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

COMMERCIAL ARBITRATION APPLICATION NO.237 OF 2024

WITH

COMMERCIAL ARBITRATION APPLICATION NO.243 OF 2024

Tata Capital Limited ...Applicant

Versus

Vijay Devij Aiya & Anr. ...Respondents

Mr. Nikhil Mehta *i/b KMC Legal Ventures Advocates for Applicants*

Mr. Shanay Shah *a/w. Hemal Ganatra i/b. Hemal Ganatra, Advocates for Respondents.*

CORAM: **SOMASEKHAR SUNDARESAN, J.**

RESERVED ON: **March 24, 2025**

PRONOUNCED ON: **April 22, 2025**

JUDGEMENT:

Context and Factual Background:

1. These Applications have been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (***"the Act"***), seeking appointment of an arbitrator in connection with disputes and differences that are said to have arisen between the parties under a Loan Agreement dated

January 31, 2016 and another top-up Loan Agreement dated October 31, 2017 (collectively, the "***Agreement***"). The arbitration agreement is contained in Clause 12.18 in each of the Applications (found at Page Nos. 44 and 46 respectively).

2. Since there is trenchant opposition to these Applications being allowed in view of the language contained in the arbitration agreement, the provisions of the arbitration agreement (identical for both Applications) are extracted below:-

> *"if any dispute, difference or claim arises between the parties hereto in connection with this Agreement or the security hereof or the validity, Interpretation, Implementation or alleged breach of this Agreement or anything done or omitted to be done pursuant to this Agreement or otherwise in relation to the security hereof, the parties shall attempt in the first instance to resolve the same through negotiation/ conciliation. If the dispute is not resolved through negotiation/conciliation within thirty days after commencement of discussions or such longer period as the parties agree to in writing, then the same shall be settled by arbitration to be held in Chennai/Delhi/Mumbai in accordance with the Arbitration and Conciliation Act 1996, or any statutory amendments thereof and shall be referred to a person to be appointed by TCSFL. In the event of death, refusal, neglect, inability, or incapability of the person so appointed to act as a Arbitrator, TCSFL may appoint a new arbitrator. The award of the arbitrator shall be final and binding on all parties concerned.*

Notwithstanding anything contained hereinabove, in the event due to any change in the legal status of TCSFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCSFL comes under the purview of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (the 'DRT Act), which enables TCSFL to enforce the security under the SARFAESI Act or proceed to recover dues from the Borrower under the SARFAESI Act and/or the DRT Act, the arbitration provisions hereinbefore contained shall, at the option of TCSFL cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCSFL such proceedings shall stand terminated and the mandate of the arbitrator shall come to an end from the date when such law or its change/amendment or the notification, becomes effective or the date when TCSFL exercises its option of terminating the mandate of arbitrator, as the case may be. Provided that neither a change in the legal status of TCSFL nor a change/amendment in law or issuance of notification as referred to in this sub paragraph above, will result in invalidating an existing award passed by an Arbitrator pursuant to the provisions of this Agreement."

3. It will be seen from a plain reading of the foregoing that at the threshold, the provision contains an unequivocal agreement between the parties to resolve their disputes and differences by reference to arbitration in Mumbai. Indeed, the arbitration agreement entails a unilateral appointment of an arbitrator, which is a facet now

clearly declared as being untenable and in conflict with the foundational principle of independence and impartiality of the arbitrator. The Applicant fairly states that in view of this element in the provision, he would leave it to this Court to appoint an arbitrator.

4. The objections to allowing these Applications flows primarily from the second paragraph of the arbitration agreement. The provision is a *non-obstante* clause that enables the Applicant to opt out of the arbitration agreement in the event the Applicant becomes a beneficiary of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("***SARFAESI Act***") and other special debt recovery legislation referred to therein. Put differently, the Applicant would have the right to opt out of arbitration. No such provision to opt out is provided for the Respondents.

