



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

COMMERCIAL ARBITRATION APPLICATION (L) NO. 25050 OF 2023

Aditya Birla Finance Limited  
Having its office at 10<sup>th</sup> Floor, R Tech Park,  
Nirlon Complex, Off Western Express Highway,  
Goregaon (East), Mumbai – 400 063.  
Through Authorised Representative  
Mr. Ankit Aggarwal

... Applicant

*Versus*

Paul Packaging Private Limited  
A company incorporating under the  
Companies Act, 1956 and  
Having office at:  
14B/1B, Anil Moitra Road, Kolkata – 700 019.

Also at:  
A/11/46, Gurusaday Road,  
Ballygunge, Kolkata – 700019.

Also at:  
25 A, Baburam Sil Lane,  
Kolkata – 700 012.

... Respondent

Mr. Vishal Maheshwari, Kamini Pansare a/w. Mihir Beradia, i/b. VM  
Legal, for the Applicant.

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CORAM: ADVAIT M SETHNA, J.

DATE: 19 NOVEMBER 2024

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**ORAL JUDGMENT:**

1. Heard Mr. Maheshwari, learned counsel for the applicant. None appears for the respondent.

**A) Issue for consideration:-**

2. This is an application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*“the Arbitration Act”* for short) for an appointment of a sole arbitrator. It is to adjudicate upon the disputes and differences arising out of and in relation to the loan agreement dated 13 September 2018 which includes sanction letter dated 16 August 2018 executed between the applicant and the respondent. The pivotal issue that falls for consideration revolves around the objection taken by the respondent (borrower) on the effect/implication of invocation of the arbitration clause in the loan agreement dated 13 September 2018, in light of the pending proceedings in Debt Recovery Tribunal (*“DRT”* for short), in the nature of an application under Section 17 of the Securitisation and Reconstruction of Financial Assets and enforcement of Security Interest Act 2002 (*“the SARFAESI Act”* for short) and notice issued under Section 13(2) of the said Act.

3. In the above context, the substantive prayer of the applicant is reproduced below:

*“(a) That this Hon’ble Court be pleased to appoint a sole Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 to constitute the Arbitral Tribunal to adjudicate the dispute between the Applicant and the Respondents arising*

*under the Clause 23.16 of Loan Agreement dated September 13, 2018.”*

**B) Applicant's case:-**

The case of the Applicant is summarized as under:

4. The Applicant is a non-banking finance company registered under the Reserve Bank of India (“**RBI**” for short) carrying a business of providing loan facilities under various schemes to its customers. The respondent is a private limited company incorporated under the Companies Act, 1956, having its address as mentioned in the cause title. The said respondent is the borrower who had availed finances facilities from the applicant.

5. In or around August 2018, as stated by the applicant, the respondent had approached the applicant to obtain a finance facility. Accordingly, the applicant issued a sanction letter dated 16 August 2018, sanctioning loan amount to the respondent for a sum of Rs.6,75,00,000/- (Rupees Six Crores Seventy-Five Lakhs) on terms and conditions set out in the sanction letter. The rate of interest and penal interest were specifically mentioned in such sanction letter, which was duly accepted by the respondent.

6. Pursuant to issuance of the sanction letter, the applicant and the respondent executed a loan agreement on the terms and conditions stipulated thereunder. It appears that the respondent also issued a demand

promissory note, memorandum of title deeds in favour of the applicant for such loan amount alongwith other documents required for obtaining the loan. The sanction letter was a part of the loan agreement and all terms and conditions of the sanction letter formed an integral part of the loan agreement.

7. In furtherance of the loan agreement as stated by the applicant, it appears that as a part of disbursement of the finance facilities, the respondent agreed to credit an equitable mortgaged in the property which is more particularly described in the application (at page 16 paragraph 'c'). The applicant has further stated that upon receipt of the respondent's letter of request dated 13 September 2018, the applicant disbursed the loan amount to the respondent.

