hereinafter referred to as "RDB Act"*). Such proceedings as is well laid down, are in the nature of civil proceedings and therefore, any observations made in context thereto ought not to be squarely made applicable to the proceedings under the SARFAESI Act, 2002.

5. It is further asserted that the loan availed by the petitioner was restructured vide Facility Agreement dated 27.01.20214 and the reference of the disputes that arose under the loan Agreement in view of the failure of the petitioner to abide by the restructured payment plan, was referred to arbitration on 08.01.2015. The final award was made on 09.06.2015. No fresh cause of action has accrued between the parties in respect of which Section 11 could have been filed. There are no independent disputes as those which existed, have already been adjudicated in this previous Award. According to the respondent herein, the cause of action for filing the present petition arose on the issuance of Demand Notice dated 12.07.2021 under Section 13 (2) of the SARFAESI Act, 2002. The bare perusal of the Demand Notice would show that it was issued only on account of the default in the re-payment of EMIs on the part of the petitioner in regard to the Loan Facility Agreement dated 27.01.2014.

6. It is further submitted that the Supreme Court in *M.D. Frozen Foods Exports Private Limited vs. Hero Fincorp Ltd. (2017) 16 SCC 741* had dismissed the petition of the Borrower and allowed the Financial Institution

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to proceed with the measures under SARFAESI Act, 2002 while holding that prior arbitration proceedings were not a bar for taking recourse to the measures under the SARFAESI Act, 2002. The said case was not the one wherein the measures taken by the Financial Institution under the SARFAESI Act, 2002 was sought to be settled through arbitration as is being done in the present case.

7. The Supreme Court in *Vidya Drolia (Supra)* has clarified and affirmed that the Non Performing Assets Securitization Act, 2002 (*hereinafter referred to as "NPA Act, 2002"*) 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 cannot be exercised through the arbitral proceedings.

8. It is stated that the observations made in the Judgement dated 14.10.2022 that "*the objection taken on behalf of the respondent in regard to non-arbitrability of the disputes in view of the SARFAESI Act, 2002 is without merit"* requires to be reviewed and the petition under Section 11 ought to be dismissed. There is an error apparent on the face of the record and the impugned Order dated 14.10.2022 is required to be reviewed and the petition under Section 11 of the Act, 1996 may be dismissed.

9. The **Respondent in its reply** has taken a preliminary objection that review petition is not maintainable under the Act,1996 and the application is liable to be dismissed at the threshold. Further, it is vehemently contented that the petitioner had relied upon *M.D Frozen Fruits Private Limited (Supra)* which has been affirmed in *Vidya Drolia (Supra)* wherein it has been held that arbitration proceedings can go hand in hand with the proceedings under the SARFAESI Act, 2002.

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10. It is explained that though an earlier Award dated 09.06.2015 was made but the same was not acted upon by the parties. After the instalments have been duly paid, the respondent bank has turned dishonest as the Statement of Accounts is not showing a correct picture with respect to the payments made by the petitioner from time to time. There is therefore, an existing dispute and the petitioner is within its right to invoke arbitration. It is submitted that the application is without merit and is liable to be dismissed.

11. **Learned counsel on behalf of the petitioner has argued** that the scope of review is twofold. One is with regard to the procedural aspects and the other is in respect to the substantive observations made in the impugned Order. Though the review on substantial grounds may not be maintainable but here the impugned Order has been assailed purely on the technical/procedural ground of reliance having been placed on an overruled judgement and thus the review is maintainable.

12. It is further argued that in the latest judgement, the Apex Court in *Vidya Drolia (Supra)* has categorically observed that the action taken under the SARFAESI Act, 2002 is not amenable to arbitration. This Court has relied upon *HDFC (Supra)* which has been specifically overruled by the Apex court in *Vidya Drolia (Supra).*The reliance on an overruled judgement is an error apparent on the face of the record which is reviewable under Order XLVII of CPC.

13. It is further argued that the Order is erroneous in observing that the earlier Arbitration Award of 2015 does not bar the present petition for invoking the fresh arbitration. It is argued that the impugned Order suffers from error apparent on the face of the record which is liable to be corrected

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by way of review.