Objections to the Applications:

5. The Respondents' objections to these Applications being allowed, is layered. *First*, the Respondents commends for endorsement, a judgement of a Learned Division Bench of the Delhi High Court in *Tata Capital Housing Finance Ltd. Vs. Shri Chand Construction &*

Apartments Pvt. Ltd.[1] (***Tata Capital***) in which, an identical clause has been interpreted, holding the clause to be invalid since it destroys the essential feature of mutuality that is fundamental for validity of an arbitration agreement.

6. *Second*, the Respondents contends that the Applicant having chosen to enforce through SARFAESI Act, the Applicant is deemed to have lost its right to pursue arbitration and that it has made an election in favour of SARFAESI Act.

7. *Third*, according to the Respondents, arbitration had already been initiated in the past and the Applicant unilaterally appointed an arbitrator by a letter dated October 29, 2018. The Respondents contend that when the Applicant became a beneficiary of debt recovery legislation, the Applicant did not "withdraw" from the arbitration, reserving the right to initiate it afresh. Instead, the Respondents submit, the Applicant let the arbitration lapse. The Respondents would submit that by an order dated December 10, 2019, the Learned Arbitrator unilaterally appointed earlier, had noted that the mandate had expired and left it to the parties to file an appropriate application in

[1] *2022 (1) ARB LR 213 (Delhi) (DB) – paragraphs 17,18,29 and 30 are pressed into service.*

accordance with law, but no application seeking extension of the mandate was filed by the Applicant under Section 29-A of the Act. Therefore, the Respondents submit, the arbitration proceedings already stood terminated and cannot be revived yet again.

8. The defence of the Applicant to these objections is conceptual, about lenders having a right to pursue arbitration even while being a beneficiary of enforcement measures under the SARFAESI Act. The Applicant seeks to rely on *M.D. Frozen Foods vs. Hero Fincorp Ltd*.[2] (***MD Frozen Foods***) to defend the right to pursue arbitration despite having become a beneficiary of the SARFAESI Act and having chosen to also adopt enforcement measures under the SARFAESI Act. The Applicant would submit that since both processes can be pursued in parallel, the objection based on the Applicant's option to terminate the arbitration agreement is irrelevant, and that in any case the Applicant has never terminated the arbitration agreement.

Analysis and Findings:

9. On the *first* issue, the short point for consideration is whether the ratio in ***Tata Capital*** commends itself for endorsement by this Court,

[2] *(2017) 16 SCC 741*

bearing in mind that the jurisdiction being exercised by this Court is under Section 11 of the Act. Whether the absence of mutuality in the second part of the arbitration agreement is destructive of the very existence of the arbitration agreement is the question I need to answer.

10. Towards this end, it would be necessary to see the context in which the judgement in ***Tata Capital*** was rendered. The loan agreement between the parties in that case – essentially, the borrower and the lender Tata Capital Housing Finance Ltd. – had an identical arbitration clause. In that case, the borrower had repaid the loans owed to the lender and sought return of the title documents held by the lender under a mortgage. The lender had lost and misplaced the original title deeds. The borrower suffered injury in the form of a lost opportunity to sell the property and filed a civil suit for damages on the premise that nothing remained in the loan obligations. Although the lender had indicated that it would file an application under Section 8 of the Act, the lender went on to seek time to file a written statement in response to the suit. Since the lender did not file a written statement, a Learned Single Judge closed the right of the lender to file the written statement. The lender challenged the decision shutting out the written statement before a Division Bench, and succeeded in setting aside the direction foreclosing

the written statement.

11. Meanwhile, the lender filed an application under Section 8 of the Act, and claimed that the suit would not lie. The lender contended that the arbitration agreement may have terminated for claims that the lender may raise; but that for claims raised by the borrower, the arbitration agreement remained in existence. Dealing with such contention, the Learned Single Judge held that the dispute between the parties was not about repayment of the loan but about the lender having lost the original title deeds. That apart, the Learned Single Judge held that the arbitration agreement did not exist in the manner contended by the lender. The Learned Single Judge ruled that Section 8 of the Act required the Court to examine the existence of an arbitration agreement in respect of all or certain "disputes" (the parties could choose which disputes between them would be covered by arbitration) but it could never be argued that claims relating to the same dispute in the relationship could be divided on the basis of which party's claim was arbitrable and which party's claims could be left out.