8. The applicant had also stated that it had sanctioned, disbursed various facilities to the respondent. In this regard, it appears that by a sanction letter dated 29 October 2019, the applicant had sanctioned a loan by way of credit facilities to the respondent for a sum of Rs.50,00,000/- (Rupees Fifty Lakhs). Further, the applicant had vide another sanction letter dated 10 July 2020 sanctioned an amount of Rs.1,36,00,000/- (Rupees One Crore Thirty Six Lakhs only) to the respondent under the GECL term loan vide sanction letter dated 11 November 2021 for an amount of

Rs.68,14,000/- (Rupees Sixty-Eight Lakhs Fourteen Thousand Only) to the respondent under the GECL term loan facility. The said loan agreements for the above sanction and disbursement amount stipulated that the seat of arbitration shall be New Delhi for the purposes the disputes and differences arising thereunder. As stated the applicant is pursuing the said proceedings under such agreements.

9. According to the applicant, though the respondent was making payments, there were defaults on the part of the respondent to adhere to the terms and conditions of the loan agreement. The applicant also contended that the respondent defaulted in repayments of EMI amount as agreed under the loan agreement and accordingly there were continued defaults on the part of the respondent.

10. Further, in light of such consisting defaults in making payments towards the loan amounts under the loan agreement on 07 May 2022, the loan account of the respondent was declared as Non-Performing Assets ("**NPA**" for short).

11. The applicant through its authorized officer issued a statutory demand notice dated 20 June 2022 to the respondent under Section 13(2) of the SARFAESI Act calling upon the respondent to make payment for a sum of Rs.6,11,38,461.4/- (Rupees Six Crores Eleven Lakhs Thirty-Eight

Thousand Four Hundred Sixty-One and Four paise) due as on 16 June 2022 with further interest and other charges at the contractual rates till actual payment and/or realization thereof within sixty days from the receipt of the demand notice. The applicant contends that the respondent failed to make payment to the applicant even after such statutory sixty days period, from the receipt of demand notice by the respondent. The respondent duly replied to the demand notice issued by the applicant, by its objection letter dated 19 August 2022, to which the applicant by letter dated 01 September 2022 specifically denied all the objections raised in such demand notice.

12. It was on 06 September 2022 that the authorized officer took symbolic possession of the mortgaged properties.

13. The applicant has stated that in light of the above, it was constrained to file proceedings under Section 14 of the SARFAESI Act for taking over possession of the mortgaged properties, which forms the subject matter of the auction proceedings initiated by the applicant.

14. The applicant contends that as on 04 August 2023 a sum of Rs.7,07,22,058.10/- (Rupees Seven Crore Seven Lakh Twenty-Two Thousand Fifty-Eight and Ten paise only) was due and payable by the respondent to the applicant under the loan agreement. In this context, the applicant submits that the failure on the part of the respondent to pay the

outstanding amount as referred to above gave rise to disputes and differences arising between the applicant and respondent. In this regard, the loan agreement specifically provides for an arbitration clause No.23.16 as set out in the loan agreement.

15. Further to the above, as stated by the applicant, it issued a notice of its advocate dated 10 February 2023 addressed to the respondent invoking the said arbitration clause, considering the disputes and differences arising between the applicant and the respondent, under the said loan agreement. The applicant in such notice dated 10 February 2023 suggested the name of Dr. Justice S. Radhakrishnan (Former Judge of this Court) as the sole arbitrator within a period of thirty days from the receipt of the said notice, failing which the applicant would take appropriate proceedings for appointment of arbitrator for adjudicating the disputes between the applicant and the respondent, under the said arbitration clause.

16. The respondent by its letter dated 02 March 2023 responded to the applicant's notice invoking arbitration dated 10 February 2023. In the said reply, the respondent referred to a purported loan agreement dated 13 September 2018 calling upon the applicant to furnish a copy of such loan agreement within three days. To such reply, the applicant by a letter dated 10 March 2023, addressed to the respondent furnished a copy of such loan

agreement as required by the respondent.

17. Pursuant to the above, there being no response to the respondent, the applicant has approached this Court by filing the present application dated 31 August 2023 filed under Section 11(6) of the Arbitration Act for the reliefs to appoint the sole arbitrator as set out under the prayer clause reproduced [*Supra*].

**C) Analysis and reasoning:-**

18. With the assistance of the learned counsel for the applicant I have perused the record.

19. By an order of this Court dated 26 October 2023, liberty was sought by the applicant to amend this application and confine this application to the loan agreement dated 13 September 2018 and file a separate application in respect of the disputes and differences arising out of under the deed of guarantee dated 13 September 2018. Leave to amend was granted in such terms. Accordingly, the applicant filed separate application being Commercial Arbitration Application (L) No.32948 of 2023 relating to the guarantor.