14. **Learned counsel on behalf of the respondent** has taken a preliminary objection that there is no provision for review of the Orders made under the Arbitration and Conciliation Act,1996 as held by this Court in the case of *Kushraj Bhatia vs. M/s. DLF Power & Services Ltd. 2022/DHC/005349* and therefore, the present application is liable to be rejected out rightly. It is further argued that in *Vidya Drolia (Supra)*, there is no reference to the proceedings under the SARFAESI Act, 2002 and even though *HDFC(Supra)* has been overruled, *M.D. Frozen (Supra)* has not been overruled which clearly provides that the proceedings can be undertaken by way of arbitration in respect of a matter which is also a subject matter under the SARFAESI Act, 2002.

15. Learned counsel for the respondent has placed reliance on *M.D. Frozen (Supra)* and *India Bulls Housing Limited Vs. Deccan Chronicals and others (2018) 14 SCC 783.*

16. **Submissions heard.**

A. Maintainability of Review Petition under The Arbitration & Conciliation Act, 1996:

17. The first objection which has been taken on behalf of the respondent is that it has been settled by the Supreme Court in various judgments that the review petition in respect of the orders made under Arbitration & Conciliation Act, 1996 is not maintainable.

18. In *Ram Chandra Pillai vs. Arunschalathammal & Ors. 1871 (3) SCC 847* the scope of review in general has been defined and it is stated that the power of review is not an inherent power. It must be conferred by law either

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specifically or by necessary implication and no power of review can be exercised in the absence of any express provision conferring this power of review.

19. In *Jain Studios Ltd. Through its President vs. Shin Satellite Public Co. Ltd.* (2006) 65 SCC 501 a reference was made to *SBP & Co. vs. Patel Engineering Ltd. And Anr. (2005) 8 SCC 618* and it was made clear that the powers exercised by the Chief Justice of High Court or its Nominee under Sub-section 6 of Section 11 of the Act is judicial. It was further observed that specific power of Review was conferred on the Supreme Court of India by virtue of Article 137 of the Constitution. It specifically provided that the Supreme Court shall have the power to review any judgment pronounced or order made by it and because of conferring the review power on the Supreme Court, the same can be exercised by the Supreme Court in respect of any judicial Order.

20. In *Ankiteros Shipping Corporation vs. Adani Enterprises Ltd., Mumbai 2020 (3) Mh. L.J.* it was explained that unlike the Supreme Court which is vested with power of review under Article 137 of Constitution of India, High Court is not vested with any such similar power of review under the Constitution. *The difference between substantive review and procedural review has to be considered in so much as the power of substantive review must be vested in a Court by a Statute and in the absence of any such power, no substantive review can be undertaken by the Court. However, a procedural review inheres in every Court and Tribunal to review its decision and if a procedural fault is found, to undo the same.* This was explained by stating that if a party has been proceeded ex-parte or such like orders are made, the Court in exercise of its inherent powers can review such Orders,

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but any Order given on merit would entail substantial review which cannot be exercised in the absence of specific conferment of the power of review to the Court.

21. In *Sanjay Gupta vs. Kerala State Industrial Development Corporation Ltd. 2009 SCC Online Ker 6361* the Kerala High Court explained this principle by observing that the Review of Order under Section 11 of the Arbitration & Conciliation Act, 1996 does not lie with the High Court. Even when a Judge of the High Court acts as a Nominee of Chief Justice, he acts merely as a Statutory Authority as designated by the Chief Justice in terms of Section 11 of the Act. Therefore, unless the power of review is expressly conferred under the Act itself, general power of review as may be available to the High Court under other jurisdictions : civil, criminal or writ, cannot be extended to review the earlier Order issued by the Nominee of the Chief Justice. The Review Petition is, therefore, not maintainable and is liable to be dismissed.

22. Similarly in *COBRA-CIPL JV*, the High Court of Madhya Pradesh while placing reliance on the observations of the Supreme Court in *Jai Singh vs. MCD (2010) 9 SCC 385* observed that while exercising its power under Article 227 of the Constitution, the High Court may exercise its powers to correct any patent perversity in the Order of the Tribunal or the Subordinate Court or where there is manifest failure of justice, but said power cannot be exercised to correct all Orders or Judgment of the Court or Tribunal acting within the limits of this jurisdiction.

23. By way of the present review petition, the petitioner is seeking review of the Order vide which an application under Section 11 of the Arbitration & Conciliation Act, 1996 has been allowed. Since the Order made under

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Section 11 of the Act is in exercise of the statutory powers as defined under the Arbitration & Conciliation Act, any review of the same can be only within the parameters of the Statute. Since, there is no provision of review in the Arbitration & Conciliation Act, this Court finds itself without any jurisdiction to review the present Order.

