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

% Date of Decision: 15.01.2025

\+ **O.M.P.(I) (COMM.) 11/2025 and I.A. 870/2025**

NUPOWER RENEWABLES PRIVATE LIMITED .....Petitioner

Through: Mr. Venkatesh, Advocate

versus

SAMMAAN CAPITAL LIMITED .....Respondent

Through: Mr. Dayan Krishnan, Sr. Advocate with Mr. Ankit Banati, Mr. Siddharth Joshi, Mr. Shubham Madaan and Mr.Shreedhar Kale, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 9 of the Arbitration and Conciliation Act, 1996 (hereafter referred, the 'A&C Act'), the petitioner seeks the following reliefs: -

> *"(a) Stay the Loan Recall Notice dated 26.12.2024, Wilful Default Notice dated 03.01.2025 and Notice alleging fraud dated 03.01.2025 issued by the Respondent;*
> *(b) Grant ex-parte ad-interim reliefs in terms of the prayers (a) above;*
> *(c) Award costs of this Petition/Application."*

2. The petitioner claims to be a private limited company incorporated under the Companies Act, 1956 and engaged in the business of power generation through its wind turbine generator facilities. The respondent (formerly known as Indiabulls Housing Finance Limited) is a mortgage-focused Non-Banking Finance Company ("NBFC"). The parties entered into

a Loan Agreement dated 16.09.2011 (hereafter, "agreement") whereby the respondent sanctioned the grant of a financial facility to the petitioner for an amount of Rs. 150,00,00,000/-. The petitioner also executed an Escrow Agreement with the respondent in terms of which all the receivables collected/received from the date of execution of the Loan Agreement had to be directly deposited in the Escrow Agreement.

The respondent issued a Loan Recall Notice dated 26.12.2024 seeking to recall the total outstanding loan along with interest for Rs. 8,72,89,551/- and with pending TDS amounting to Rs. 33,42,591/-. It was alleged in the Recall Notice that during the period from June 2024 to November 2024, amounts received from the power purchasers were being siphoned off and the payments/receivables were not directly received in the escrow account as per the agreement. It was also alleged that the Debt Service Reserve Amount (hereafter, "DSRA") was not maintained as per terms and conditions of the Escrow Agreement.

Vide the Willful Default Notice and Notice alleging fraud dated 03.01.2025, the respondent alleged that the petitioner utilized the financial facility for purposes other than the specified purpose in the loan documents and reiterated the allegation of siphoning of receivables. Petitioner replied to the said notices, stating that it had adhered to the repayment schedule and it was the respondent who rather breached the terms of the Loan Agreement by unilaterally increasing the Rate of Interest (hereafter, "ROI"). The petitioner invoked arbitration by issuing notice dated 10.01.2025 under Section 21 of the A&C Act.

3. Learned Counsel for the petitioner submits that the respondent has breached the terms of the agreement by arbitrarily and unilaterally charging

higher interest rates, beyond the agreed rate. He further submits that the parties had agreed that the ROI would be at par with prevailing Base Rate (SBI) (per annum) of SBI from time to time plus 235 basis points. However, the respondent unilaterally increased the ROI by 40 points to be 12.2%, whereas the SBI Base Rate had only increased by 10 points.

It is next submitted that the allegation of siphoning of funds by the petitioner is completely baseless and the petitioner had in fact paid part of interest and principal instalment from own funds since the project inflows were inadequate. It is contended that it was the respondent's conduct of charging higher ROI leading to undue deductions which hampered the viability of the Escrow Account and necessitated the deposit of receivables in an alternate account. In so far as the inability of the petitioner to maintain DSRA is concerned, it is submitted that the same was on account of poor winds for the last 3-4 years due to ENSO effect which led to shortfall in revenue.

It is submitted that the bar on the jurisdiction of civil courts is only restricted to the challenges to the measure taken under RDB/SARFAESI Act as a specialized forum, i.e., DRT has been created for the same but the dispute regarding specific performance of contract is not under the scope of powers conferred on the DRT and therefore, reference to arbitration can be made.

4. Mr. Dayan Krishnan, learned Senior Counsel on behalf of the respondents has vehemently opposed the present petition and submits that the respondent having terminated the agreement, the same being determinable in nature, no interim order could be granted for its enforcement. Reliance is placed on the decision of the Division Bench of

this Court in Rajasthan Breweries Limited v. The Stroh Brewery Company, reported **as 2000 (55) DRJ (DB).**

He refers to clause 2.2 (e) of the agreement to submit that petitioner had to directly deposit the receivables in the Escrow Account and to no other account. It is submitted that though the petitioner had initially deposited the receivables in the Escrow Account, but has been in default since 01.07.2024. It is further submitted that though the petitioner was served with a Cure Notice dated 15.10.2024, there was no formal reply to it but rather only talks had taken place. It is contended that the petitioner has in the letter dated 06.01.2025 addressed to the respondent admitted to depositing receivables in an alternate account, in complete breach of the agreement and has hence as per Clause 12.1(c) of the agreement committed an Event of Default.

