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

Reserved on: 8th May, 2023

Date of decision: 11th July, 2023

\+ **W.P.(C) 8573/2021**

IDFC FIRST BANK LIMITED ..... Petitioner

Through: Mr. Parag P. Tripathi, Senior Advocate with Mr. Dhruv Malik, Ms. Sharmistha Ghosh, Ms. Palak Nenwani, Ms. Aditi Sinha, Ms. Mishika Bajpai, Advocates (M: 8826623092)

versus

HITACHI MGRM NET LIMITED ..... Respondents

Through: Mr. Ashish Bhagat, Mr. Ritik Malik, Mr. Akhil Suri, Mr. Udit Thakran, and Mr. Jitu Khare, Advocates (M: 9910639360)

CORAM:
JUSTICE PRATHIBA M. SINGH

JUDGMENT

Prathiba M. Singh, J.

1. This pronouncement has been done through hybrid mode.

Background

2. The present petition has been filed by the Petitioner-IDFC First Bank Limited (*hereinafter 'IDFC Bank'*) challenging the impugned order dated 31st May 2021 whereby, a three member Arbitral Tribunal dismissed the application filed by the Petitioner under Section 16 of the Arbitration and Conciliation Act, 1996 (*hereinafter 'Arbitration Act'*).

3. A brief background of this petition is, that two agreements were entered into on 15th May 2017 between IDFC Bank and the Respondent-Hitachi MGRM Net Limited (*hereinafter 'Hitachi'*). The said agreements

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were titled Strategic Partnership Agreement ('SPA') and Business Development Agreement ('BDA'). The Agreements had an arbitration clause. The same reads:

> *"9.7 Governing Law and Jurisdiction*
>
> *i. This Agreement shall in all respects be subject to and governed by and construed in accordance with laws of India and in the event of any dispute arising on any basis from or under any part of this Agreement, the Parties shall submit to arbitration.*
>
> *ii. If any dispute, difference, claim or controversy (the "Dispute") arises between the Parties about the validity, interpretation, implementation or alleged breach of any provision of this Agreement, then the Parties shall negotiate in good faith to endeavour to resolve the matter. However, if the Dispute has not been resolved by the Parties within thirty (30) days after the date of receipt of written notice of the Dispute by either Party from the Party raising the Dispute, then Dispute shall be referred to a sole arbitrator mutually acceptable to both the Parties. The arbitration shall be governed by the Arbitration and Conciliation Act, 1996 as updated. If the Parties are unable to mutually agree upon and appoint a sole arbitrator then the arbitration shall be referred to a panel of three arbitrators appointed in the following manner; one arbitrator shall be appointed by each Party and the third arbitrator shall be appointed by the aforesaid two arbitrators. The venue of arbitration shall be at New Delhi. The award of arbitrator shall be final and binding on the Parties.*
>
> *iii. The provisions of this Section shall survive termination of this Agreement.*
>
> *iv. it is agreed between the Parties hereto that Courts in New Delhi shall have non-exclusive jurisdiction to*

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entertain and try suits and other legal proceedings, if any, between the Parties hereto."'"

4. Disputes arose between the parties and accordingly the agreements stood terminated. However, according to the Petitioner, the Respondent was to refund an amount of Rs. 15 crore which had been paid as an advance. As the Respondent failed to refund the same, the Petitioner invoked arbitration on 28th June 2019.

5. While the arbitration proceedings were ongoing, on 14th December 2020, the Supreme Court's decision in ***'Vidya Drolia and Others vs. Durga Trading Corporation' [(2021) 1 Supreme Court Cases (Civ) 549:2020]*** was rendered. As per this decision, it is the Petitioner's case that disputes which are governed by the Recovery of Debts and Bankruptcy Act, 1993 (*hereinafter 'RDB Act, 1993'*) would not be arbitrable.

6. In view of the said decision in ***Vidya Drolia (supra)***, on 23rd February 2021, the Petitioner- IDFC Bank moved an application under Section 16 of the Arbitration Act challenging the jurisdiction of the Arbitral Tribunal and seeking termination of the mandate of the Tribunal. On 31st May 2021, the Arbitral Tribunal, after pleadings and hearing, passed the impugned order dismissing the application filed under Section 16 of the Arbitration Act.