24. Moreover, the grounds raised for review are in the realm of Appeal as the findings of this Court have been challenged which cannot be brought within the scope of "*error apparent on the face of the record*" and the impugned Order is not amenable to Review.

B. Second Award in respect of same dispute:

25. Even otherwise on mertits, the first ground for seeking review of the impugned Order is that the respondent herein (petitioner in the main petition) had defaulted in payment of instalments of the loan granted to it and an Award dated 09th June, 2015 has already been made for recovery of the loan amount along with interest @ 18% per annum from June, 2015 till the date of actual payment. The basic question that was raised was whether a second arbitration petition in respect of the same dispute is maintainable. This aspect was considered in detail in the impugned Award and it was held that the present petition for appointment of Arbitration under Section 11(6) of the Arbitration & Conciliation Act was maintainable. It may be observed that the disputes have arisen afresh in so much as the petitioner herein has claimed defaults in payments after restructuring of Loan for which proceedings have been initiated by the Petitioner and the respondent who has assailed the amounts being claimed, has sought determination of its liabilities for which there is no other forum except by way of civil suit/

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arbitration. According to the respondent, fresh disputes have arisen and the respondent cannot be left remedy less.

26. In *M.D. Frozen Foods Exports Private Limited and Others v. Hero Fincorp Limited* (2017) 16 SCC 741, and following this judgment in *Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited and Others* (2018) 14 SCC 783, 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.

27. Also, once this specific plea has been taken and dealt and answered in the impugned Order, then any grievance against the findings may be subject to an appeal, but definitely does not fall within the ambit of review.

C. Reliance on the overruled decision of *HDFC Bank Ltd. Vs. Satpal Singh Bakshi reported in 2012 SCC OnLine Del 4815*

28. The other main objection taken is that in the case of *Vidya Drolia (Supra)* it has been specifically held that the disputes referable to SARFAESI Act are not arbitrable and cannot be referred to arbitration under Arbitration & Conciliation Act. The reliance in the impugned Order has been placed on *HDFC Bank vs. Satpal Singh Bakshi* (2012) SCC OnLine Del 4815, but the said judgment has been specifically over ruled in the case of *Vidya Drolia (Supra)*. The impugned Order allowing the application under Section 11(6) of the Act, 1996 thus, suffers from an error apparent on the face of record and is required to be reviewed.

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29. The first aspect which needs to be reiterated is that this objection was taken specifically by the petitioner herein in its reply to the petition under Section 11(6) of A&C Act. This aspect was specifically dealt with in the impugned Award and it was held that even in the matters referable to SARFAESI Act, the arbitration proceedings can be initiated. Once an issue has been agitated and it has been answered, the same becomes amenable to appeal and not to review.

30. It may still be considered whether the dispute in hand is not referable to arbitration as has been held in the impugned Award.

I. Competence to decide arbitrability of Disputes:

31. Section 16 of the Arbitration & Conciliation Act, 1996 deals with the competence of Arbitration Tribunal to rule on its jurisdiction. In *SBP & Co. Vs. Patel Engg. Ltd.* (2005) 8 SCC 618 the Supreme Court held that Section 16 makes explicit that the Arbitral Tribunal has jurisdiction to rule on its own jurisdiction including ruling on objections to existence of validity of the arbitration agreement, but if the Court at the referral stage has decided the jurisdictional issue, then such decision of the referral court would be final and binding on the Arbitral Tribunal.

32. In *Shin-Etsu Chemical Co. Ltd. Vs. Aksh Optifibre Ltd.* (2005) 7 SCC 234 the Apex Court further observed that Section 16 incorporates the principles of separation and "*competence-competence"* thereby clearly indicating that the arbitrator can decide his or her own jurisdiction even when the validity of the main contract or the arbitration agreement is challenged. The Arbitration Act itself envisages that the Arbitral Tribunal should rule on the questions of non-arbitrability, subject to the second look by the court post the award. This helps in expeditious and quick disposal of

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matters before the court at the first stage while preserving the court's power to examine the three facets of arbitrability at the third stage. This also prevents the possibility of multiplicity of trials, an aspect highlighted in *Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya* (2003) 5 SCC 531.