12. It was this decision of the Learned Single Judge that was challenged before the Learned Division Bench of the Delhi High Court

by the lender. The lender argued that safe-keeping of the mortgaged title deeds was explicitly covered by the loan agreement and therefore any dispute about failure to keep them safe was covered by the arbitration agreement. It was argued that the right to terminate the arbitration agreement was only with the lender and not with the borrower, which meant that the borrower was bound to proceed to arbitration and had no right to file a suit.

13. It is in this peculiar factual matrix and context that the Delhi High Court considered the existential validity of the arbitration agreement in the context of Section 8 of the Act. In a nutshell, the context was of the borrower having filed a suit and the lender having asserted the right to file a written statement. On being denied that right, the lender appealed and secured its right to file the written statement. After securing such right, the lender argued that no civil suit would lie.

14. Such provocative and irreconcilable conduct was the context of the judicial review in that case, and that too after the suit was well underway. In that context, the lender's submission that one party's claim under the same agreement would need to proceed to arbitration

while the other party's claim need not be covered by arbitration, was repealed. It was in that context that the Court ruled that there was an absence of mutuality, which was fatal to the agreement.

15. In my opinion, with the deepest respect for the Learned Division Bench of the Delhi High Court, the ruling on the absence of mutuality rendering the arbitration agreement to be illegal has to be read in this context and not in absolute terms. Another means of viewing the matter could be that the lender having filed and won an appeal to secure its right to file a written statement, the lender had waived the right to arbitration. The arbitration agreement in any case was structured to allow the lender to terminate the arbitration agreement and by securing the right to file the written statement, the lender could be said to have exercised its option to terminate the arbitration agreement.

16. Against such backdrop, another parallel on dealing with an illegal feature of an arbitration agreement would be apt to discuss. It is now clearly declared law that the element of unilateral appointment of an arbitrator is illegal. However, rather than such element of illegality rendering the entire arbitration agreement *void ab initio*, such illegality

is capable of being cured by ensuring that the appointment of an independent and impartial arbitrator is achieved by eliminating the element of one party alone appointing the arbitrator. By the same token, the parties having unequivocally agreed to arbitrate in the first part of the arbitration agreement (Clause 12.18 extracted above), in my opinion, the optionality in the second part ought not the erode the substratum of the arbitration agreement. Instead, just as the element of unilateral appointment has been held to be illegal and that element is excised by courts, it may follow that one party's option to terminate the arbitration agreement can be excised by eliminating such right or by making such right bilateral to save the arbitration agreement. In any case, for purposes of this case, such an approach is academic since the matter at hand is not a case of the Respondent seeking to protect a civil suit filed by the Respondents (unlike in ***Tata Capital*** before the Delhi High Court). The Applicant also is not claiming to terminate the arbitration agreement. The Applicant is seeking to invoke it.

17. The Respondents in this case are calling upon this Court to non-suit the Applicant from arbitration on the premise that a clause of an identical nature has been held by the Delhi High Court to be illegal in ***Tata Capital***. Neither are the Respondents seeking to litigate outside

arbitration nor is the Applicant seeking to non-suit the Respondents in any other forum. There is no dissonance in the form of any party claiming that one side's claims alone are arbitrable and the other party's claims are not. Therefore, with the deepest respect to the Learned Division Bench of the Delhi High Court, I am of the view that ***Tata Capital***, which is a decision under Section 8 of the Act, would not impact this Court's limited jurisdiction under Section 11 of the Act.

18. The scope of review under Section 11 is explicitly set out in Section 11(6A) of the Act. It is now trite law, with particular regard to the decisions of a seven-judge Bench in the ***Interplay Judgement***[3] followed by multiple others, including ***SBI General***[4] and ***Patel***[5] that the Section 11 Court ought not to venture beyond examining the existence of a validly existing arbitration agreement that has been formally executed. Even a question of existential substance is a matter that falls squarely in the domain of the arbitral tribunal, in view of Section 16 of the Act. Therefore, it would be open to the Respondents to file an application under Section 16 of the Act.

