



INDIALAW

ARBITRATION AND CONCILIATION

PENDENCY OF PROCEEDINGS UNDER SECTION 17 OF THE SARFAESI ACT DOES NOT BAR INITIATION OF ARBITRATION PROCEEDINGS STATES DELHI HC

AUTHOR Supriya Bhosale, Asav Rajan Arora

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In a recent judgment¹ the High Court of Delhi, in a Section 11 Petition, held that the initiation of the arbitration proceedings cannot be barred merely because the Petitioner has taken steps for recovery/possession of the secured property/asset through the process of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 ("SARFAESI Act"). It was further clarified by His Lordship Justice V. Kameswar Rao that the scope of Section 11 of the Arbitration and Conciliation Act, 1996 is only to examine the arbitrability of the disputes and the Court can refuse the appointment of an arbitrator only for non-arbitrable disputes.

Facts of the case

Respondents approached the Petitioner for the grant of a Secured Term Loan. Accordingly, a loan was sanctioned against property ("LAP") for Rs. 32 crores as also Lease Rental Discounting loan facility ("LRD") for Rs. 55 crores was provided.

There were two Master Facilities Agreements and two Supplementary Agreements signed with respect to the Respondents being the borrower and the Petitioner being a lender. The said loans were disbursed after the Facilities Agreements were signed by the parties with a tenure of 180 months.

Respondents failed to pay the loan amount, even after the notice for repayment of the loan amount was sent to them, compelling Petitioners to invoke the Arbitration clause of the Master Facilities Agreements and Deeds of Guarantee. That despite notice being served, the Respondents failed to concur or nominate an Arbitrator. Petitioner filed the petitions under Section 11(5) of the Arbitration and Conciliation Act, 1996 (Arbitration Act).

Contentions

Learned counsel for the Petitioner, argued that the Respondent did not adhere to the terms of repayment and committed defaults and hence Petitioner had recalled the loan facilities.

He further contended that the SARFESI proceedings-initiated u/ 13(4) are enforcement proceedings, whereas arbitration is an adjudicatory process. In the event the secured assets are insufficient to satisfy the debts, the secured creditor can always proceed against the other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum. Thereby suggesting that SARFESI proceedings and arbitration proceedings go hand in hand.

The learned counsel for the Respondent stated that the Petitioner has suppressed from this Court that it has already taken steps under Section 13 (2) of the SARFAESI Act, and obtained symbolic possession of the immovable property.

He also contended that as per Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court is barred with respect to all the matters in the jurisdiction of DRT. The issues of outstanding dues under Master Facilities Agreements and Deeds of Guarantee will be has to exclusively adjudicated by DRT. He argued that a petition will be filed by the Respondents under Section 17 of the SARFAESI Act, which alone will have the jurisdiction.

He further argued, that the claims of Banks and financial institutions covered by DRT and SARFESI Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of DRT by necessary implication.

Observation of the Court

The court observed that the only issue in the present case is whether the petitioner is entitled to appoint a Sole Arbitrator for the adjudication of the disputes.

The court stated that *"The reference to DRT in the submission of the counsel for respondent is with regard to the fact that SARFAESI Act under Section 17 provides DRT as a Forum. However, the mandate of the DRT under Section 17 of the SARFAESI Act is limited to examining whether the action initiated by the petitioner is in accordance with Section 13 (4) of the Act and nothing more. So, in that sense, the proceedings are not under the RDB Act, but under SARFAESI Act"*

It further observed that *"Having said that, even if the petitioner intends to take action under Section 17 of the Act by filing a petition before DRT that would still not preclude the initiation of arbitration proceedings by the petitioner in accordance with law."*

"That apart, the petitioner has invoked the arbitration clause and called upon the respondents to accord their concurrence to the appointment of the arbitrator, to which no response has been given even after expiry of 30 days. Therefore, it is clear that disputes have arisen between the parties."

The court disposed the petition by appointing a sole Arbitrator for the resolution of the dispute between the parties.

¹ HERO FINCORP. LIMITED vs TECHNO TREXIM (I) PVT. LTD. & ORS. And HERO FINCORP. LIMITED vs TECHNO TREXIM (I) PVT. LTD. & ORS