33. In *Vidya Drolia (Supra)*, the Apex Court in detail considered the matters which could be referred for arbitration. It discussed in detail that the disputes which are non-arbitrable cannot be referred to arbitration under Section 11 of the A&C Act. The following fourfold test was propounded to determine when a subject matter of a dispute in an arbitration agreement is not arbitratable:

> *(1) when cause of action and subject matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.*
>
> *(2) when cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized adjudication, and mutual adjudication would not be appropriate and enforceable;*
>
> *(3) when cause of action and subject matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable; and*
>
> *(4) when the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).*

34. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and

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assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject matter is non-arbitrable. Only when the answer is affirmative that the subject matter of the dispute would be non-arbitrable.

35. After laying down the fourfold test, the question which was considered by the Apex Court was: who would decide the non-arbitrability. It was explained that the issue of non-arbitrability can be raised at three stages :

(i) before the Court on an application for reference under Section 11 for stay of pending judicial proceedings and reference under Section 8 of the A & C Act;

(ii) before the Arbitral Tribunal during the course of the arbitration proceedings; and

(iii) before the Court at the stage of challenge to the Award or its enforcement.

36. It was observed that *who decides non-arbitrability* remains a vexed question that does not have a straight forward universal answer as would be apparent from the opinions in the various judgements are at variance. To some extent, the answer depends on how much jurisdiction the enactment gives to the arbitrator to decide their own jurisdiction as well as the court's jurisdiction at the reference stage and in the post-award proceedings. It also depends upon the jurisdiction bestowed by the enactment, viz. the facet of non-arbitrability in question, the scope of the arbitration agreement and authority conferred on the arbitrator.

37. In *Vidya Drolia (Supra)* while referring to the aforementioned judgments it was observed that the stage of referral under Section 11 is not

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the stage for the court to enter into a mini trial or an elaborate review who has to usurp the jurisdiction of the Arbitral Tribunal but to affirm and uphold the integrity and efficacy of arbitration as an Alternate Dispute Resolution Mechanism.

Non-arbitrability of Disputes under SARFESI Act,2002

38. In the present case, the main ground on which the review has been sought is the non-arbitrability of disputes under SARFESI Act,1993 as held in the case of *Vidya Drolia (supra) while* over ruling judgment of *HDFC Bank Ltd. (Supra)* on which reliance has been placed in the impugned order.

39. To understand the controversy, it would be pertinent to refer to the scope of the Acts under consideration.

40. The background in which the SARFAESI Act was enacted was that the financial sector was held to be one of the key drivers of India's efforts to achieve success in rapidly developing its economy. There was no legal provision for facilitating securitization of financial assets of banks and financial institutions. Further, unlike International banks, the banks and financial institutions of India did not have power to take possession of securities and sell them. This resulted in slow pace of recovery of loans and mounting levels of non-performing assets of the banks and financial institutions.

41. SARFAESI Act, 2002 was enacted with the provisions that are enabling as well as empowering the secured creditors to take possession of the securities, realize long terms assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising power to take possession of securities, sell them and reduce non-performing assets by

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adopting measures for recovery or reconstruction, to deal with them without the intervention of the court and also alternatively to authorize any Securitization or Reconstruction Company to acquire financial assets of any Bank or Financial institutions. It was enacted essentially with a distinct purpose to facilitate banks and financial institutions to recover dues in a speedy manner by enforcement of security interest without intervention of the court.

42. Likewise, the ***Recovery of Debts and Bankruptcy Act, 1993 (RDB Act***) contains provisions for modes of recovery of debts, appeals against the order of Recovery Officer, power to make rules as described and discussed therein. This Act also has the object to provide for establishment of Tribunal for expeditious adjudication and recovery of debts due to Banks and Financial Institutions and for matters connected therewith or incidental thereto. The main object and reason for enactment of this Act as well was to provide an expeditious mechanism for recovery of funds/ debts due to the Banks and Financial Institutions the significant operation of which has turned into non-performing assets value of which deteriorates with passage of time.

