

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

ARBITRATION APPLICATION NO.258 OF 2018

HMG Industries Ltd. .. Applicant

Vs.

Canara Bank .. Respondent

Ms. Anita Castelino, i/by Lambay & Co., for the Applicant.

Ms. Niyati Merchant, with Mr. Harsh Sheth, i/by MDP & Partners, for the Respondent.

CORAM : A. K. MENON, J.

DATE : 13TH JUNE, 2022.

P.C. :

1. This is an application filed under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate upon disputes between the applicant and the respondent. The applicant is a public limited company. The respondent is a nationalized bank.

2. It is the case of the applicant that vide a Debenture Trust Deed dated 25th July 1995 between the parties, the respondent-bank was appointed as a Debenture Trustee. Later, in the year 2006, an Amended Scheme of Compromise between the applicant and the secured creditors, including debenture-holders, unsecured creditors, equity shareholders, preference shareholders and workers was sanctioned by this court. According to the applicant, the scheme does not contemplate the respondent-bank continuing as a trustee. The respondent-bank has since raised demand on the applicant in a sum of Rs.1,22,46,357/- towards its fees and has sought to take legal action against the applicant. It is at this stage that the applicant has

invoked clause 5 of the Amended Scheme of Compromise and called upon the respondent-bank to pay to the applicant a sum of Rs.2,75,00,000/- being alleged loss suffered by the applicant due to retention of original title deeds by the respondent-bank. Thus, the applicant is before this court seeking appointment of a Sole Arbitrator.

3. The respondent-bank has opposed the application. According to the respondent, there is no arbitration agreement between the parties and hence the application is not competent. The matter has been pending since last four years. For various reasons, it is seen to have been adjourned from time to time mainly at the instance of the parties' Advocates. Eventually, on 6th June 2022, both sides stated that they have filed written submissions and they did not wish to make oral submissions. Accordingly, the matter has been taken up today.

4. In the written submissions filed on behalf of the applicant, which run into fourteen paragraphs across eight pages, paragraph nos.1 and 8 are dedicated only to the factum of the constitution of the parties, execution of the Debenture Trust Deed in 1995, grouping of the respondent-bank as sundry creditor under the Scheme, correspondence between the Stressed Assets Stabilization Fund and the respondent-bank and the contention that despite the Scheme of Compromise sanctioned on 10th February 2006. The respondent-bank, it is alleged, continues to hold on to original title deeds although it need not continue as a trustee under the Scheme. The submissions include contentions on merits eventually seeking release of the title deeds. It is the contention of the applicant that by various letters, the respondent-

bank has demanded payment of a sum of Rs.1,22,46,357/- and is threatening to take legal action against the applicant. In the meantime, it is contended that the applicant having suffered losses, it is entitled to recover a sum of Rs.2,75,00,000/- from the respondent-bank due to non-return of the original title deeds. No particulars of loss incurred is disclosed.

5. Ms. Castelino appearing in support of the application has pressed into service the aforesaid contentions by inviting my attention to clause 5 of the Amended Scheme of Compromise. For ease of reference, clause 5 is reproduced below :-

“5. Removal of Difficulties and Settlement of Disputes

5.1 In the event of any dispute, difference or controversy arising out of or in relation to the present scheme, the same would be referred to the sole arbitration of an arbitrator to be appointed by the company. The arbitration would be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996.”

6. The applicant admits in its written submissions that the respondent-bank had vide letter of 3rd October 2017 contended that the bank was not a party to the Scheme of Compromise. This, according to Ms. Castelino, was incorrect. According to her, once the Scheme of Compromise under Section 391 of the Companies Act, 1956 is sanctioned by the court, the Scheme overrides all agreements and the Scheme is binding on the bank. It is therefore contended that the said clause is binding and that an Arbitrator be appointed.

7. On behalf of the respondent-bank also, the learned counsel has relied upon the written submissions in which the bank has contended that in its affidavit-in-reply

dated 18th September 2019, it had taken up the plea that the application is misconceived. There is no agreement between the applicant and the respondent-bank containing any arbitration clause. Hence, there is no arbitration agreement between the parties. The respondent-bank has to recover the fees of Rs.1,22,46,357/- and as a trustee of the Debenture Trust Deed, the respondent-bank has demanded fees from time to time and the present attempt of the applicant to invoke the alleged arbitration agreement is only to pressurize the respondent-bank to give up its claim. It is contended that the application is not maintainable and the Amended Scheme of Compromise is not binding upon the respondent bank as debenture trustee.

8. The written submissions go on to state that the respondent-bank was appointed as a trustee to the holders of the debentures and as such trustee has been providing services in terms of the Debenture Trust Deed and has demanded fees that are due to it, which the applicant has declined to pay thus far. In order to defeat the respondent-bank's claim, the applicant has sought to incorrectly contend that there is an arbitration agreement between the parties and that clause 5 of the Amended Scheme of Compromise is binding.

9. Having considered the written submissions filed by the parties and both the learned counsel having conceded that they do not intend to make any oral submissions, as recorded in the order of 6th June 2022, I had occasion to peruse the application, reply, annexures to the application including the Amended Scheme of Compromise. The Scheme binds the secured creditors and debenture-holders including unsecured creditors, equity shareholders, preference shareholders and

workers. The secured creditors and unsecured creditors are defined. The Scheme makes no reference to the Debenture Trust Deed. The trustee stands appointed under the Debenture Trust Deed and clause 5 of the Amended Scheme of Compromise contemplates certain arrangements for sale of assets and payments to be made to the secured creditors. It has nothing to do with the services that have been rendered by the respondent-bank. The respondent-bank and its services find no reference in the Amended Scheme of Compromise.

10. At best, the Scheme overrides all the agreements between parties affected. There is no arbitration agreement between the applicant and respondent incorporated in the Debenture Trust Deed and hence no question of imposing one by virtue of the Scheme. Such an imposition is not contemplated under Section 7 of the Act.

11. The company's obligation to pay the financial institutions referred to in clause 4.3 of the Amended Scheme of Compromise sets out the intention of the applicant to pay financial institutions 100% of the principal dues. There are 23 financial institutions, there are workers' dues and government dues mentioned, so also the sundry creditors. The debenture trustee is not one of the entities that are mentioned in Annexures 1 or 2 to the Scheme, all of which are financial institutions and others who may benefit under the Scheme. The debenture trustee is an independent obligation of the applicant and it is evident that the application does not satisfy the requirement of Section 7 – filing of an arbitration agreement.

12. None of the requirements of Section 7(2) to (5) are to be found in the present case and hence there is no question of appointing an arbitrator.

13. In these circumstances, the application cannot succeed. Accordingly, I pass the following order :-

- (i) Arbitration Application is dismissed.
- (ii) No costs.

(A.K. MENON, J.)