Submissions on behalf of the Petitioner

7. Mr. Parag P. Tripathi, ld. Sr. Counsel for the Petitioner, made the following submissions:

(A) That the impugned order passed by the Arbitral Tribunal is liable to be challenged under Article 226/227 of the Constitution of India as there is inherent lack of jurisdiction on the part of the Arbitral Tribunal in the light of ***Vidya Drolia (supra).*** At the time when the

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arbitration clause was invoked, it was done so on the basis of the Full Bench decision in ***HDFC Bank Limited vs. Satpal Singh Bakshi [2012 SCC Online Del 4815 :2013 134 DRJ 566]*** which was the law prevalent at that point of time. However, since the said judgement of the Delhi High Court was overruled subsequently by the Supreme Court in ***Vidya Drolia (supra)***, the arbitral tribunal could no longer have jurisdiction in the matter. Reliance is placed on -

- *Deep Industries Ltd. vs. ONGC (2020) 15 SCC 706* ,
- *Bhaven Construction vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. 2021 SCC Online SC 8* ,
- *Punjab State Power Corporation Limited vs. EMTA Coal Ltd. 2020 SCC Online SC 1165*,
- *Surender Kumar Singhal and Ors vs. Arun Kumar Bhalotia & Ors 2021 SCC Online Del 3708* ,
- *Virtual Perception OPC Pvt. Ltd vs. Panasonic India Pvt. Ltd. 2022 SCC Online Del 566* and
- *Ambience Projects & Infrastructure Pvt. Ltd. vs. Neeraj Bindal, 2021 SCC Online Del 4023*

(B) That even though IDFC Bank had itself invoked arbitration in the first place, in view of the change in the legal position which emerged after ***Vidya Drolia (supra)***, IDFC Bank ought to be permitted to approach the correct forum in accordance with Section 17 and Section 18 of the RDB Act, 1993.

(C) That the definition of `debt' under Section 2(g) of the RDB Act, 1993 is wide enough to cover the scope of services which were contemplated under the agreements. Thus the Debt Recovery Tribunal would have jurisdiction. In this regard, Mr. Tripathi, refers to the various clauses of the agreements as well as to Schedule 1, which sets

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out the various services to be provided by IDFC Bank and some reciprocal obligations of IDFC Bank. Reliance is placed upon ***United Bank of India vs. Debts Recovery Tribunal (1999) 4 SCC 69*** and ***Arjun Panditrao Khotkar vs. Kailash KushanRao Go rantyal (2020 7 SCC 1)*** in support of this submission.

(D) That considering that Petitioner-IDFC is a bank, all the services which were to be provided by Hitachi to IDFC Bank in accordance with the agreements are within the scope of 'banking business', which is the only business that the Petitioner can be engaged in under Section 6 of the Banking Regulation Act, 1949 (*hereinafter 'BR Act,1949'*). It is further submitted that since banking activity has not been defined, reference may be placed on Section 6(n) of the BR Act, 1949 which provides the forms of business in which the banking companies may engage.

(E) That both the agreements do not in any manner take away from the fact that the fundamental core business that was sought to be promoted by Hitachi on behalf of IDFC Bank was 'banking business' and would thus, be covered within the meaning of the phrase *"during the course of any business activity undertaken by the bank"* under Section 2(g) of the RDB Act,1993. Reliance is placed upon ***Eureka Forbes Ltd. vs. Allahabad bank (2010) 6 SCC 193*** in support of this submission.

(F) That since the entire scope of the agreements was not *de hors* banking activity, which was the sole and exclusive activity which the Petitioner can be engaged in and in view of the bar under Section 18 of the RDB Act,1993, the Arbitral Tribunal lacks jurisdiction in the

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present case. Ld. Sr. Counsel, places reliance on paragraphs 57,58 and 78 of ***Vidya Drolia (supra)*** which categorically holds that the matters covered under the RDB Act,1993 are not arbitrable.