20. I would first deal with the query of this Court on the aspect of service of this Commercial Arbitration Application (L) No.25050 of 2023, to the respondent. In response, Mr. Maheshwari submitted that service is complete.



He referred to an order of this Court dated 5 April 2024, under which notice was issued. A service report filed by the Registry of this Court dated 10 June 2024, shows delivery to the respondent on the second address as set out in the cause title to the application. This also corroborates the fact that the service is complete. The learned counsel for the applicant then referred to the affidavit of service filed on behalf of the applicant on different dates ranging from 6 November 2023 to 18 November 2024. In this context, my attention is drawn to latest affidavit dated 18 November 2024 where the service to the respondent by the applicant is demonstrated from the email annexed thereto. Such email also stated that these applications would be taken up by this Court at 2:30 pm on 19 November 2024 at Serial No.3. In my view, it therefore, becomes clear that the service to the respondent is complete.

21. A bare perusal of the above unequivocally bring to fore, the fact that respondent has been duly served, in different modes, including notice issued by this Court. However, it appears from the record that respondent, for reasons best known to it, has chosen to not remain present and contest these applications. It is thus clear that the respondent is not interested in pursuing these applications. It is pertinent to note that the present application under Section 11(6) of the Arbitration Act is filed in the month of August 2023. Sufficient time has gone by since then. It is in the interest of justice to not

procrastinate this any further and the said application be decided.

22. A careful perusal of the record makes it clear that there is an arbitral clause contained in loan agreement dated 13 September 2018, which is extracted below:

*“23.16 Arbitration:*

*All claims or disputes arising out of or in relation to this Agreement shall be settled by arbitration. The arbitration tribunal shall consist of a sole arbitrator to be appointed by ABFL. All parties to this Agreement hereby expressly consent to ABFL being the sole appointing authority. Any vacancy created in the arbitration tribunal, for any reason whatsoever, shall also be filled only by ABFL acting as the sole appointing authority. Only a former judge of any High Court or the Supreme Court will be eligible to act as an arbitrator under this clause. The place of arbitration shall be Mumbai. Parties agree that the Courts in Mumbai shall have the exclusive jurisdiction to exercise all powers under the Arbitration & Conciliation Act, 1996.”*

23. Such arbitration clause categorically stipulates that (a) all claims or disputes arising out of or in relation to the loan agreement shall be settled by arbitration; (b) A former judge of the Supreme Court or the High Court shall act as sole arbitrator; (c) The place/venue of arbitration shall be Mumbai. In the above context, Section 7 of the Arbitration Act, becomes relevant which reads thus:

- “7. *Arbitration agreement.*—(1) *In this Part, “arbitration agreement” means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
- (2) *An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
- (3) *An arbitration agreement shall be in writing.*
- (4) *An arbitration agreement is in writing if it is contained in—*
- (a) *a document signed by the parties;*
  - (b) *an exchange of letters, telex, telegrams or other means of telecommunication 1[including communication through electronic means] which provide a record of the agreement;*
  - (c) *an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.*
- (5) *The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.”*

From the above provision it is clear that the arbitration agreement is in the form of such arbitration clause incorporated in the loan agreement dated 13 September 2018.

24. It is pertinent to mention that even though the said arbitration clause provides for appointment of the arbitrator to be done so unilaterally by the applicant a perusal of notice invoking arbitration dated 10 February 2023 shows that the applicant while invoking the arbitration clause suggested the name of a neutral sole arbitrator, as incorporated in the said notice. In view thereof, it is not necessary to delve into the issue of unilateral appointment of an arbitrator who is now ineligible to act in terms of the decisions of the Supreme Court in *Perkins Eastman Architects DPC and Another vs. HSCC (India) Limited*<sup>1</sup> and the judgments on this issue passed thereafter.

25. In view of the above, it is clear that there is an unequivocal arbitration agreement in the form of clause referring any dispute or difference arising under the loan agreement. It is not as if that the existence of such clause is disputed by the respondent in the given facts and circumstances. The primary objection of the respondent emerges from the letter dated 23 November 2022 of the advocate of the respondent to the advocate of the applicant, in the companion Commercial Arbitration Application (L) No.32948 of 2023. Such objection is that there are pending proceedings before the DRT filed under Section 17(1) and Section 13(2) of the SARFAESI Act. Also, according to the respondent, such fact has been suppressed by the applicant, as is seen from a bare perusal of the said notice.