He further submits that the respondent was contemplating action against the petitioner under the SARFAESI Act. He contends that the jurisdiction of the Arbitral Tribunal was ousted by Section 34 of the SARFAESI Act. Reliance is placed on the decisions of Co-ordinate benches of this Court in Fermina Developers (P) Ltd. v. Indiabulls Housing Finance Ltd., reported as **2022 SCC OnLine Del 4487** and Indiabulls Housing Finance Ltd. v. Shipra Estate Ltd., reported as **(2023) 1 HCC (Del) 213.** It is informed that Indiabulls Housing Finance Ltd. (Supra) was challenged before the Supreme Court by way of **SLP No (s) 7084-7089/2023** which was dismissed as withdrawn vide order dated 24.04.2023 on the ground that the petitioners therein would pursue remedies under the SARFAESI Act. He further submits that the petitioner's case does not fall in any exceptions carved out in the decision of Fermina (Supra).

He submits that in the alternative, if a reference is made to an Arbitral Tribunal, no relief may be granted under Section 9 of the A&C Act as the Tribunal would be competent to look into the question as to the validity of the notice as well as the requirement of any interim relief. In this regard, reference is made to the decision of a Division Bench of this Court in Inter ADS Exhibition Pvt. Ltd. v. Busworld International Cooperative Vennootschap Met Beperkte Anasprakelijkheid, reported as **2020 SCC OnLine Del 2485.**

5. In rejoinder, it is submitted that the reliance placed by the respondent on the decision in Fermina (Supra) is misplaced as the same was a case of a One Time Settlement in which the notice under Section 13(2) of the SARFAESI Act was already issued and the petition under Section 9 of the A&C Act was filed thereafter.

Learned counsel for the petitioner submits that the petitioner has always been ready and willing to perform the contract and the default in this case cannot be attributed to it. It is submitted that in this scenario, the respondent does not have right to terminate or determine the contract which remains specifically enforceable. Reliance is placed on the decision of a Co-ordinate Bench of this Court in DLF Home Developers Ltd. v. Shipra Estate Ltd. and Ors, reported as **2021 SCC OnLine Del 4902.**

He submits that the petitioner has a very strong prima facie case, and mandatory ad-interim injunction can be granted in view of the decision of the Supreme Court in Hammad Ahmed v. Abdul Majeed & Ors, decided on **03.04.2019** in **Civil Appeal Nos. 3382-3383 of 2019.** Learned counsel for the petitioner submits that majority of the loan amount already stands repaid and the petitioner is willing to pay the remaining balance on the agreed upon

schedule but with interest in terms of the agreement.

6. Mr. Krishnan, learned Senior Counsel for the respondent submits that the contract in the case of DLF (supra) contemplated no termination and hence the parties had the right to seek specific performance of the same. He further submits that the issue of ROI can be looked into by the DRT. In this regard, he places reliance on the decision of Supreme Court in Electrosteel Castings Ltd. v. UV Asset Reconstruction Co. Ltd., reported as **(2022) 2 SCC 573.**

7**.** I have heard learned counsel for the parties and gone through the records.

8. At the outset, petitioner has expressed its willingness to refer the matter for arbitration and has agreed to agitate the reliefs claimed in this petition before the arbitrator tribunal. However, the respondent has opposed the arbitral referral and has contended that the jurisdiction of the Arbitral Tribunal was ousted by Section 34 of the SARFAESI Act, since the respondent was contemplating to take action under the SARFAESI Act. Having said that, the respondent has also argued, assuming reference is made for arbitration, the reliefs claimed herein may be left for the Arbitrator Tribunal to decide.

Since the concession for arbitral referral is made by the respondent as an alternative submission, it is deemed appropriate to deal with the respondent's objection of the ouster of jurisdiction of civil courts under Section 34 of the SARFAESI ACT.

9. Section 34 of the SARFAESI Act bars the jurisdiction of the civil courts to "*entertain any suit or proceedings in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or*

under this act to determine and no injunction shall be granted by any court or other authority in respect of any action taken in pursuance of any power conferred by or under this act or under the Recovery of Debts and Bankruptcy Act, 1993" (hereafter, "RDB Act").