(G) That Section 19(8) of the RDB Act,1993 deals with the rights of the Defendant viz. the right of pleading a set off and filing a counter claim against the claim. Hence, the rights of the Respondent would be protected and are in no way prejudiced. Reference is made to '***Magnostar Telecommunications vs. Kotak Mahindra Bank Ltd. 2010 SCC Online Del 1006'.***

(H) That the proposition that general laws do not prevail over special laws, and that in case of conflict between the two, the general statute must yield to a special one, has been reiterated in ***'Gujarat State Civil Supplies Corporation Limited vs. Mahakali Foods Pvt. Ltd. '2022 SCC Online SC 1492*** wherein it was held that the MSMED Act, 2006 is a special enactment having an effect overriding the Arbitration Act which is perceived to be a general enactment.

Submissions by the Respondent

8. Mr. Bhagat, ld. counsel, appearing for the Respondent, makes the following submissions-

(A) That a perusal of Section 6 of the Banking Regulation Act, 1949 would show that the activities provided under the SPA would not be covered as 'banking activities'. Clauses 2.2 and 2.3 of the SPA are relied upon which show that data and user base had to be given to IDFC Bank.

(B) That the disputes at hand, given the nature of the services which are provided under the agreements, also do not constitute a 'debt' under

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the provisions of the RDB Act,1993. Thus, they are not covered by the judgement in ***Vidya Drolia (supra).*** It is reiterated that there is no other relationship between the parties except a contractual relationship in terms of the present agreements which were entered into for carrying out reciprocal obligations and under no circumstances did it constitute a lender-borrower relationship.

It is argued that the advance of Rs.15 crores was also paid by the Petitioner after clearly understanding the vastness of the agreements as also the dividends that could accrue to both the parties. It was also alleged that the agreements fell through due to various breaches/ shortcomings by the Petitioner due to which business losses/expenses were incurred by the Respondent. Further, the Petitioner did not follow the correct process as agreed between the parties under the contract.

(C) That the Arbitral Tribunal has on 15th March 2023 directed the filing of an affidavit in evidence within four weeks by both the parties. Thus, the proceedings are at an advanced stage and a piecemeal challenge in this manner to an order under Section 16 of the Arbitration Act ought not to be permitted by this court.

(D) That insofar as the maintainability of the present writ petition is concerned, the Petitioner's only remedy under the Arbitration Act is to wait for the final award and raise a challenge under Section 34 of the said Act. Even issues relating to the jurisdiction ought not to be entertained at the stage of Section 16 application under the Arbitration Act, 1996. Specific reliance is placed upon the ld. Division Bench's judgement of the Bombay High Court in ***' Tagus Engineering Private***

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limited vs. Reserve Bank of India & Ors. in W.P(C) 3957 of 2021 dated 21st February 2022 [MANU/MHOR/28215/2022] wherein under similar circumstances, in a writ petition arising out of an order under Section 16 of the Arbitration Act the court held that the matter ought to be relegated to the Arbitral Tribunal under Section 34 of the Arbitration Act. Reliance is also placed on ***Bhaven Construction vs. Executive Engineer Sardar Sarovar Nigam[(2021) SCC OnLine SC 8) and Deep industries Ltd. vs ONGC [(2020) 15 SCC 706]*** wherein it is held that under writ jurisdiction the courts should refrain from interfering with the orders of the Arbitral tribunal, if an alternate remedy exits, which in this case it does. Reliance is placed upon ***Surendra Kumar Singhal & Ors. vs. Arun Kumar Bhalotia & Ors., Tagus Engineering Private Limited & Ors. vs. Reserve Bank of India & Anr. and IDFC First Bank Limited vs. Bell Invest India Limited & Anr.*** in support of this submission.

(E) That the Petitioner filed its claims before the Arbitral tribunal to the tune of approx. Rs. 300 crores. The Respondent has also raised a counter claim of more than Rs. 350 crores and if this matter is now relegated to the DRT, the Respondent would be left with no efficacious remedy or there would be multiplicity of proceedings and conflicting rulings.

(F) That though an Arbitral tribunal cannot entertain claims for 'debts' due by banks and financial institutions, there is no such bar on an Arbitral Tribunal from entertaining claims against banks and financial institutions which have been made by way of counter claims by Hitachi against IDFC Bank in the present matter. Reliance is placed

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on ***Rajasthan Limited vs. VCK Shares & Stock Broking Services*** in support of this submission.

