MANU/DE/3216/2021

Equivalent Citation: 2021VIAD(Delhi)390, 286(2022)DLT323

IN THE HIGH COURT OF DELHI

FAO (OS) 40/2020 and CM No. 15441/2020

Decided On: 24.11.2021

Appellants: **Tata Capital Housing Finance Ltd.**
Vs.
Respondent: **Shri Chand Construction and Apartment Private Limited and Ors.**

Hon'ble Judges/Coram:
Vipin Sanghi and Jasmeet Singh, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Sanjeev Singh, Ridhi Pahuja and Deepak Anand, Advocates

For Respondents/Defendant: Rajat Aneja and Rajula Gaur, Advocates

JUDGMENT

Jasmeet Singh, J.

1. The present appeal has been filed by the appellant TATA CAPITAL HOUSING FINANC LTD. (hereinafter referred to as 'appellant'), being aggrieved by the order dated 04.03.2020 passed in IA No. 11823/2019 in CS(OS) No. 179/2019 titled SHRI CHANI CONSTRUCTION & APARTMENT PVT. LTD. VERSUS TATA CAPITAL HOUSING FINAI LTD. Vide said order, the learned Single Judge dismissed the application filed by the defendant/appellant in the suit, under Section 8 of the Arbitration and Conciliation Act, 1996.

2. Briefly stating the facts in the present appeal as under:

3. The respondent filed a suit for recovery of Rs. 3,40,00,000/- against the appellant with interest @ 18% per annum pendente lite and future interest on account of loss of the security documents in the form of original title documents (which had been kept by the respondent with the appellant) of the immovable property mortgaged with the appellant vide loan account no. 9921466 & 9904086. The respondent has cleared the loan in question and nothing remained due or recoverable by the appellant against the respondent. The property in question i.e. C-7, Greater Kailash-I, New Delhi-110048, admeasures 300 sq. yards approximately.

4. The respondent purchased two portions of the said property comprising the first floor and second floor with a terrace. The respondent availed finance facility from the appellant to the tune of Rs. 2.3 crores vide Loan Account No. 9904086, in the month of March 2017 and another sum of Rs. 8,00,000 (Rs. Eight lakhs only) vide separate loan agreement dated 18.04.2017, Loan Account No. 9921466. The respondent handed over 17 original documents of the property as under:

S.Nos.	Description of Documents	Document Type
1.	ORIGINAL NO DUES LETTER FROM IIHFL TO SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
2.	ORIGINAL RECEIPT DATED 10/04/2015 FROM BAJAJ FINANCE LTD TO NIKHIL AGGARWAL	ORIGINAL
3.	ORIGINAL RECEIPTS(2 NOS.)FROM HDFC BANK LTD TO MRS. ARUNA AGARWAL	ORIGINAL
4.	ORIGINAL AGREEMENT TO SELL DATED 05.05.1988 BETWEEN RADHA KRISHNA IN FAVOUR OF SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
5.	ORIGINAL AGREEMENT TO SELL DATED 12.08.1988 BETWEEN SAVITA BAL AND SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
6.	ORIGINAL GENERAL POWER OF ATTORNEY DATED 12.08.1988 BETWEEN SAVITA BAL AND ATUL BANSAL	ORIGINAL
7.	ORIGINAL SALE DEED DATED 13.04.2009 EXECUTED BY SAVITA BAL IN FAVOUR OF SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
8.	ORIGINAL SALE DEED DATED 08.12.1989 EXECUTED BY MR. PREM CHAND, RAMESH KUMAR BATRA AND USHA BATRA IN FAVOUR OF SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD. THROUGH ITS DIRECTOR MR. ATUL BANSAL	ORIGINAL
9.	ORIGINAL SALE DEED DATED 08.12.1989 EXECUTED BY MR. PREM CHAND, RAMESH KUMAR BATRA AND USHA BATRA IN FAVOUR OF SHRI CHAND CONSTURCTIONS AND APARTMENTS PVT. LTD. THROUGH ITS DIRECTOR MR. ATUL BANSAL	ORIGINAL
10.	ORIGINAL SALE DEED DATED 06.05.1988 EXECUTED BY MR. RADHA KRISHAN IN FAVOUR OF PREM CHAND	ORIGINAL
11.	ORIGINAL WILL DATED 12.08.1989 EXECUTED BY SAVITA BAL IN FAVOUR OF ATUL BANSAL	ORIGINAL
sale	ORIGINAL GENERAL POWER OF ATTORNEY BY PREM CHAND IN FAVOUR OF RAMESH KUMAR SONDHI	ORIGINAL
13.	ORIGINAL RECEIPT DATED 04.05.1988 FROM JITENDRA TO SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
14.	ORIGINAL RECEIPT DATED 15.07.1988 FROM JITENDRA TO SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
15.	ORIGINAL RECEIPT DATED 17.08.1988 FROM JITENDRA TO SHRI CHAND CONSTRUCTIONS AND APARTMENTS PVT. LTD.	ORIGINAL
16.	ORIGINAL FIR DATED 02.02.2009 FROM SHRI CHAND CONSTRUCTION AND APARTMENTS PVT. LTD. WITH SHO MALVIYA NAGAR POLICE STATION NEW DELHI	ORIGINAL
17.	ORIGINAL NEWSPAPER CUTTING IN LIEU OF LOSS OF SALE DEED.	ORIGINAL

