$~ J

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

Date of decision: 21st February 2023

\+ ARB. A. (COMM.) 36/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. ..... Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA ESTATE LTD. ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

\+ ARB. A. (COMM.) 37/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. ..... Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA HOTELS LTD. ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

\+ ARB. A. (COMM.) 38/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. ..... Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA LEASING LTD ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

\+ ARB. A. (COMM.) 61/2022 & CAV 263/2022, I.A.14170/2022, I.A.14171/2022, I.A.14172/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. .....Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA LEASING PVT. LTD. ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

\+ ARB. A. (COMM.) 62/2022 & CAV 262/2022, I.A.14173/2022, I.A.14174/2022, I.A.14175/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. .....Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr. Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA HOTELS LTD ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

\+ ARB. A. (COMM.) 63/2022 & CAV261/2022, I.A.14176/2022, I.A.14177/2022, I.A.14178/2022

INDIABULLS HOUSING FINANCE LTD. & ANR. .....Appellants

Through: Mr. Rajiv Nayar, Senior Advocate with Mr. Rishi Agrawala, Mr. Karan Luthra, Mr.

Ankit, Mr. Shravan Niranjan & Mr. Prabhav Bahuguna, Advocates.

versus

SHIPRA ESTATE LTD. ..... Respondent

Through: Mr. Rakesh Tiku, Senior Advocate with Mr. Rudra Pratap, Mr. Ankit Kashyap, Mr. Ashish & Mr. Subhanshu, Advocates.

CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

The present appeals have been filed by M/s. Indiabulls Housing Finance Ltd. and M/s. Edelweiss Asset Reconstruction Company Ltd. under section 37(2)(b) of the Arbitration and Conciliation Act, 1996 ('A&C Act' for short) impugning orders dated 11.06.2022 and 30.08.2022 made in three separate arbitral proceedings by the learned Sole Arbitrator. The respondents M/s. Shipra Estate Ltd., M/s. Shipra Hotels Ltd. and M/s Shipra Leasing Pvt. Ltd., are claimants before the (same) learned Arbitrator. The impugned orders have come to be passed by the learned Arbitrator on applications filed by the respondents under section 17 of the A&C Act, whereby they had sought maintenance of *status quo* in relation to the securities provided by them against loans availed from appellant No.1, who (latter) is the 'secured creditor'. For sake of convenience, the particulars of the appeals being decided by this common judgment as also the respective impugned orders are tabulated below :

S. No.	Appeal Number and Cause Title	Arbitration Petition	Order Impugned
1.	ARB. A. (COMM.) 36/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Estate Ltd.	ARB P. 516/2021	11.06.2022
2.	ARB. A. (COMM.) 37/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Hotels Ltd.	ARB P. 513/2021	11.06.2022
3.	ARB. A. (COMM.) 38/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Leasing Ltd .	ARB P. 514/2021	11.06.2022
4.	ARB. A. (COMM.) 61/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Leasing Pvt. Ltd.	ARB P. 514/2021	30.08.2022
5.	ARB. A. (COMM.) 62/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Hotels Ltd.	ARB P. 513/2021	30.08.2022
6.	ARB. A. (COMM.) 63/2022 Indiabulls Housing Finance Ltd. & Anr. vs. Shipra Estate Ltd.	ARB P. 516/2021	30.08.2022

2. By way of impugned order dated 11.06.2022, made in the first set of applications under section 17 of the A&C Act, the learned Arbitrator had set-aside Sale Notice dated 29.04.2022 issued by appellant No.1 under section 13(4) of the Securitisation and Reconstruction of Financial Assets

and Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short) read with section 8(6) of the Security Interest (Enforcement) Rules, 2002 ('SARFAESI Rules' for short) seeking to enforce their 'security interest' in "Shipra Mall" situate at Plot No. 9, Vaibhav Khand, Indirapuram Scheme, Ghaziabad, Uttar Pradesh ('Mall Asset' for short). Order dated 11.06.2022 became subject matter of an earlier round of proceedings before this court by way of Arb. Appeal (Comm.) Nos. 36/2022, 37/2022 and 38/2022, which were disposed-of *vide* order dated 08.07.2022. Those arbitration appeals have subsequently been sought to be revived by way of I.A. Nos. 14180/2022, 14179/2022, and 14181/2022. Since this court proposes to deal with all the appeals together, the applications are allowed; the appeals bearing Arb. Appeal (Comm.) Nos. 36/2022, 37/2022 and 38/2022 are taken on Board.