43. The Debt Recovery Act was amended by Act 1 of 2000 to remove the lacunae by providing for set off and counter-claims by the borrower in the application filed by Banks/ Financial Institutions before the Tribunal. The effect of sub-sections (6) to (11) of Section 19 of the Amended Act is that any defendant in a suit or proceedings initiated by the Bank or Financial Institution can :

(a) ***Claim set off*** *against the demand of the Bank/ Financial Institution, any ascertained sum of money regally recoverable by him from such*

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bank/ financial institution; and

(b) ***Set-up by way of counter-claim*** *any right or claim in respect of a cause of action accruing to such defendant against the bank/ financial institution, either before or filing of the application, but before the defendant has delivered his defence or before the time for delivering the defence has expired.*

44. Section 17 and 18 have not been amended and jurisdiction has not been conferred on the Tribunal even after amendment, to try independent suits or proceedings initiated by the borrowers or others against Banks/ Financial Institutions nor the jurisdiction of civil courts has been barred in regard to such suits or proceedings. The only change that has been made is to enable defendants to claim set off or make a counter-claim under Section 19 in applications already filed by Banks/ Financial Institutions for recovery of the amounts due to them, the intention being that any claim of Bank/ Financial Institution and the counter-claim or set off of the defendant may be dealt with as a unified proceeding and may be disposed of by a common order. However, making a counter-claim in the bank application before the Tribunal is not the only remedy but an option available to the borrower/ defendant. He can also file a separate set off proceeding before the civil court or other appropriate Forum in respect of his claim against the Bank and pursue the same. A defendant having an independent claim against the Bank, cannot be compelled to make his claim against the Bank only by way of counter-claim, nor can his right by way of independent suit in a court having jurisdiction be transferred to a Tribunal against his wishes.

45. There is no provision in the RDB Act for transfer of suits and proceedings except under Section 31 which relates to the proceedings by the

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bank or financial institution for recovery of a debt. Section 31 applies only to those cases and proceedings which were pending before the Court before the date of establishment of the Tribunal under the DRT Act which got transferred to the Tribunal. A suit filed by the borrower is therefore does not attract Section 31 of RDB Act, 1993.

46. In *Nahar Industrial Enterprises Ltd. vs. Hong Kong and Shanghai Banking Corporation* (2009) 8 SCC 646 it was opined by the Apex Court that ***the suit filed by a borrower against the Bank was not barred before the civil court although a suit filed by the bank against a borrower was barred***.

47. In *Indian Bank vs. ABS Marine Products (P) Ltd.* (2006) 5 SCC 72 the Division Bench of the Apex Court The inter play of the provisions of RDB Act, 1993 and the Code of Civil Procedure, 1908 were discussed in *Indian Bank's* case. It was observed that Chapter V of RDB Act, 1993 deals with recovery of debt determined by DRT. Section 25 of RDB Act prescribes the mode of recovery of debts which takes place pursuant to the Certificate issued under Section 19(7) to recover the amount of debts specified in the Certificate by any of the modes specified therein. The expense of the relief which the defendant may claim in the suit proceedings can certainly go beyond mere adjustment of the amounts of claim for which the DRT would not have any power. It is further clarified that a claim petition filed by a financial institution before the DRT has to proceed in a particular manner and would so proceed.

48. It was observed that there is no provision in the Act for transfer of suits or proceedings except Section 31 which relates to suits/ proceedings by the Bank or Financial Institution for recovery of a debt. It is evident from

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Section 31 that only those cases and proceedings which were pending before any Court immediately before the establishment of the Tribunal under the DRT Act stood transfer to the Tribunal. The suit that was filed long after the date when the Tribunal was established and no being a suit or proceedings instituted by a Bank or Financial Institution for recovery of a debt, it did not attract Section 31. It was held that the jurisdiction of the civil courts was not barred in regard to any suit filed by the borrower against the bank for any relief. Jurisdiction was barred only in regard to applications by the bank or a financial institution for recovery of debts. It was thus, held that the borrower has the option to file a suit before the civil court and the counter claim before the DRT was not the only remedy. It was further concluded that there are no restrictions on the powers of civil courts under Section 9 of the Code, unless extremely or impliedly excluded as has been reiterated by the Constitution Bench in the case of *Dhulabhai vs. State of Madhya Pradesh* 1968 SCR (3) 660.

