IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COMM. ARBITRATION APPLICATION (L) NO.12570 OF 2021

Mantras Green Resources Ltd. & Ors. .. Applicant

Versus

Canara Bank .. Respondent

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Mr.Mangesh M.D.Patel for the Applicant.
Mr.Gajendra A. Rajput for the Respondent.

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CORAM: BHARATI DANGRE, J.
DATED : 03rd MARCH, 2023

JUDGMENT:-

1. The applicant, a company incorporated under the provisions of the Companies Act, 1956 and engaged in an activity of conservation of environment at it's core so as to ensure eco-friendly plans and solutions, has approached this Court, seeking appointment of a Sole Arbitrator to adjudicate the disputes that have arisen with the respondent-Canara Bank, a body corporate constituted under the Banking Companies (Acquisition & Transfer of Undertaking) Act.

The aforesaid relief is sought in the wake of an arbitration clause comprised in the common hypothecation Agreement executed between the applicant and the respondent on 19/12/2017, where it was agreed, to refer any dispute arising in connection with the Agreement to an Arbitrator or if there is no agreement reached, then to be

referred to a panel of three Arbitrators, one appointed by each party and third selected by two Arbitrators.

2. It is not in dispute that the applicant, in the wake of it's activity, availed facility from the respondent bank and as per the applicant, it has availed approximately INR 8.5 Crore from the respondent bank out of the total sanctioning facility of INR 20 Crore. Though the application proceed to disclose the manner in which the amount was expended, I need not delve deep into the same. The applicant has alleged that on account of numerous breaches committed by the respondent bank, it suffered a huge loss amounting to Rs.14,20,51,051/-.

In any case, according to the applicant, it is entitled for the benefit of making over the reference to the Arbitrator and, therefore, it had invoked arbitration vide it's notice forwarded to the respondent on 09/04/2021, when it demanded arbitration by clearly setting out the dispute and claimed that the sum of Rs.14,20,51,051/- with further interest at the rate of 12% is payable to it.

3. Despite the notice being duly received by the respondent on 15/04/2021, since it did not accord any consent to the proposed name of the Arbitrator and forwarded a reply on 21/05/2021, where it is accused of raising sham defences and untenable contentions, the applicant has approached this Court, seeking appointment of a Sole Arbitrator in terms of the clause contained in the common hypothecation Agreement to that effect.

4. The learned counsel Mr.Gajendra Rajput, appearing for the respondent bank, vehemently opposed the relief sought in the application by submitting that in the wake of the decision of the Hon'ble Apex Court in the case of ***Vidya Drolia & Ors. Vs. Durga Trading Corporation***[1], the dispute is non-arbitrable and he would specifically rely upon paragraph 58 of the said decision, where it has been held as under :

> "58. Consistent with the above, observations in *Transcore* on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi,* which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in *HDFC Bank Ltd.* has been referred to in *M.D.Frozen Foods Exports (P) Ltd.,* but not examined in light of the legal principles relating to non-arbitrability. The decision in *HDFC Bank Ltd.* holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case of the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."

5. Traversing the aforesaid contentions, the learned counsel Mr.Mangesh M.D.Patel appearing for the applicant, has placed reliance upon the decision of the Hon'ble Apex Court in the case of ***Bank of Rajasthan Ltd. Vs. VCK Shares &***

1 (2021) 2 SCC 1

Stock Broking Services Ltd.[2], where the Three-Judge Bench of the Hon'ble Apex Court, on 10/11/2022, has clearly answered a reference made over to it, by concluding that the jurisdiction of a Civil Court to try a suit filed by a borrower, against the bank or financial institution, is not ousted by virtue of the scheme of the Recovery of Debts and Bankruptcy Act, 1993 (for short, ***"the RDB Act"***) in relation to the proceedings for recovery of debt by a bank or financial institution.

Relying upon the said decision, the submission advanced is that the remedy available to a bank for recovery of it's dues under the RDB Act, will not preclude the applicant, who is a borrower, to initiate proceedings before a Civil Court against the bank or financial institution and amongst the choice between the Civil Court and Arbitration, the latter being a forum chosen by the parties and clearly contemplated in the Agreement in writing, making it imperative for the parties for being referred for Arbitration, the applicant is entitled to invoke Arbitration.

The learned counsel would submit that in any case, if a civil suit is filed by the applicant in it's capacity as a borrower, in terms of Section 8 of the Arbitration and Conciliation Act, 1996, the Court is duty bound to take cognizance of the arbitration agreement entered between the parties and in such a case, would refer the parties to arbitration unless it finds that, *prima facie,* no valid arbitration agreement exists.

The learned counsel would, therefore, submit that when the Three-Judge Bench of the Hon'ble Apex Court in the case of ***Bank of Rajasthan Ltd.*** (supra) has held that the remedies

2 Civil Appeal Nos.8972-8973/14

open to the borrower to initiate proceedings before a Civil Court against the bank or financial institution, which seek to recover the loan against it and the embargo that is created upon the bank for recovery of it's dues, which is held to be special remedy available, the decision in the case of ***Vidya Drolia*** (supra) would not act as a legal impediment in the applicant invoking arbitration, as the Agreement between the parties comprise of an arbitration agreement, with a clear intention being manifested that the dispute arisen amongst the parties out of the said Agreement, would be referred for arbitration.