3. By way of impugned order dated 30.08.2022 made in subsequent applications under section 17 of the A&C Act, which also sought to restrain petitioner No.1 from creating any third-party rights in the Mall Asset, the learned Arbitrator has clarified that his order dated 11.06.2022 " ...*continues to apply*", thereby again prohibiting enforcement of the security interest in the Mall Asset.

4. A brief reference to the relevant portions of the orders made by the learned Arbitrator and by this court in the earlier proceedings would be helpful at this point :

Impugned order dated 11.06.2022 made by the learned Arbitrator

"35. ... In these circumstances, the Tribunal interdicts and sets aside the Notice of Sale of the Claimant's asset - the Shipra Mall situated at

Plot No. 9, Vaibhav Khan, Indirapuram, Ghaziabad issued by Respondent No. 1 under Section 13(4) of the SARFAESI Act, till 7th July, 2022 to await the decision/direction of the Hon'ble Division Bench in FAO (OS)(Comm) No. 78-80 and 118 of 2021. Application under Section 17 is decided accordingly. But the prayers not specifically traversed or dealt with herein are left open."

Order dated 08.07.2022 made by this court

"By way of the present arbitration appeals filed under section 37(2)(b) of the Arbitration & Conciliation Act, 1996 the appellants impugn common order dated 11.06.2022 made by the learned Sole Arbitrator setting aside a sale notice dated 29.04.2022 issued by appellant No.1 under section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI') read with Rule 8(6) of the Security Interest (Enforcement) Rules, 2002.

* * * * *

4. Mr. Nayar submits that all further steps as may be permissible under the SARFAESI Act shall be taken only pursuant to the fresh sale notice dated 24.06.2022.

5. Sale notice dated 24.06.2022 is however not subject matter of challenge in these proceedings nor was it in contention before the learned Sole Arbitrator.

6. In view of the above, nothing survives in the present appeals and the same are accordingly disposed of as infructuous.

7. It is clarified that the court has not expressed any opinion on the legal issues raised by the appellants by way of these appeals, which issues are left open."

Impugned order dated 30.08.2022 made by the learned Arbitrator

"7. Pursuant to the Delhi High Court's Order dated 17.06.2022 in Arb. Appeal (COMM) No. 36-38 of 2022, fresh Sale Notices dated 24.06.2022 (which resulted in a failed auction) and dated 21.07.2022 were issued by the Respondent No. 1. Since there has been no substantial or significant change in the factual scenario, and the applicability of Lalit Mohan Madhan has not been undermined, the interim Order of this Tribunal in Order No. 9 dated 11.06.2022 continues to apply.

* * * * *

> *12. Accordingly, this Tribunal considers it appropriate to prohibit the Respondent from confirming the sale of the Mall Asset through subsequent auction proceedings. In the interest of justice, no third-party rights should be created on the 'Mall Asset' until further orders/directions to the contrary, subject always to the decision of the Hon'ble Division Bench in FAO (OS)(Comm) No. 78-80 and 118 of 2021. The Application under Section 17 is decided accordingly, and all prayers not specifically traversed or dealt with herein are left open."*
>
> (emphasis supplied)

5. The essence of the appellants' challenge is that in restraining appellant No.1 from confirming the sale of the Mall Asset through auction proceedings, the learned Arbitrator has exceeded his jurisdiction and has stepped into the domain of the powers conferred exclusively upon agencies under the SARFAESI Act for enforcement of a 'security interest'. This, the appellants contend, is beyond the remit of the arbitral proceedings. Furthermore, the contention is that the respondents have a remedy against enforcement of a security interest under the SARFAESI Act, by way of proceedings that can be initiated before the Debts Recovery Tribunal ('DRT' for short). The appellants support this submission *inter-alia* relying upon the decision of the Supreme Court in ***Vidya Drolia & Ors. vs. Durga Trading Corporation***[1] which, it is contended, holds that matters falling within the domain of the SARFAESI Act are non-arbitrable.