It is further submitted that even if the application under Section 16 had been allowed and Hitachi were to file its counter claims before the Debt recovery tribunal, the claims of Hitachi would be hit by the statute of limitation. Moreover the choice of forum would be that of Hitachi which can continue to pursue its claims before the Arbitral Tribunal.

(G) That in terms of Section 16(2) of the Arbitration Act, a plea that the Arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defence. It is stated that in the present matter the statement of defence was filed by the respondent along with the counter claim on 10th December 2020. However, the Petitioner filed the said Application only on 24th February 2021, thereby making the instant application bad in law.

Rejoinder Submissions by the Petitioner

9. Mr. Tripathi, ld. senior counsel, appearing for the Bank, in rejoinder, again reiterates the dictum of the Supreme court in ***Vidya Drolia & Ors. vs. Durga trading Corporation [(2021) 1 Supreme Court Cases (Civ) 549:2020]*** which categorically holds that the matters which are covered by the RDB Act,1993 would not be arbitrable. Since the issue itself has been decided in ***Vidya Drolia (supra)*** the ld. Division Bench order of the Bombay High Court would be of no relevance.

10. Further the question as to whether the liability under the present dispute is a debt cannot be decided by the Arbitral Tribunal because on the face of the provisions i.e., Section 6 and Section 2(g) of the RDB Act,1993

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are covered by banking activities. He further concedes that though there may not be typical activities such as the giving of loans by the banks, the activities fall within the definition which is wide enough to take within its purview all business activities undertaken by the bank or which are incidental or conducive to the advancement of the business.

11. Emphasis is again laid on the provisions of the RDB Act,1993 to submit that the said agreements were entered into for expanding the user base which itself is a core activity of the bank.

12. Lastly, Mr. Tripathi submits that the Respondent is not left without remedy inasmuch as section 19(7) to section 19(9) of the RBD Act , the Respondent-Hitachi is free to set up a counter claim if and when the matter is before the Arbitral Tribunal.

Analysis and Findings

13. In the present case, the application filed by the Petitioner-IDFC Bank under Section 16 of the Arbitration and Conciliation Act, 1996 has been dismissed by the Arbitral Tribunal. Since the same is not appealable under Section 37 of the Arbitration and Conciliation Act,1996 the present writ petition has been filed.

14. Section 16 of the Arbitration and Conciliation Act, 1996 permits any party to raise an objection relating to the jurisdiction of the Arbitral Tribunal including any objection in relation to the existence or the validity of the Arbitration Agreement. Such a plea was raised in the present case before the three-member Arbitral Tribunal by filing a Section 16 application. It is well settled that the said plea ought to be raised at the earliest stage in the proceedings. However, in the present case, the delay in raising the plea is sought to be justified on the basis of the change in legal position as a result

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of the decision in ***Vidya Drolia (supra)***.

15. The basic premise on which the lack of jurisdiction was alleged was that the Petitioner is a bank. It had a claim of recovery of money from the Respondent. The said recoverable amount constitutes a `debt' as defined under Section 2(g) of the RDB Act,1993. The Debt Recovery Tribunal constituted under the RDB Act,1993 has the exclusive jurisdiction to deal with this dispute. As per the Petitioner, the amount recoverable arising out of the present dispute being 'debt' in terms of the RDB Act,1993 is thus not arbitrable as held in the decision of the Supreme Court in ***Vidya Drolia & Ors. v. Durga Trading Corporation*** as also in terms of Section 18 of the RDB Act,1993.

16. It is the case of the Petitioner that under the Banking Regulation Act, 1949, the Petitioner is a licensed entity and considering the nature of the agreement between the parties, the same would constitute banking business under Section 6 of the Banking Regulation Act,1949.

17. So long as the Petitioner is functioning within the provisions of the Banking Regulations Act,1949 it can invoke the jurisdiction of the Debt recovery Tribunal against the Respondent. The contention of the Respondent that its claim against the Bank cannot be entertained, is refuted on the ground that in the Debt Recovery Tribunal, the Respondent can file a counter claim.