10. The provision itself circumscribes the width of the ouster to the matters that are exclusively within the jurisdiction of the DRT or the Appellate Tribunal under RDB Act. Even the prohibition against injunction is confined to the actions taken under the SARFAESI Act or RDB Act.

11. The moot question therefore that requires examination is whether the subject matter of this petition would require an arbitral referral of the disputes raised herein or the same is within the exclusive domain of the DRT/DRAT.

12. Disputes herein pertain to loan agreement, which, has a provision for arbitral adjudication of disputes. Petitioner has disputed the recall of loan initiated by the respondent by declaring them as willful defaulter.

13. At this juncture of the dispute, neither the respondent has initiated an action under the RDB Act by filing a recovery proceeding, nor has it yet taken a recourse to measures envisaged in the SARFAESI Act in relation to the securities in question. To be fair to the respondent, it has not even claimed that any proceedings are pending in DRT or any statutory notice under SARFAESI Act has been issued so far. Indisputably, only a cure notice dated 15.10.2024 has been issued so far. In fact, whether the respondent is a notified Financial Institution under RDB Act itself is not known, for this court to conclude if the proceedings under RDB are available to the respondent at all.

14. Clearly, the causes envisaged in Section 34, that would oust the

jurisdiction of the court, do not exist as of now.

15. This court, in Diamond Entertainment Technologies (P) Ltd. v. Religare Finvest Ltd., reported as **2022 SCC OnLine Del 3357**, had the occasion to deal with the complimentary nature of SARFAEASI remedies that exist alongside other remedies available to parties to a dispute. It has been observed in the said judgment that SARFAEASI remedies are not adjudicatory exercise but a non-court enforcement remedy against the security interest. Adjudication of disputes between the lender and a borrower to ascertain existence of debt, is within the realm of DRT proceedings or civil suit/arbitration, as the case may be.

16. The misgivings regarding the interplay between SARFAESI Act and A&C Act has been laid to rest by Supreme Court in M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., reported as **(2017) 16 SCC 741**, where it has been held that SARFAESI Act provides for a remedy in addition to the provisions of the A&C Act and there is no conflict between the two proceedings as they act cumulatively is what has been held by Supreme Court. Following is quoted from the said judgment to emphasise the ratio.

> *"32. The aforesaid is not a case of election of remedies as was sought to be canvassed by the learned Senior Counsel for the appellants, since the alternatives are between a civil court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an Arbitral Tribunal has been elected. The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In Transcore v. Union of India [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is*

what has been envisaged under the SARFAESI Act and the two Acts are cumulative remedies to the secured creditors.

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.

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. [Sarthak Builders (P) Ltd. v. Orissa Rural Dev. Corpn. Ltd., 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83] , the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] and the Division Bench of the Allahabad High Court in Pradeep Kumar Gupta v. State of U.P. [Pradeep Kumar Gupta v. State of U.P., 2009 SCC OnLine All 877 : AIR 2010 All 3] 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 [Deccan Chronicles Holdings Ltd. v. Union of India, 2014 SCC OnLine AP 104 : AIR 2014 AP 78] following the overruled decision of the Orissa High Court in Subhash Chandra Panda v. State of Orissa [Subhash Chandra Panda v. State of Orissa, 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88] does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

17. While inter-play between SARFAESI Act and A&C Act, has been resolved in favour of A&C Act in MD Frozen Foods(Supra), the conflict between A&C Act and RDB Act, has been resolved in favour of RDB Act in Vidya Drolia v. Durga Trading Corpn., reported as **(2021) 2 SCC 1,** by holding that the disputes covered under RDB Act are non-arbitrable. Following is quoted from Vidya Drolia(Supra) with judicial deference:

"56. In M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] , and following this judgment in Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd. [Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783 : (2018) 4 SCC (Civ) 703] , it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act.

The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

57. In Transcore [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , on the powers of the Debt Recovery Tribunal ("DRT") under the DRT Act, it was observed : (SCC p. 141, para 18)

> *"18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."*

58. Consistent with the above, observations in Transcore [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] on the power of the DRT conferred by 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 [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] , 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. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] has been referred to in M.D. Frozen Foods Exports (P) Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] , but not examined in light of the legal principles relating to non-arbitrability. The decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] 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 of 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."