6. In order to cement the foregoing contention, appellant No.1 submits that they are a 'financial institution' and a 'secured creditor' within the meaning of sections 2(m) and 2(zd) of the SARFAESI Act *vis-à-vis* the respondents,

[1] (2021) 2 SCC 1

who are the 'borrower' as defined in section 2(f) of the SARFAESI Act; and a 'security interest' is stated to have been created in favour of appellant No. 1 over the 'secured asset', namely the Mall Asset, as understood in section 2(zf) and 2(zc) of the SARFAESI Act. The definition sections relied upon are extracted below :

> ***"(m) "financial institution" means*** —
>
> *(i) a public financial institution within the meaning of Section 4A of the Companies Act, 1956 (1 of 1956);*
> *(ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);*
> *(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);*
> *(iii-a) a debenture trustee registered with the Board and appointed for secured debt securities;*
> *(iii-b) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitisation or asset reconstruction, as the case may be;*
> *(iv) any other institution or non-banking financial company as defined in clause (f) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;*
>
> * * * * *
>
> ***"(zd) "secured creditor" means*** —
>
> *(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1);*
> *(ii) debenture trustee appointed by any bank or financial institution; or*
> *(iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or*
> *(iv) debenture trustee registered with the Board and appointed for secured debt securities; or*
> *(v) any other trustee holding securities on behalf of a bank or financial institution,*

in whose favour security interest is created by any borrower for due repayment of any financial assistance.

* * * * *

***"(f) "borrower"** means any person who, or a pooled investment vehicle as defined in clause (da) of Section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) which, has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who, or a pooled investment vehicle which, becomes borrower of a asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance [or who has raised funds through issue of debt securities;*

***"(zf) "security interest"** means right, title or interest of any kind, other than those specified in Section 31, upon property created in favour of any secured creditor and includes—*

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset;

***"(zc) "secured asset"** means the property on which security interest is created;"*

7. It is further the appellants' submission that appellant No.1 is entitled, as a matter of law, to enforce its security interest over the secured asset in terms of section 13(4) of the SARFAESI Act. The relevant portion of section 13 reads as under :

*"**13. Enforcement of security interest.**—(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.*

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that—

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :—

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5A) * * * * *

(5B) * * * * *

(5C) The provisions of Section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5-A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) * * * * *

(8) * * * * *

(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

* * * * *

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

> ***(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.****"*
>
> (emphasis supplied)

8. It is further argued, that once a sale notice has been issued under section 13(4) of the SARFAESI Act, the procedure for sale of an immovable secured asset is also provided in Rule 8 of the SARFAESI Rules, which reads as under :

> ***"8. Sale of immovable secured assets.****—(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.*
>
> *(2) The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.*
>
> *(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule (2) of Rule 8.*
>
> *(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.*
>
> *(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.*

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of Rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:—

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty.

Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that * * * * *

(7) * * * * *

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled between the secured creditor and the proposed purchaser in writing."

(emphasis supplied)

9. Further, the case of the appellants is that the respondents' remedy against the enforcement of appellant No. 1's security interest in the Mall Asset lies before the DRT under section 17 of the SARFAESI Act, which reads as under :

***"17. Application against measures to recover secured debts.**—(1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:*

*Provided that * * * * **

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

> *(4)* ***If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt****.*
>
> *(4-A)* * * * * *
>
> *(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:*
>
> *Provided* * * * * *
>
> *(6)* * * * * *
>
> *(7)* * * * * * ”
>
> (emphasis supplied)

10. In support of their case, the appellants have also argued the following legal propositions, citing judicial precedents :

    10.1. That the DRT has exclusive jurisdiction to decide all matters relating to sections 13 and 17 of the SARFAESI Act[2]; and in exercise of its extraordinary writ jurisdiction, even the High Court would not entertain a challenge to a sale notice issued under section 13 (4) of the SARFAESI Act, since an efficacious remedy is available to the aggrieved borrower under that special statute. Where the statute provides for a special remedy, such remedy should be resorted to;

---

[2] ***Phoenix ARC Pvt Ltd vs. Vishwa Bharti Vidya Mandir & Ors.***, (2022) 5 SCC 345;
Bank of Baroda vs. Gopal Shriram Panda & Anr., 2021 SCC Online Bom 466;
ICICI Bank Ltd & Ors. vs. Umakanta Mohapatra & Ors., (2019) 13 SCC 497;
Lalit Mohan Madhan& Ors. vs. Reliance Capital Ltd., 2018 (167) DRJ 346;
Varimadugu Obi Reddy vs. B. Sreenivasulu & Ors., (2023) 2 SCC 168

10.2. That the jurisdiction of a 'civil court' to entertain a challenge to the actions of a secured creditor is completely barred in view of section 34 of the SARFAESI Act, since a loan taken from a financial institution carries the character of public money, and recovery thereof should not be lightly blocked by the court[3];