18. In the background of the above facts, the issues that arise for determination are twofold:

i) Whether the present writ petition is maintainable and is liable to be entertained;

ii) Whether the arbitral proceedings ought to continue in view of the

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objection as to the non-arbitrability raised.

19. The Petitioner has raised various grounds to argue that the disputes are non-arbitrable. The said objections have been rejected by the Arbitral Tribunal vide a detailed order.

20. Section 37 of the Arbitration and Conciliation Act, 1996 permits an appellate remedy in case the Arbitral Tribunal accepts the plea of jurisdiction. Section 37 reads as under:

> *"**37. Appealable orders**.—(1) An appeal shall lie from the following orders (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order, namely:—*
> *(a) refusing to refer the parties to arbitration under section 8;*
> *(b) granting or refusing to grant any measure under section 9;*
> *(c) setting aside or refusing to set aside an arbitral award under section 34.*
> *(2) Appeal shall also lie to a court from an order of the arbitral tribunal—*
> *(a) accepting the plea referred to in sub-section (2) or sub-section (3) of section 16; or*
> *(b) granting or refusing to grant an interim measure under section 17.*
> *(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."*

21. The above provision makes it clear that an order passed under Section 16 is appealable if the plea raised is held to be maintainable and the arbitral proceedings are terminated. However, if the plea is rejected and the arbitral proceedings continue, no appeal is provided. Clearly, therefore, the intention is not to permit an appellate remedy in case the Arbitral Tribunal holds that

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it has jurisdiction to proceed with the reference. Further, an order under Section 16 which is not appealable under Section 37 would, in the scheme of the Arbitration and Conciliation Act,1996 be liable to be challenged only once the final award is passed by invoking the terms of Section 34 of the Act.

22. When applications under Section 16 are dismissed by the Arbitral Tribunals, the remedy of writ jurisdiction is invoked in some cases. The Supreme Court dealt with an identical situation in '***Deep Industries Ltd. v ONGC Ltd. (2020) 15 SCC 706***.' In the said decision, the Supreme Court held as under:

> *"i) There was no doubt whatsoever that if petitions were to be filed under Articles 226/227 of the Constitution against orders passed in appeals under Section 37 of Act, the entire arbitral process would be derailed and would not come to fruition for many years. Article 227 is a constitutional provision which remains untouched by the non-obstante Clause of Section 5 of the Act. In these circumstances, what was important to note was that though petitions could be filed under Article 227 against judgments allowing or dismissing first appeals under Section 37 of the Act, yet the High Court would be extremely circumspect in interfering with the same, taking into account the statutory policy so that interference was restricted to orders that were passed which are patently lacking in inherent jurisdiction.*
> *(ii) A Section 16 application had been dismissed by the Arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act was that where a Section 16 application was dismissed, no appeal was provided and the challenge to the*

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> *Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34. What the High Court had done in the present case was to invert this statutory scheme by going into exactly the same matter as was gone into by the arbitrator in the Section 16 application, and then decided that the two year ban was no part of the notice for arbitration, a finding which was directly contrary to the finding of the Arbitrator dismissing the Section 16 application. For this reason alone, the judgment under appeal needs to be set aside…."*

23. This judgment has again been reiterated by the Supreme Court in '***Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. and Ors. (2022) 1 SCC 75'***, where again the Supreme Court has held as under:

> *" 25. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the court examines the same Under Section 34. Respondent No. 1 is therefore not left remediless, and has statutorily been provided a chance of appeal**. In Deep Industries case (supra), this court observed as follows:***
>
> *"**22.** One other feature of this case is of some importance. As stated herein above, on 09.05.2018, a Section 16 application had been dismissed by the learned Arbitrator in which substantially the same contention which found favour with the High Court was taken up**. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised Under Section 34."***

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(emphasis supplied)

26. In view of the above reasoning, we are of the considered opinion that the High Court erred in utilizing its discretionary power available Under Articles 226 and 227 of the Constitution herein. Thus, the appeal is allowed and the impugned Order of the High Court is set aside. There shall be no order as to costs. Before we part, we make it clear that Respondent No. 1 herein is at liberty to raise any legally permissible objections regarding the jurisdictional question in the pending Section 34 proceedings."