5 . The respondent made the entire payment under the two loan accounts to the appellant in the month of May, 2018 and, thereafter, requested for return of original documents. The respondent claimed that it had buyers for the first floor of the property in question, but on account of lack of original documents, they kept delaying the execution of the sale deed. The appellant, it appears, lost/misplaced the aforesaid original documents and lodged an FIR on 21.06.2018 with the Crime Branch of Delhi Police, wherein the appellant reported the loss of the original documents on 10.01.2018. As a result, the respondent filed the suit seeking recovery of Rs. 3,40,00,000 (Rs. 3 crores Forty Lacs only) as damages. The respondents stated the following reasons as the basis for their claim of a sum of Rs. 3,40,00,000/-:

a) They had to sell, first floor and the third floor, at a reduced price and;

b) Also had to suffer depletion in the market value of the Basement and Ground floor and till date have been unable to sell these portions;

c) As a result, they have suffered enormous losses and depletion of wealth.

6 . Thus, the respondent sought recovery of damages/compensation owing to loss of valuable property documents in the form of original title documents of property number C-7, Greater Kailash-I, New Delhi-110048 to the tune of Rs. 3,40,00,000/-.

7. The suit was first listed before the learned single judge of this Court on 01.04.2019, wherein subject to reservations expressed in the order, the suit was entertained and summons were ordered to be issued. The appellant appeared before the Joint Registrar on 20.05.2019 and stated that complete set of documents and 3 pages of the plaint had not been received. It was also stated that there is an arbitration clause in the agreement between the parties and an application for referring the parties to arbitration would be filed.

8 . On 01.08.2019, no written statement of the appellant was on record. When on 21.08.2019, the Written Statement was still not filed by the appellant, the learned Single Judge closed the right of the appellant to file the written statement and the respondent was directed to file an affidavit by way of examination in chief. Against this order of closing the right to file the written statement, the appellant filed FAO (OS) 179/2019 and the Division Bench vide order dated 27.09.2019, permitted the appellant to file the written statement by 11.10.2019.

9 . In the meanwhile, the appellant filed IA No. 11823/2019 under Section 8 of the Arbitration and Conciliation Act, 1996, contending that in view of the arbitration clause contained in the loan agreements, the respondent be directed to pursue his claim through arbitration, and the arbitrator must be appointed in accordance with the terms and conditions of the loan agreement. The respondent opposed the said application on the ground that the appellant by its conduct, as aforesaid, has disentitled himself from applying under Section 8 of the Arbitration Act.

10. It was contended by the respondent that by filing an appeal to the Division Bench against the order of 21.08.2019-which closed the appellant's right to file the written statement; the appellant had opted to proceed with the suit and now cannot be heard to claim Arbitration. The learned Single Judge rejected the argument of the respondent on this ground. However, the learned Single Judge, in the order impugned before us, held that the dispute raised in the suit cannot be said to be covered by Clause 12.18 of the Dispute Resolution clause of the Loan agreement, and was of the view that the arbitration agreement, in the present case, was invalid. The discussion found in the

impugned judgment reads as follows:

> "24. I have enquired from the counsel for the defendant, whether by any change or amendment in law or notification issued by the Central Government or otherwise, the defendant comes under the purview of Securitisation and the Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) or the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (DRT Act).
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> **25.** The counsel for the defendant states that the defendant comes under the purview of the SARFAESI Act. He however states that it was not so on the date of entering into the agreement containing the arbitration clause but is a subsequent development. Later, he states that SARFAESI Act provisions became available to the defendant prior to the agreement dated 29th March, 2017.
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> **26.** I have enquired from the counsel for the defendant, that once the defendant has come under the purview of the SARFAESI Act, whether not the second part of the clause aforesaid in the agreement would apply, ceasing the effect of the arbitration clause.
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> **27.** The counsel for the defendant states that the arbitration clause will cease to have effect only as far as the claim of the defendant against the plaintiffs is concerned but will continue to have effect as far as the claims of the plaintiffs against the defendant are concerned.
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> **28.** On enquiry, whether there can be a valid arbitration clause providing for arbitration of claims of one of the party and providing for the remedy of the Court or any other fora for claims of the other party, the counsel for the defendant is unable to cite any law.
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> **29.** Section 7 of the Arbitration Act defines an 'arbitration agreement' as meaning 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. In my view, the words "all or certain disputes" permit classification of disputes but do not permit classification of claims. The said words, in my view, do not allow a provision providing for claims of one of the parties arising in respect of a defined legal relationship to be adjudicated by arbitration but the claim of the other party arising in respect of the same legal relationship to be adjudicated by any other mode. The same would be contrary to the public policy prohibiting splitting up of claims and causes of action as enshrined in the provisions of the CPC and would result in multiplicity of proceedings, with claims of one of the parties to a legal relationship being decided by one forum and the claims of the other party to the same legal relationship being decided by another forum and possibility of conflicting findings. Such cannot be the interpretation of the words "all or certain disputes". The said words have to be interpreted as permitting the parties to specify the disputes of a particular nature/class to be submitted to arbitration, whether the said dispute arises from the claim of one or the other party,
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> .....
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> ...

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34. Even otherwise, the dispute resolution clause aforesaid is contained in a Loan Agreement dated 18th April, 2017 between the parties where under the defendant loaned monies to the plaintiffs and the plaintiffs agreed to re-pay the same. Clause 2.4 of the Loan Agreement required the plaintiffs to furnish security and further provided that upon full and final payment by the plaintiffs to the defendant of all amounts, the defendant shall release the security in favour of the plaintiffs. It is not in dispute that the plaintiffs have repaid all the dues of the defendant but the defendant has been unable to return the security deposited by the plaintiffs with the defendant and the claim of the plaintiffs in the present suit is only for damages for not so returning the security in the form of title deeds of immovable property of the plaintiffs. The said dispute cannot be said to be covered by Clause 12.18 of the Dispute Resolution clause reproduced above of the Loan Agreement.

35. In this context, the introduction in Section 8 of the Arbitration Act by the amendment with effect from 23rd October, 2015 of the words "unless it finds that prima facie no valid arbitration agreement exists", the Court while adjudicating an application under Section 8 Arbitration Act is entitled to adjudicate the question of validity of the Arbitration Agreement. The Arbitration Agreement in the present case in view of admission of the defendant of the defendant coming within the purview of the SARFAESI Act is not found to be valid.

36. The application is thus dismissed."

11. This finding of the learned Single Judge has been assailed before us in the present appeal.

12. The appellant has relied on the following judgments:

- Sundaram Finance Ltd. v. T. Thankam, MANU/SC/0177/2015 : (2015) 14 SCC 444

- Magma Leasing & Finance Ltd. v. Potluri Madhavilata, MANU/SC/1672/2009 : (2009) 10 SCC 103

- M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., MANU/SC/1244/2017 : (2017) 16 SCC 741

- Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components, MANU/SC/0985/2018 : (2018) 9 SCC 774

13. In order to appreciate the controversy, it will be relevant to reproduce the arbitration clause which reads as under.

"12.18 *DISPUTE RESOLUTION*

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

negotiations/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 TCHFL. In the event of death, refusal neglect, inability, or incapability of the person so appointed to act as an Arbitrator, TCHFL 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 TCHFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCHFL 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 TCHFL 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 TCHFL, cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCHFL 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 TCHFL exercises its option of terminating the mandate or arbitrator, as the case may be. Provided that neither a change in the legal status of TCHFL 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.

The Borrower's liability hereunder shall not be affected, terminated or prejudiced by the death, insolvency or any incapacity of the Borrower, but such liability shall continue in full force and effect and shall be binding on the Borrower's successors provided in the title and as the case may be."