18. The decision in Vidya Drolia (Supra) holds that the claims of banks and financial institutions covered under the RDB Act are non-arbitrable. However, the jurisdiction exercised by the Debt Recovery Tribunal (hereafter, "DRT") while acting under RDB Act and SARFAESI Act is different and the two acts are complementary to each other. While the RDB Act provides for the mechanism and machinery equipped for determination of the due debts, the mechanism under SARFAESI Act is concerned with recovery of secured debts. The presence of an adjudication mechanism in both the RDB Act and A&C Act leads to overlap and conflict, and thus the non-arbitrability of the subject dispute as laid down in Vidya Drolia (Supra). However, there is no such conflict between the A&C Act and SARFAESI Act, with both dealing with different aspects of the dispute, and hence the ratio of M.D. Frozen Foods (Supra) holds true and there is no bar on simultaneous proceedings under SARFAESI Act and A&C Act.

19. In the present case however, there is no indication or an assertion made by the respondent that it has been notified as a financial institution under RDB Act, which may have brought ouster of jurisdiction of civil court under Section 18 of the RDB Act, into play.

20. From the aforesaid discussion, it is safely concluded that SARFEASI Act does not *per se* make the disputes in relation to the underlying financing agreements, non-arbitrable. In this regard, reference is made to the concurring view taken by courts in Hero Fincorp. Ltd. v. Techno Trexim (I) (P) Ltd., reported as **2022 SCC OnLine Del 3859** and Paisalo Digital Ltd. v. Sat Priya Mehamia Memorial Education Trust & Ors, decided on **03.04.2024** in **ARB.P.396/2024.** In Fermina, the Court has held as under:

> *"51. In any case and in light of the enunciation of the law in terms of the decisions which have been noticed above, the Court finds itself unable to hold that the provisions of the RDB Act or the SARFAESI can be read or understood as introducing an omnibus bar to arbitration and the trial of disputes in accordance with the procedure prescribed under the 1996 Act. The Court would in each case have to consider the nature of the dispute which stands raised and examine whether it is one which those two statutes mandate being tried only by the DRTs in accordance with their respective provisions."*

21. It is thus amply clear, in view of the catena of decisions discussed hereinabove, that proceedings under the SARFAESI Act alone would not bar an aggrieved party from seeking relief under the A&C Act. In the present case, the SARFAESI proceedings have not even been initiated, but only contemplated. Thus, the challenge to the present petition on this ground must fall.

22. In view of the above discussion, this Court deems the present case fit for referring the parties to arbitration. Be that as it may, during the course of arguments consensus emerged between the parties and they agreed to refer the disputes for arbitration by a tribunal comprising of a sole arbitrator.

23. As far as petitioner's request for stay of recall notice dated 26.12.2024 and default notice dated 03.01.2025, as an interim measure, pending arbitration is concerned, this court has serious doubts if such a direction can

even be issued under Section 9. It is doubtful if the relief sought for falls in the category of interim measures taken for the protection of the subject matter of the dispute. Furthermore, interim stay of recall notice will amount to grant of final relief, which is the relief that the petitioner is likely to seek in the arbitral proceedings, since the recall notice is under challenge, even in these proceedings, which is basis for seeking interim orders.

24. The legality of recall notice, being a matter of substantive dispute between the parties, is left open to be decided in the arbitral proceedings. Even otherwise, under Section 41(e) of the Specific Relief Act, courts are precluded from granting injunction to enforce a contract which can't be specifically enforced-which under Section 14 (d), determinable contracts are not. It is argued by the respondent that the loan agreement between the parties, was determinable in nature. Under Clause 12.2, respondent could recall the loan pursuant to the occurrence of an Event of Default as defined in Clause 12.1 of the agreement.

25. In view thereof, court is not inclined to grant the reliefs claimed in the petition, however, the petitioner may approach the arbitrator, with an appropriate application under Section 17, for the same relief, or any other relief, it may choose to assert. As stated above, this court has not commented upon the legality of the recall notice, prima facie, or otherwise, lest it prejudiced the Petitioner's prospects in arbitration. Resultantly, the following directions are issued:

i) The disputes between the parties under the said agreement are referred to the Arbitral Tribunal and the present petition itself could be treated as an application under Section 17 of the A&C Act.

ii) Mr. Justice Jayant Nath, former Judge at High Court of Delhi, (Mob.No. 8527959494) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

iii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018 or as the parties may agree.

iv) The learned Arbitrator shall furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.

v) It is made clear that all the rights and contentions of the parties, including on the existence and validity of the Arbitration agreement, arbitrability of any of the claim/counter claim, any other preliminary objection, need and legality of interim relief, as well as contentions on merits of the dispute by either of the parties, are left open for adjudication by the learned arbitrator.

vi) The parties shall approach the learned Arbitrator within two weeks from today.

26. The petition is disposed of in the above terms alongwith pending application.

MANOJ KUMAR OHRI
(JUDGE)

JANUARY 15, 2025/*ry*
(order is released on 06.02.2025)