24. While there is no doubt that a remedy under Articles 226 and 227 are available against the orders passed by the Arbitral Tribunal, such challenges are not to be entertained in each and every case and the court has to be 'extremely circumspect'.

25. Recently, in ***Surendra Kumar Singhal & Ors. v. Arun Kumar Bhalotia & Ors. 279 (2021) DLT 636***, this Court, after considering all the decisions, of the Supreme Court[1] has laid down circumstances in which such petitions ought to be entertained. The relevant portion of the said judgment reads as under:

"24. A perusal of the above-mentioned decisions, shows that the following principles are well settled, in respect of the scope of interference under Article 226/227 in challenges to orders by an arbitral tribunal including orders passed under Section 16 of the Act.

(i) An arbitral tribunal is a tribunal against which a petition under Article 226/227 would be

[1] *Deep Industries Ltd. vs. ONGC (2020) 15 SCC 706 ; Bhaven Construction vs. Executive Engineer Sardar Sarovar Narmada Nigam Ltd. 2021 SCC Online SC 8 ; Punjab State Power Corporation Limited vs. EMTA Coal Ltd. 2020 SCC Online SC 1165; Virtual Perception OPC Pvt. Ltd vs. Panasonic India Pvt. Ltd. 2022 SCC Online Del 566* and *Ambience Projects & Infrastructure Pvt. Ltd. vs. Neeraj Bindal, 2021 SCC Online Del 4023*

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maintainable;
(ii) The non-obstante clause in section 5 of the Act does not apply in respect of exercise of powers under Article 227 which is a Constitutional provision;
(iii) For interference under Article 226/227, there have to be `exceptional circumstances';
(iv) Though interference is permissible, unless and until the order is so perverse that it is patently lacking in inherent jurisdiction, the writ court would not interfere;
(v) Interference is permissible only if the order is completely perverse i.e., that the perversity must stare in the face;
(vi) High Courts ought to discourage litigation which necessarily interfere with the arbitral process;
(vii) Excessive judicial interference in the arbitral process is not encouraged;
(viii) It is prudent not to exercise jurisdiction under Article 226/227;
(ix) The power should be exercised in `exceptional rarity' or if there is `bad faith' which is shown; (x) Efficiency of the arbitral process ought not to be allowed to diminish and hence interdicting the arbitral process should be completely avoided."

26. A perusal of the above would show that it is only under exceptional circumstances or when there is bad faith or perversity that writ petitions ought to be entertained.

27. The pivot of the Petitioner's argument to challenge maintainability of arbitral proceedings is on the decision of ***Vidya Drolia (supra)*** wherein the Supreme Court has held as under:

"58. Consistent with the above, observations in Transcore on the power of the DRT conferred by

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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 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.

xxx xxx xxx

78. In view of the aforesaid discussions, we overrule the ratio in N. Radhakrishnan inter alia observing that allegations of fraud can be made a subject matter of arbitration when they relate to a civil dispute. This is subject to the caveat that fraud, which would vitiate and invalidate the arbitration clause, is an aspect relating to non-arbitrability. We have also set aside the Full

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Bench decision of the Delhi High Court in the case of HDFC Bank Ltd. which holds that the disputes which are to be adjudicated by the DRT under the DRT Act are arbitrable. They are non-arbitrable."

28. On the strength of the submission that the amount recoverable by the Petitioner from the Respondent is a debt, it is urged that the Petitioner would be entitled to approach the Debt Recovery Tribunal. ***Vidya Drolia(supra)*** is categorical in holding that the disputes would not be arbitrable as the DRT has jurisdiction.

29. While there can be no doubt that in a case where the Court finds clearly that the dispute is liable to be adjudicated by the Debt Recovery Tribunal ('DRT'), the same would be non-arbitrable, it cannot be said that such clarity exists in the present case.

30. In the present petition, the following issues would have to be considered in order to decide as to whether the Tribunal has jurisdiction or not:

i) The nature of the agreements and the reciprocal obligations;

ii) The nature of the transactions and the services to be provided by both parties;

iii) Whether the amounts sought to be recovered by the Petitioner would constitute 'debt';

iv) Whether the nature of services would also come within the definition of 'banking activities'.