10.3. That since, in view of section 34 of the SARFAESI Act, the jurisdiction of civil courts to entertain any challenge to enforcement of the security interest is barred, any challenge as to the legality of such enforcement is to be filed before and considered by the DRT, which is the forum that is competent to exercise jurisdiction over such challenge. Section 34 which expressly bars the jurisdiction of a 'civil court', by necessary implication, also bars the jurisdiction of an arbitral tribunal.[4]

10.4. That proceedings seeking enforcement of a 'mortgage', being enforcement of a right *in-rem*, cannot in any case be decided by an arbitral tribunal; and since a remedy exists under the special statute, *i.e.* the SARFAESI Act, the remedy of arbitration cannot over-ride such special remedy; and the 'doctrine of election' is not available to a party[5].

10.5. That most importantly, in the seminal decision of the Supreme Court in *Vidya Drolia* (supra), it now stands unequivocally settled that

---

[3] ***Authorized Officer, State Bank of Travancore & Anr. vs. Mathew K.C.,*** (2018) 3 SCC 85; ***Jagdish Singh vs. Heeralal & Ors.***, (2014) 1 SCC 479

[4] ***Electrosteel Castings Ltd. vs. UV Asset Reconstruction Co. Ltd. & Ors.***, (2022) 2 SCC 573

[5] ***Booz Allen & Hamilton Inc vs. SBI Home Finance Ltd. and Ors***, (2011) 5 SCC 532
Bell Finvest India Ltd. vs. A U Small Finance Bank Ltd., 2022 SCC OnLine Del 3632

arbitral proceedings do not bar initiation of proceedings for enforcement of a security interest under the SARFAESI Act; and further, that even if a party agrees to refer disputes to arbitration, it may yet seek to enforce its security interest in terms of the SARFAESI Act and the 'doctrine of election' does not hamper such enforcement, since no choice is available as between the remedy under the A&C Act and the SARFAESI Act, the latter being a special remedy provided by law. Attention in this behalf is drawn to paras 54, 55 and 56 of *Vidya Drolia* (supra), which are extracted and discussed later in this judgment.

11. Controverting the submissions made on behalf of the appellants, Mr. Rakesh Tiku, learned senior counsel appearing for the respondents has made the following arguments :

11.1. The learned Arbitrator has not exceeded his jurisdiction and has not stepped into the domain of the SARFAESI Act. He has instead, in a carefully worded order, only attempted to balance the powers available to the arbitral tribunal under section 17 of the A&C Act with those available to the DRT under the SARFAESI Act. It is submitted, that the effort is only to preserve the subject-matter of arbitration and to secure the amount in dispute in the arbitral proceedings, by way of an interim measure of protection, that appeared to the learned Arbitrator to be just and convenient so that arbitral proceedings are not rendered infructuous. It is pointed-out that in order dated 30.08.2022, the learned Arbitrator has only "*prohibit*(ed) *the Respondent* (appellant No.1 herein) *from confirming the sale of the*

Mall Asset" through subsequent auction proceedings, without impeding the respondents' right to issue sale notice or call for bids.

11.2. The learned Arbitrator's order is in consonance with the well settled principle of interpretation of statutes *viz.* that whenever possible, conflicting statutes must be interpreted so as not to render either of them nugatory. To this end, the learned Arbitrator has attempted to balance appellant No.1's right under the SARFAESI Act with the respondents' right to have their interest in the arbitral proceeding protected in exercise of powers under section 17 of the A&C Act.

11.3. It is argued that a judicial precedent must be read in the context of its factual backdrop, referring to the well settled principle of application of precedents in ***Union of India & Anr. vs. Major Bahadur Singh***[6].

11.4. It is further argued, that having once chosen to have their disputes referred to arbitration, the appellants have by implication, waived their right to file a civil suit or to adopt remedies under the SARFAESI Act or under the Recovery of Debts and Bankruptcy Act, 1993 ('DRT Act' for short)

11.5. The decision of the Supreme Court in *Vidya Drolia (*supra) has been sought to be distinguished by the respondents, arguing, that the said case arose in the context only of rent control legislation, without any reference either to section 17 of the A&C Act or to any provision of the SARFAESI Act including section 13 (4) thereof. It is further