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<sup>1</sup>. (2020) SCC 760

In this context, on a plain reading of the applicant's notice invoking arbitration dated 10 February 2023, more particularly paragraph 4 thereof, it is clear that there is a reference to the proceedings under Section 13(2) of the SARFAESI Act and the notice issued thereunder. In view thereof, such objection, even if construed as a preliminary objection, will not take the case of the respondent on suppression any further. This is particularly in light of such disclosure in the paragraph 4 of the notice dated 10 February 2023, which is also to be read in the context of paragraphs 1, 2 and 3 of the said notice.

26. The primary objection raised by the respondent which relates to the very invocation of the arbitration clause by the applicant in light of the pending proceedings before DRT. I may now refer to the judgment of the Hon'ble Supreme Court in *M.D. Frozen Foods Exports Pvt. Ltd and Ors. v. Hero Fincorp Limited*<sup>2</sup> for reference, paragraphs 33 and 34 of the said judgment, are reproduced below:

*“33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.*

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<sup>2</sup>. 2017 SCC OnLine SC 1211.

34. *We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in Sarthak Builders (P) Ltd. v. Orissa Rural Dev. Corpn. Ltd. 12, the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v. State of U.P. lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in Deccan Chronicles Holdings Ltd. v. Union of India's following the overruled decision of the Orissa High Court in Subhash Chandra Panda v. State of Orissa does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."*

A perusal of the above decision makes the legal position succinctly clear to the effect of the Supreme Court has held that SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is in the context of an adjudicatory proceedings. The SARFAESI proceedings and arbitration proceedings thus can proceed parallelly. In view thereof, such objection raised by the respondent, touching upon the very invocation of arbitration clause by the applicant, runs contrary to the above decision of the Supreme Court, wherein no uncertain terms, it has been held that both proceedings under SARFAESI and arbitration can go hand in hand. Thus, in my opinion, such objection of the respondent is devoid of merit. In testing the merit of such objection holistically, it becomes necessary to delve on the scope of interference, intervention of this Court in proceedings instituted

under Section 11 of the Arbitration Act.

27. This Court in *Tata Capital Limited v. Priyanka Communications (India) Pvt. Ltd., and Ors.*<sup>3</sup>, has considered the said aspect. While ruling on the same, this Court has relied upon an important decision of the Supreme Court in *Interplay between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899*<sup>4</sup>. The relevant paragraphs of the judgment of this Court in Tata Capital [*Supra*] are reproduced below:

*“27. A perusal of these judgements shows that, prior to the judgement the Hon'ble Supreme Court in Interplay (Supra), the scope of interference by the Court in proceedings under Section 11 of the Act was slightly wider. However, the judgement of the Hon'ble Supreme Court in Interplay (Supra) has narrowed down the scope. In Interplay (Supra), the Hon'ble Supreme Court has held that the scope of examination under section 11 (6A) should be confined to the existence of an arbitration agreement on the basis of Section 7 of the Act. Similarly, the validity of an arbitration agreement, in view of Section 7 of the Act, should be restricted to the requirement of formal validity such as the requirement that the agreement be in writing. The Hon'ble Supreme Court has held that this interpretation gives true effect to the doctrine of competence-competence by leaving the issue of substantive existence and validity of an arbitration agreement to be decided by the Arbitral Tribunal under Section 16 of the Act. The Hon'ble Supreme Court in Interplay (Supra) accordingly clarified the*

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<sup>3</sup>. CARAP No.168 of 2023, Bombay High Court.

<sup>4</sup>. (2024) 6 SCC 1.