[3] *In Re: Interplay Between Arbitration Agreements Under Arbitration and Conciliation Act, 1996 & Stamp Act, 1899 – (2024) 6 SCC 1*
[4] *SBI General Insurance Co. Ltd. v. Krish Spinning – 2024 SCC OnLine SC 1754*
[5] *Ajay Madhusudan Patel v. Jyotrindra S. Patel – 2024 SCC OnLine SC 2597*

19. On the *second* issue, in ***MD Frozen Foods***, the pursuit of the enforcement remedies under the SARFAESI Act has unequivocally been held to be a remedy in addition to the adjudicatory process available under the Act. Therefore, the mere fact that the Applicant initiated proceedings under the SARFAESI Act would not bring to an end the arbitration agreement.

20. Finally, the *third* issue is a tricky one. The Respondents contend that the Applicant had initiated arbitration through a unilaterally appointed arbitrator and that arbitration was allowed to lapse. It is common ground that such arbitration was by a unilaterally appointed arbitrator and therefore, in my opinion, whether such an arbitrator had the power to grant leave to initiate arbitration afresh is moot. Even after an award is passed by a unilaterally appointed arbitrator, it would be open to the unilaterally-appointing party to give up the award to avoid expenditure of costs in defending the indefensible and seek to initiate arbitration afresh. In those circumstances, even if the mandate of the unilaterally appointed arbitral tribunal had lapsed, what would follow is that the lapsing of the mandate was the mandate of an arbitral tribunal that was *non est* in the eyes of law. Therefore, in exercise of the limited jurisdiction under Section 11 of the Act, I do not

think it appropriate to delve into the existential substance of the arbitration agreement.

21. Being satisfied that an arbitration agreement is validly in existence or, at worst, is still subsisting, it is in the fitness of things to refer the disputes and differences between the parties in connection with the Agreement to arbitration by a Sole Arbitrator. It would be open to the Respondents to address the arbitral tribunal appointed hereby, to adjudicate on its own jurisdiction in exercise of its powers under Section 16 of the Act.

22. In these circumstances, both these Applications are hereby ***finally disposed of***, in terms of the following order:

> A] Mr. Sandeep H. Parikh, a learned advocate of this Court is hereby appointed as the Sole Arbitrator to adjudicate upon the disputes and differences between the parties arising out of and in connection with the Agreement referred to above;
>
> Office Address:- 11-E, 1st Floor, Examiner Press Building,
>
> Opposite Lentin Chambers, Dalal Street,

Fort, Mumbai-400 001.

Email ID: adv.sparikh@gmail.com

B] A copy of this Order will be communicated to the Learned Sole Arbitrator by the Advocates for the Applicant within a period of one week from the date on which this order is uploaded on the website of this Court. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal along with a copy of this Order;

C] The Learned Sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with Section 12(1) of the Act to the parties within a period of two weeks from receipt of a copy of this Order;

D] The parties shall appear before the Learned Sole Arbitrator on such date and at such place as indicated, to obtain appropriate directions with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc. At such meeting, the parties shall provide a valid and functional email address along with mobile and landline numbers of the respective Advocates of the parties to the

Arbitral Tribunal. Communications to such email addresses shall constitute valid service of correspondence in connection with the arbitration;

E] All arbitral costs and fees of the Arbitral Tribunal shall be borne by the parties equally in the first instance, and shall be subject to any final Award that may be passed by the Tribunal in relation to costs.

23. Needless to say, nothing contained in this order is an expression of an opinion on merits of the matter or the relative strength of the parties. All issues on merits are expressly kept open to be agitated before the arbitral tribunal appointed hereby.

24. Learned Counsel for the Respondent seeks a stay of this order appointing the arbitrator. For the reasons already recorded in the judgement, no case is made out to stay such an order since the interest of the Respondent are well protected.

25. All actions required to be taken pursuant to this order shall be taken upon receipt of a downloaded copy as available on this Court's website.

[SOMASEKHAR SUNDARESAN, J.]