[6] (2006) 1 SCC 368

pointed-out that in the supplementary opinion of N.V. Ramana, J., (as His Lordship then was) in *Vidya Drolia* (supra) a cautionary note has been recorded to the effect that what can, or cannot, be arbitrated upon should be decided on a case-to-case basis. Reference in this regard is made to para 214 of the judgment, which reads as under :

> *"214. It is to be noted that whether a subject-matter can or cannot be arbitrated should necessarily be dealt on a case-to-case basis, rather than having a bold exposition that certain subject-matters are incapable of arbitration. This case is one such example of overbroad ratio, expounded by this Court by laying that certain subject areas cannot be arbitrated per se."*

12. In support of their submissions, the respondents have sought to rely upon the following judicial precedents :

12.1. That the bar contained in section 79 of the Real Estate Regulation and Development Act, 2016 does not apply to arbitral proceedings; and equally, the jurisdiction of a civil court is not entirely ousted by section 13(4) of the SARFAESI Act.[7] Also that the bar under section 13(4) of the SARFAESI Act applies only to a 'civil court' which an arbitral tribunal is not.

12.2. That if two remedies are available for the same relief, a party is entitled to exercise the 'doctrine of election', to elect either of the two. Furthermore, once a party elects a remedy, in this case the remedy under the A&C Act, remedies under other statutes, *viz.* under

[7] ***AshoPalav Coop. Housing Society Ltd. vs. Pankaj Bhagubhai Desai & Anr.***, Judgment dated 10.06.2022 passed by the High Court of Judicature at Bombay in Commercial Arbitration Petition (L) No. 1206 of 2019;
Mardia Chemicals Ltd. & Ors. vs. Union of India & Ors., (2004) 4 SCC 311;
Ashok Kumar Raizada vs. The Bank of Rajasthan & Anr., ILR (2014) I Delhi 356.

the SARFAESI Act in this case, would not be available for the same dispute.[8]

12.3. That once fraud is alleged, an aggrieved party cannot be denied recourse to the civil court against actions by a secured creditor.[9]

Discussion & Conclusions

13. As a prefatory observation, it is clarified that this court does not propose to enunciate on the arbitrability or non-arbitrability of matters covered by the SARFAESI Act *in their generality*. That is a larger question, the answer to which would perhaps depend on the nature of the dispute; on what the arbitrator is called upon to do; and other relevant factors. What the court is called upon to decide in the present case is, *firstly*, whether the learned Arbitrator was within his remit to interdict and set-aside a sale notice issued by appellant No. 1 under section 13(4) of the SARFAESI Act; and, *secondly*, whether the learned Arbitrator could have thereby curtailed the rights of a 'secured creditor' in relation to a 'security interest' created under that special statute, in relation to which the respondents have a specific remedy under section 17 before a specialised tribunal *viz.* the DRT.

14. While extensive arguments have been made by both sides, in the opinion of this court, the questions required to be decided do not brook much doubt, especially in view of the recent, authoritative pronouncement of the Supreme Court in *Vidya Drolia* (supra).The relevant portions of *Vidya Drolia* as extracted below are self-explanatory:

---

[8] ***Ireo Grave Realtech Pvt. Ltd. vs. Abhishek Khanna & Ors.,*** (2021) 3 SCC 241;
Priyanka Taksh Sood & Ors. vs. Sunworld Residency Pvt. Ltd. & Anr., 2022/DHC/001768

[9] ***Tajunissa & Anr. vs. Vishal Sharma & Ors.***, 2022 SCC OnLine Del 18

"54. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. ***There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum****. In Transcore v. Union of India [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116], this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the DRT Act") is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms : (Transcore case [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , SCC p. 162, para 64)*

> *"64. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, 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. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."*

"55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between

the provisions of the mandatory law and arbitration as an alternative. Conversely, and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the "text of the statute, the legislative history, and "inherent conflict" between arbitration and the statute's underlying purpose" [Jennifer L. Peresie, "Reducing the Presumption of Arbitrability" 22 Yale Law & Policy Review, Vol. 22, Issue 2 (Spring 2004), pp. 453-462.] with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. ***When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed****. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed.* ***When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable****.*

"56. In M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805], and following this judgment in Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd. [Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783 : (2018) 4 SCC (Civ) 703], ***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****."*

(emphasis supplied)

15. On a plain reading of the foregoing dicta in *Vidya Drolia* (supra), the answer to the above issues is the following :

15.1. Since a specific right is vested in a 'secured creditor' to enforce a 'security interest' , by issuance of a sale notice under section 13(4) of the SARFAESI Act, that specific right cannot be ousted by an order made by an arbitral tribunal;