49. Further in *Transcore vs. Union of India* (2008) 1 SCC 125, it was opined that the DRT being a Tribunal and a creature of Statute does not have any inherent powers which inheres in civil courts such as Section 151 of the Code. 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*

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> *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."*

50. Likewise, in the case of *M.D. Frozen Foods (Supra)*, and following this judgment in *Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited and Others* (2018) 14 SCC 783, it has been held that 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. The disputes even though agitated before the Debt Recovery Tribunal (DRT), are still arbitrable because even after the proceedings under SARFAESI Act have been satisfied, there may still be dues left, which would be required to be determined and recovered for which the DRT proceedings would have to continue.

51. This entire controversy about jurisdiction of the borrower to resort to arbitration has been elaborately explained by the Apex Court in the recent judgement by the Apex Court in *Bank of Rajasthan Ltd. vs. VCK Shares & Stock Broking Services Ltd.* 2022 LiveLaw (SC) 941, in which a reference was made to answer the question whether the legal right of the borrower to

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initiate proceedings before a civil court against the Bank or Financial Institution which seeks to recover an amount against it, is barred in view of the RDB Act, 1993. After referring in detail to the observations made in the case of *Indian Bank (Supra)* it was stated ***that Section 17 of RDB Act bars the jurisdiction of civil court only in respect of application filed by the Bank or Financial Institution. No jurisdiction has been conferred on DRT to try independent suits or proceedings initiated by the borrower or others against Banks/ Financial Institutions.*** The suit on the other hand, which may be filed by the borrower takes its own course and is in the nature of parallel proceedings but then it is the option of the borrower and there is no problem in this so long as the objective of having expeditious disposal of the claim before the DRT under the RDB Act is not impeded due to filing of civil suit.

52. *Vidya Drolia (Supra)* referred to *M.D. Frozen Foods Exports Private Limited (Supra)* and *Transcore (Supra)* and it was observed that:

> *"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*

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> *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."*

53. The observations made in *Vidya Drolia* as stated above, are not applicable to the facts in hand and is distinguishable as it is the borrower/ respondent who had brought its disputes for resolution through Arbitration by filing the application under S.11 of the Act, 1996 and not the Bank/ Financial Institution to whom The RDB Act is applicable.

54. The Co-ordinate Bench of this Court in *Hero Fincorp. Limited vs. Techno Trexim (I) Pvt. Ltd. & Ors.* MANU/DE/4581/2022 has considered all the aspects as discussed above and has relied upon the case of *M.D. Frozen Foods (Supra)* and *Indiabulls House Finance (Supra)* to hold that

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The RDB Act, 1993 under Section 19 specifically provides that an application under the Act may be made by a Bank or Financial Institution. Section 17 of RBD 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. Therefore, the proceedings undertaken under SARFAESI Act are not the proceedings under RDB Act. It was therefore, concluded that even if an action is taken under Section 17 of the RBD Act by filing a petition before DRT, it would not preclude the initiation of arbitration proceedings by the petitioner (borrower) in accordance with law.

55. It may not be out of place to note **Section 11 of SARFAESI Act** which provides for resolution of disputes. It reads as under:

> *"**Resolution of disputes** – Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank, or financial institution, or asset reconstruction company or qualified buyer, **such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and conciliation Act, 1996,** as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly."*

56. From this Section itself it is evident that the resolution of disputes through arbitration is recognized even under the SARFAESI Act and there is

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no absolute bar of referral of such disputes which may be covered under the SARFAESI Act by way of arbitration.

57. As has been argued, that even though *HDFC Bank Ltd. (Supra)* has been over ruled, the law as enunciated in *M.D. Frozen Foods (Supra)* still is good law. Though *M.D. Frozen Foods (Supra) is* mentioned specifically in *Vidya Drolia (Supra)* but it has not been overruled and there is no ground to review the impugned Order.

58. To sum up, firstly the review petition is not maintainable under law; secondly the grounds for review as agitated in the application are more in the realm of appeal and not amenable to review. Thirdly, there is no error apparent on face of record nor are the findings in contravention of the observations made in *Vidya Drolia (Supra)* which was the main ground for seeking review.

59. It may also be observed that any observation made herein while deciding an application under Section 11 are without prejudice and the parties are at liberty to raise these objections in regard to the competence and arbitrability of the dispute under Section 16 of the Arbitration & Conciliation Act, 1996 and it is within the domain and jurisdiction of the learned Arbitrator to decide the same in accordance with law.

60. There is no merit in the Review petition which is hereby dismissed.

NEENA BANSAL KRISHNA
(JUDGE)

JANUARY 10, 2023
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