6. On hearing the rival contentions advanced by learned counsel for the parties, it is clear that the applicant, who is a borrower, is insisting upon, arbitration as a remedy to settle the disputes that have arisen with the respondent and the respondent is vehemently opposing, the invocation of arbitration on the ground that the dispute is non-arbitrable and, since, a special forum has been created by an Act of Parliament to resolve the said disputes, initiation of arbitration proceedings is not maintainable.

7. At this stage, it is necessary to make reference to the RDB Act, which has created a special forum in form of Debt Recovery Tribunal (**"DRT"**). The aforesaid enactment intended to facilitate creation of special machinery for speedy recovery of dues of banks and financial institutions, the Tribunal being created under the enactment, for expeditious

adjudication and recovery of debts due to the banks and the financial institutions.

Necessarily it provides a forum to the banks/financial institutions to approach the Tribunal and Section 19 contemplate an application at the instance of the bank or financial institution, which had to recover any debt from any person and this application would be adjudicated by the Tribunal in the manner prescribed by the statute. The powers are conferred on the Tribunal to grant the claim of the applicant and also determine a claim for set-off or counter-claim, if any, while adjudicating the proceedings.

The Tribunal is also empowered to take strict measures as conditional attachment of the whole or any part of the property and also detention of a person in civil prison, if he is found guilty of disobedience or breach of the order passed by the Tribunal. The power of the Tribunal would also extend to appointment of a Receiver on any property, removal of any person from possession or custody of the property and commit the same to the possession, custody or management of the Receiver.

8. The RDB Act contains a provision barring the jurisdiction of any court or authority in relation to the matter to be determined by the Tribunal, exception being made in relation to recovery of debts due to any multi-State co-operative Bank under the Multi-State Co-Operative Societies Act, 2002.

9. The scheme of the RDB Act is exhaustively dealt, by Their Lordships of the Hon'ble Apex Court in the case of ***Bank of Rajasthan Ltd.*** (supra) and by extensively referring to the statutory frame-work contained therein in the form of Sections 17, 18 and 19 of the Act, the following reference which was made over to the Larger Bench, came to be adjudicated.

> "(a). Whether an independent suit filed by a borrower against a Bank or Financial Institution, which has applied for recovery of its loan against the plaintiff under the RDB Act, is liable to be transferred- and tried along with the application under the RDB Act by the DRT?
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> (b). It the answer is in the affirmative, can such transfer be ordered by a court only with the consent of the plaintiff?
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> (c). Is the jurisdiction of a Civil Court to try a suit filed by a borrower against a Bank or Financial Institution ousted by virtue of the scheme of the RDB Act in relation to the proceedings for recovery of debt by a Bank or Financial Institution?"

10. Upon discussing the statutory scheme, the following observations are made, which I deem it appropriate to reproduce, as the same gives an insight as regards the jurisdiction of the special forum, especially created for the banks and financial institutions.

> "39. On a plain reading of the provisions, the conclusion reached was that Section 17 of the RDB Act bars the jurisdiction of the Civil Court only in respect of applications filed by the bank or financial institution. This provision did not bar the jurisdiction of the Civil Court to try a suit filed by the borrower. There was also an absence of provisions in the Act for transfer of suits and proceedings except Section 31, which relates to pending suit proceedings by a bank or financial institution for recovery of debt.
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> 40. It was noticed that the significant aspect of Sections 17 and 18 of the RDB Act was that even after establishment of the DRT, no jurisdiction had been conferred on it to try

> independent suits or proceedings initiated by the borrower or others against banks/financial institutions. What has been permitted is only a cross-action in the form of counterclaim by a defendant in the pending application to facilitate a unified proceeding. The most significant aspect considered in this behalf is set out in para 17 extracted above-that a counterclaim in a bank's application before the DRT was not the only remedy, but an option available to the defendant borrower. The borrower was not precluded from filing a separate suit or proceeding before a Civil Court or other appropriate forum. Not only that, even the bank, in whose application a counterclaim is made, has the option to apply to the DRT to exclude the counterclaim of the defendant while considering its application. If the DRT were to find in the bank's favour, the defendant would have to approach the Civil Court in respect of such excluded counterclaim, as the DRT does not have jurisdiction to try an independent claim against the bank/financial institution."

11. Referring to the various steps as regards various claims under Section 19, it has been held that there is no provision in the RDB Act by which the remedy of a civil suit by the defendant in a claim by the bank is ousted, but it has been held to be a choice of the defendant, who may file a counterclaim or may be desirous of availing of the more strenuous procedure established under the Code.

Recording that if the defendant/borrower is to invoke the jurisdiction of the DRT by filing a counterclaim, it was noticed that the bank had a right to seek relegation of that claim to the Civil Court and DRT has been empowered to do so, even at the final adjudication stage, in the wake of the summary nature of remedy provided before the DRT.