31. The present case is not one which involves traditional banking transactions such as loans, credit facilities, mortgage, etc. It is a case where under the two agreements i.e., SPA and BDA, services have to be rendered

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by both the parties to each other. Based on the mutual representations and assurances made by both the parties to each other, the parties had vide the SPA agreed to enter into a partnership arrangement with the objective to collaborate with each other in a proactive manner to promote each others business linkages, products and services business in India. The roles and responsibilities of both the parties included promoting business linkages and products and providing user base to the Bank, providing and promoting educational products and services including service platforms, customer services, training staff, ensuring highly secured and safe banking and financial services etc. There are reciprocal obligations. The Petitioner has filed its claims and the Respondent has already filed counter claims. Trial has already commenced in the arbitral proceedings.

32. The determination of the nature of the transactions, their purport and intent, breaches, if any, legality /validity of the termination and finally, amounts payable, if any, would require a factual analysis, and also appreciation of evidence. At the stage of an application under Section 16, the Arbitral Tribunal has taken a view in the matter.

33. Without delving deeper into the submissions which were canvassed before the Court and after examining the nature of the agreements, it cannot be said at this stage that the proceedings before the Tribunal would be barred. This would, however, be subject to the final decision of the Arbitral Tribunal after evidence is led by the parties. At that stage, the Arbitral Tribunal is free to rule on the issues that have been raised before it. If the Petitioner is aggrieved by the same, it is free to avail of its remedies in accordance with law.

34. In the opinion of this Court, the present case does not fall in a

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category wherein the Court can hold unflinchingly and categorically that the Arbitral Tribunal lacks jurisdiction. The Court is thus inclined to follow the decision of the Bombay High Court in ***Tagus Engineering Private Limited & Ors. v. Reserve Bank of India and Ors.*** where, under similar circumstances, the High Court held as under:

> *"4. We believe it is wholly impermissible for this Court to exercise its jurisdiction under Article 226 of the Constitution of India even on questions of jurisdictional competence except perhaps where the arbitral tribunal is itself a statutory tribunal i.e. one created by a statute. The decision of the Supreme Court in Deep Industries Ltd v Oil And Natural Gas Corporation Ltd & Another1 is unambiguous. In paragraph 19, the Supreme Court referred to SBP & Co v Patel Engineering Ltd2 and reaffirmed paragraph 14 of that decision. Paragraph 19 of Deep Industries reads thus:*
> *In SBP & Co., this Court while considering interference with an order passed by an Arbitral Tribunal 1 (2020) 15 SCC 706.*
> *2 (2005) 8 SCC 618.Page 2 of 16 21st February 2022 28-OSWP-3957-2021.DOC under Articles 226/227 of the Constitution laid down as follows: (SCC p.663, paras 45-46) 45. It is seen that some High courts have proceeded on the basis that any order passed by an Arbitral Tribunal during arbitration, would be capable of being challenged under Article 226 or 227 of the Constitution. We see no warrant for such an approach. Section 37 makes certain orders of the Arbitral Tribunal appealable. Under Section 34, the aggrieved party has an avenue for ventilating its grievances against the award including any in- between orders that might have been passed by the Arbitral Tribunal acting under Section 16 of the Act. The party aggrieved by any order of the Arbitral*

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Tribunal, unless has a right of appeal under Section 37 of the Act, has to wait until the award is passed by the Tribunal. This appears to be the scheme of the Act. The Arbitral Tribunal is, after all, a creature of a contract between the parties, the arbitration agreement, even though, if the occasion arises, the Chief Justice may constitute it based on the contract between the parties. But that would not alter the status of the Arbitral Tribunal. If will still be a forum chosen by the parties by agreement. We, therefore, disapprove of the stand adopted by some of the High Courts that any order passed by the Arbitral Tribunal as capable of being corrected by the High Court under Article 226 or 227 of the Constitution. Such an intervention by the High Courts is not permissible. Page 3 of 16 21st February 2022 28-OSWP-3957-2021.DOC 46. The object of dismissing judicial intervention while the matter is in the process of being arbitrated upon, will certainly be defeated if the High Court could be approached under Article 227 or under Article 226 of the Constitution against every order made by the Arbitral Tribunal. Therefore, it is necessary to indicate that once the arbitration has commenced in the Arbitral Tribunal, parties have to wait until the award is pronounced unless, of course, a right of appeal is available to them under Section 37 of the Act even at an earlier stage.