*position of law laid down in Vidya Drolia and Others (Supra) in the context of Section 8 and Section 11 of the Act in the aforesaid terms. Further, in Interplay (Supra), the Hon'ble Supreme Court held that, in jurisdictions such as India, which accept the doctrine of competence-competence, only prima facie proof of the existence of an arbitration agreement must be adduced before the Referral Court. The Hon'ble Supreme Court held that the Referral Court is not the appropriate forum to conduct a mini trial by allowing the parties to adduce evidence in regard to the existence or validity of an arbitration agreement. The determination of the existence and validity of an arbitration agreement on the basis of evidence ought to be left to the Arbitral Tribunal.*

28. *Further, in Interplay (Supra), the Hon'ble Supreme Court held that Section 11 (6A) uses the expression "examination of the existence of an arbitration agreement". The purpose of using the word "examination" connotes that the legislature intended that the Referral Court had to inspect or scrutinize the dealings between the parties for the existence of an arbitration agreement. Moreover, the expression "examination" does not connote or imply a laborious or contested inquiry. On the other hand, Section 16 provided that the Arbitral Tribunal can 'rule' on its jurisdiction, including the existence and validity of the arbitration agreement. The Hon'ble Supreme Court further held that a 'ruling' connotes adjudication of disputes after admitting evidence from the parties. Therefore, it is evident that the Referral Court was only required to examine the existence of arbitration agreements, whereas the Arbitral Tribunal ought to rule on its jurisdiction including the issues pertaining to the existence and validity of an arbitration agreement.*



29. *The aforesaid position in law laid down by Interplay (Supra) has been confirmed by the subsequent decision of the Hon'ble Supreme Court in SBI General Insurance Co.Ltd. (Supra) referred to hereinabove.”*

Having considered the above decisions, it becomes clear that in the context of examining an application under Section 11, the Court ought to *prima-facie* decide on the existence of arbitration agreement under the framework of Section 7 of the Arbitration Act, and no further. Applying it to the present facts, evidently there is an arbitration agreement which manifests itself in the arbitration clause contained in para 23.16 of the loan agreement. Thus, the statutory requirement under Section 7 of the Arbitration Act is fulfilled. The Applicant had by its advocate's letter dated 10 February 2023 invoked the said clause to refer the disputes or differences arising out of loan agreement to arbitration. Thus, the objection taken by the respondent on the invocation of the arbitration clause, is sans merit in the given facts and circumstances.

28. Having considered the above, in my opinion, there exists an arbitration agreement in the form of an arbitration clause as provided for under Section 7 of the Arbitration Act, the existence of which, per se is not assailed by the respondent. Thus, it is just legal and proper that an arbitrator is appointed to arbitrate upon the disputes and differences arising under the

loan agreement to be so adjudicated by such sole arbitrator, as contemplated under the arbitration agreement manifesting in the said arbitration clause.

29. Further, on careful examination of provisions of the Arbitration Act, considering and applying the decision of Supreme Court in Interplay [*Supra*] and this Court in Tata Capital [*Supra*], the objections raised by the respondent is devoid of legal foundation, in deciding the present application under Section 11 (6) of the Arbitration Act.

30. Considering all of the above, I deem it fit and proper to pass the following order:-

**A) Appointment of Arbitrator:-**

Justice Sadhana Jadhav (Former Judge, Bombay High Court) is hereby appointed as learned sole arbitrator.

- i. A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within ten (10) days from the date this order is uploaded.
- ii. The Advocates for the Applicant will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator/s :	Justice Sadhna Jadhav (Former Judge, Bombay High Court)
Address	108, Seksaria Chambers, Nagindas Master Road, Kala Ghoda, Fort, Mumbai-400 001.

Mobile 9422989004  
Email sjadhav0660@gmail.com

- iii. **Disclosure:** The learned Sole Arbitrator is requested to forward, in hard copy, soft copy, the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration and Conciliation Act, 1996 to Advocates for the parties as soon as possible. The Advocates for the applicant will arrange to file the original statement in the Registry, within three (03) days of it being made available by the learned sole arbitrator.
- iv. **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator decides to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- v. **Interim Application/s:** Interim Application, if any, filed under Section 17 of the Arbitration and Conciliation Act, 1996 shall be decided by the arbitrator, if and so when referred.
- vi. **Fees:** The arbitral tribunal's fees shall be governed by the Fourth Schedule to the Arbitration and Conciliation Act, 1996.
- vii. **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration shall be in Mumbai.
- viii. **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal proportion.

31. The Application (L) No. 25050 of 2023, is allowed as per prayer clause (a) and in the above terms. No order as to costs.

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signed by  
GANESH  
SUBHASH  
LOKHANDE  
Date:  
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+0530

(ADVAIT M. SETHNA, J.)