Though a clarification is offered that in case such an option is exercised by the defendant/borrower, who has filed the independent suit, whatever be the nature of reliefs, the claim petition under the RDB Act would continue to proceed

expeditiously in terms of the procedure established therein, to determine whether a debt, is due to a bank and/or financial institution and whether a recovery certificate ought to be issued in this behalf.

By way of conclusive observation, it was held that the jurisdiction of the Civil Court to try a suit filed by the borrower against the bank or financial institution is not ousted despite the fact that the bank or financial institution has approached the Debt Recovery Tribunal for recovery of it's debt.

12. While dealing with an issue, whether such a suit filed by the borrower against a bank or financial institution is liable to be transferred and tried alongwith an application before the DRT, the same has been answered in the negative, since it is a matter of option of the defendant/borrower to institute a claim under the RDB Act, but it has been categorically held that the proceedings under the Act will not be impeded in any manner, by filing of a separate suit before the Civil Court.

13. In the wake of the guidance provided in the case of the ***Bank of Rajasthan Ltd.*** (supra), one aspect is now clear and that is, the bar created under the RDB Act, which has been clearly spelt out in the decision of the Hon'ble Supreme Court in the case of ***Vidya Drolia*** (supra), will operate against the bank/financial institution and it has been categorically ruled by the Three-Judge Bench that the option is left to the borrower to file a civil suit or a counterclaim in the said proceedings before the DRT.

But, when one contemplate a scenario, since the borrower has an option to file a civil suit, Section 8 of the Arbitration and Conciliation Act, 1996 will immediately come into picture, in the wake of an existing arbitration clause.

14. The learned counsel for the respondent does not dispute the existence of an arbitration clause in the Agreement entered between the parties, but he only object to the dispute being arbitrable.

I do not find any merit in the objection raised by the learned counsel for the respondent, in the wake of the clear law laid down in ***Bank of Rajasthan Ltd.*** (supra). The position of law that emerges today is, the borrower can maintain a civil suit despite a remedy being available to file a counterclaim in an application filed by the bank/financial institution before the designated forum i.e. Debt Recovery Tribunal and the choice is ultimately of the borrower to approach the Civil Court, if he deem it to be expedient.

Amongst the Civil Court and the arbitration proceedings, arbitration being a chosen forum and once it is agreed between the parties that the dispute amongst them, that has or which may arise, shall be referred for arbitration, the Civil Court under Section 8 of the Arbitration and Conciliation Act, 1996 would not entertain the suit and will relegate the parties to the process of arbitration.

Hence, though the learned counsel for the respondent has vehemently argued that the decision in the case of ***Bank of Rajasthan Ltd.*** (supra) only deal with the remedy available to

a borrower to file a civil suit in a Civil Court, as a sequel, what clearly surfaces is the bar created under Section 8 of the Arbitration and Conciliation Act, 1996 and permitting him to approach a Civil Court would not be an efficacious remedy, since the Civil Court is duty bound to relegate the parties to an Arbitrator, in the wake of the existing arbitration clause.

To avoid this scenario, I deem it appropriate to appoint an Arbitrator by exercising the power under sub-section (6) of Section 11 in the wake of the existing Arbitration Agreement between the parties and, since, the same is not disputed by the learned counsel for the respondent.

The present application, therefore, deserve a disposal by appointing a sole Arbitration. Hence, the following order.

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator** :

Justice V. M. Deshpande (Retd.) is hereby appointed as a Sole Arbitrator to decide the disputes and differences between the parties under the agreement referred to above.

(b) **Communication to Arbitrator of this order :-**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the applicant/ petitioner within one week from the date this order is uploaded.

(c) **Disclosure :** The learned Arbitrator, within a period of 15 days before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996, to the

Prothonotary & Senior Master of this Court, to be placed on record of this application, with a copy to be forwarded to both the parties.

(d) **Appearance before the Arbitrator** :The parties shall appear before the Sole Arbitrator within a period of two weeks from today and the learned Arbitrator shall fix up a first date of hearing in the week commencing from 27/03/2023. The Arbitral Tribunal shall give all further directions with reference to the arbitration and also as to how it is to proceed.

(e) **Contact and communication information of the parties :** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. This information shall include a valid and functional E-mail address as well as mobile numbers of the parties, participating in the process as well as of the Advocates.

(f) **Section 16 application :** The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) **Fees** : The sole Arbitrator shall be entitled to the fees prescribed under the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal portion and shall be subject to the final Award that may be passed by the Tribunal.

(h) **Venue and seat of Arbitration** : Parties agree that the venue and seat of the arbitration will be in Mumbai.

(i) **Procedure :** These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

15. All contentions of both the sides are left open, to be raised by the respective parties before the Arbitral Tribunal, in accordance with law.

M.M.Salgaonkar

16. Comm. Arbitration Application (L) No.12570 of 2021 stand disposed off.

(SMT. BHARATI DANGRE, J.)

M.M.Salgaonkar