5. This view was even more emphatically reasserted by the Supreme Court in Bhaven Construction Through Authorised Signatory Premjibhai K Shah v Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Ors.3 Some of the observations in this context are important and we quote paragraphs 18 to 23, 26 and 27 of Bhaven Construction.

In any case, the hierarchy in our legal framework,

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mandates that a legislative enactment cannot curtail a constitutional right. In Nivedita Sharma v COAI [(2011) 14 SCC 337 : (2012) 4 SCC (Ci) 947], this Court referred to several judgments and held: (SCC p. 343, para 11). We have considered the respective arguments/submissions. There cannot be any dispute that the power of the High Courts to issue directions, orders or writs including writs in the nature of habeas corpus, certiorari, mandamus, quo warranto and prohibition under Article 226 of the 3 (2021) SCC OnLine SC 8. Page 4 of 16 21st February 2022 28-05w-3957-2021.DOC Constitution is a basic feature of the Constitution and cannot be curtailed by parliamentary legislation. Chandra Kumar v. Union of India [(1997) 3 SCC 261:
1997 SCC (L&S) 577]. However, it is one thing to say that in exercise of the power vested in it under Article 226 of the Constitution, the High Court can entertain a writ petition against any order passed by or action taken by the State and/or its agency/instrumentality or any public authority or order passed by a quasi-judicial body/authority and it is an altogether different thing to say that each and every petition filed under Article 226 of the Constitution must be entertained by the High Court as a matter of course ignoring the fact that the aggrieved person has an effective alternative remedy. Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation .
(emphasis supplied) It is therefore, prudent for a Judge to not exercise discretion to allow judicial interference beyond the procedure established under the enactment. This power needs to be exercised in exceptional rarity, wherein one party is left remediless under the statute or a clear bad

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> *faith shown by one of the parties. This high standard set by this Court is in terms of the legislative intention to make the arbitration fair and efficient.*
> *26. It must be noted that Section 16 of the Arbitration Act, necessarily mandates that the issue of jurisdiction must be dealt first by the tribunal, before the court examine the same under Section 34. Respondent 1 is therefore not left remediless and has statutorily been provided a chance of appeal. In Deep Industries case [Deep Industries Ltd. V. ONGC, (2020) 15 SCC 706] , this Court observed as follows : (SCC p. 718, para 22). One other feature of this case is of some importance. As state hereinabove, on 9-5-2018, a Section 16 application had been dismissed by the learner arbitrator in which substantially the same contention which found favour with the High Court was taken up. The drill of Section 16 of the Act is that where a Section 16 application is dismissed, no appeal is provided and the challenge to the Section 16 application being dismissed must await the passing of a final award at which stage it may be raised under Section 34."*

35. Relegating the parties to the DRT at this stage would put the clock back completely leading to delays in adjudication. The remedy of arbitration was the chosen remedy by the parties and in the arbitral proceedings trial has already commenced. Thus, the present case does not constitute `exceptional circumstances' that warrant interference under Art. 226 of the Constitution of India. Following the rulings of the Supreme Court in ***Deep Industries Ltd. (supra)*** and ***Tagus Engineering Private Limited & Ors. (supra),*** it is held that the present writ petition would not be liable to be entertained under Art. 226 of the Constitution of India. Since the Court is rejecting the petition

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on maintainability, the issue as to whether the amount due constitutes `debt' and whether the nature of services would fall within `banking services' are not being commented upon by the Court.

36. It is, however, made clear that the observations made herein would not bind the Arbitral Tribunal in any manner from taking its own independent view in the matter on all the issues that may be raised by either of the parties. The Petitioner's remedies against the impugned order as also the final award that may be passed are left open to be availed of, in accordance with law.

37. The present petition is accordingly dismissed in view of the above. All pending applications, if any, are disposed of.

PRATHIBA M. SINGH
JUDGE

JULY 11, 2023
Rahul/RP

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