15.2. It is also clear that that the special statute not only provides a special right, but also a corresponding special and specific remedy to the contesting party, against a sale notice issued under section 13(4) to oppose enforcement of the security interest under section 17 of the SARFAESI Act. This specific remedy is however available before a public forum *viz.* the DRT, with a detailed set of rules and procedures stipulated for invocation of that remedy;

15.3. The doctrine of election is simply not available for a party to choose between the DRT or the arbitral tribunal as the forum for invoking its remedy against action under section 13(4) of the SARFAESI Act. In the words of *Vidya Drolia* (supra): "*There is no choice*". The person invoking the remedy must seek it before the forum prescribed in the statute and before no other forum. This is a situation of implicit non-arbitrability, since section 17(1) specifically provides a remedy against an action under section 13(4) of the SARFAESI Act;

15.4. The remedy of arbitration as an alternative to a proceeding before the DRT is not available also for the reason that there is no inconsistency or repugnancy as between the provisions of the mandatory law *i.e.* the SARFAESI Act and the DRT Act on the one hand, and the A&C Act on the other;

15.5. To use the words of *Vidya Drolia* (supra) again,

> "*56. … 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.*"

16. A brief consideration as to the scope of the power of this court under section 37(2)(b) of the A&C Act would not be out of place at this point. The law is long settled, that the use of power under section 37(2)(b) of the A&C Act to interfere in 'discretion' exercised by an arbitral tribunal under section 17 of the A&C Act, has to be guarded and sparing. Interference is warranted only in exceptional circumstances, in cases where the discretionary power of the arbitral tribunal has been used in a manner that is palpably arbitrary, capricious, irrational or perverse.[10] It is not permissible for a court to substitute the views it might have taken had it decided on the interim measures of protection in place of the view taken by the arbitral tribunal. It is not for the court to replace its own discretion in place of that of the arbitral tribunal, unless impelled to do so on the grounds enumerated above.

17. However, the scenario in the present case is different. Since the matter of a notice issued under section 13(4) of the SARFAESI Act is not arbitrable at all, the learned Arbitrator did not have the option to exercise any discretion in relation to that matter. It is trite to say that discretion may be exercised by an arbitral tribunal *only when such discretion vests in it*, in the first place. An illuminating reference in this regard is found in the judgment of our

[10] ***Manish Aggarwal vs. RCI Industries and Technologies Ltd.***, 2022 SCC OnLine Del 1285 at para 12

Supreme Court in ***Anurag Kumar Singh vs. State of Uttarakhand***[11], referring to the book 'Judicial Discretion' by Justice Aharaon Barak, formerly President of the Supreme Court of Israel. It reads thus:

> *"16. Judicial discretion can be exercised by a court only when there are two or more possible lawful solutions. In any event, courts cannot give any direction contrary to the statute or rules made thereunder in exercise of judicial discretion. It will be useful to reproduce from Judicial Discretion (1989) by Aharon Barak which is as follows:*
>
> > *"Discretion assumes the freedom to choose among several lawful alternatives. Therefore, discretion does not exist when there is but one lawful option. In this situation, the Judge is required to select that option and has no freedom of choice. No discretion is involved in the choice between a lawful act and an unlawful act. The Judge must choose the lawful act, and he is precluded from choosing the unlawful act. Discretion, on the other hand, assumes the lack of an obligation to choose one particular possibility among several."*
>
> (emphasis supplied)

18. Since, as held above, the exercise of a secured creditor's right to enforce a security interest under the SARFAESI Act is not arbitrable at all, there was no discretion vested in the learned Arbitrator, that he could have exercised. The grant of an interim measure under section 17 of the A&C Act, which is wholly outside the scope of arbitration, cannot be permitted. This court is accordingly, within its powers under section 37(2)(b) of the A&C Act to interfere in the impugned orders.

19. In the above view of the matter, in the opinion of this court, the learned Arbitrator clearly exceeded his remit in interdicting and setting-aside sale

[11] (2016) 9 SCC 426

notices dated 29.04.2021 and 24.06.2022 *vide* orders dated 11.06.2022 and 30.08.2022 respectively.

20. The impugned orders dated 11.06.2022 and 30.08.2022 are accordingly set-aside.

21. The appeals are allowed and disposed-of.

22. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

FEBRUARY 21, 2023

ds/ak/*uj*/Ne