(emphasis added)

14. Learned Counsel appearing for the Appellant has argued that the findings of the learned Single Judge are incorrect for the following reasons:

i. Under Section 37 of the SARFAESI Act, the application of other laws is not barred. Section 37 reads as under.

> *"The provisions of this Act or the rules made thereunder **shall be in addition to, and not in derogation of**, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) **or any other law for the time being in force."***
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> (emphasis supplied)

ii. According to the learned Counsel for the appellant, the SARFAESI Act only gives the appellant an additional remedy but in no way take away the option of demanding arbitration under the Arbitration and Conciliation Act, available to the appellant, in the light of the Agreement of the parties.

iii. It has further been argued by learned Counsel for the appellant that loss of security in the form of original title deeds will not come with the purview of the SARFAESI Act. Hence in the case of loss of documents, resort to arbitration is the only option available to the parties to pursue their remedies.

iv. It has been argued that the Appellant had never invoked the provision of SARFAESI Act in the facts of the present caseand, therefore, the trigger for the arbitration agreement ceasing to have effect did not kick in.

v. Lastly, it has been argued that Clause 12.17 of the loan agreement covers loss of documents and, hence, arbitration is the only mode of adjudication. Clause 12.17 reads as under:

> *"TCHFL shall take all reasonable endeavours for the safe upkeep of the title deeds and documents relating to the Secured Assets. In the event of the loss of possession/damages/destruction of such title deeds and documents by TCHFL for any reasons whatsoever, the Borrower acknowledges and confirms that TCHFL shall only provide its reasonable assistance to the Borrower to retrieve or rearrange the certified copies of the same from the relevant Government Agency. It is clarified for the abundant caution that the Borrower shall not be entitled to receive any damages, compensation, performance, losses (including any form of consequential losses) prejudice, expenses, costs, liability, guarantee or indemnities from TCHFL and from any TCHFL's officers, employees, agents, representatives and the liability of TCHFL shall be limited to providing the reasonable assistance as noted hereinabove."*

vi. Relying on Sundaram Finance Ltd. (supra), the appellant has argued that where the arbitration clause exists, it is obligatory for the court to refer the disputes arising between the contracting parties to the arbitrator. The Supreme Court observed:

> ***"8.*** *Once there is an agreement between the parties to refer the disputes or differences arising out of the agreement to arbitration, and in case either party, ignoring the terms of the agreement, approaches the civil court and the other party, in terms of Section 8 of the Arbitration Act, moves the court for referring the parties to arbitration before the first statement on the substance of the dispute is filed, in view of the peremptory language of Section 8 of the Arbitration Act,* ***it is obligatory for the court to refer the parties to arbitration in terms of the agreement****, as held by this Court in P. Anand Gajapathi Raju v. P.V.G. Raju* [MANU/SC/0281/2000 : (2000) 4 SCC 539 : (2000) 2 SCR 684].
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> ***9.*** *The position was further explained in Hindustan Petroleum Corpn. Ltd. v. Pinkcity Midway Petroleums* [MANU/SC/0482/2003 : (2003) 6 SCC 503]. *To quote:* (SCC pp. 510-11, para 14)
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> > *"14. This Court in P. Anand Gajapathi Raju v. P.V.G. Raju* [MANU/SC/0281/2000 : (2000) 4 SCC 539 : (2000) 2 SCR 684] *has held that the language of Section 8 is peremptory in nature.* ***Therefore, in cases where there is an arbitration clause in the agreement, it is obligatory for the court to refer the parties to arbitration in terms of their***

arbitration agreement and nothing remains to be decided in the original action after such an application is made except to refer the dispute to an arbitrator. *Therefore, it is clear that if, as contended by a party in an agreement between the parties before the civil court, there is a clause for arbitration, it is mandatory for the civil court to refer the dispute to an arbitrator.* ***In the instant case the existence of an arbitral clause in the agreement is accepted by both the parties as also by the courts below but the applicability thereof is disputed by the respondent and the said dispute is accepted by the courts below.*** *Be that as it may, at the cost of repetition, we may again state that the existence of the arbitration clause is admitted. If that be so, in view of the mandatory language of Section 8 of the Act, the courts below ought to have referred the dispute to arbitration."*

...

13. *Once an application in due compliance with Section 8 of the Arbitration Act is filed, the approach of the civil court should be not to see whether the court has jurisdiction. It should be to see whether its jurisdiction has been ousted. There is a lot of difference between the two approaches. Once it is brought to the notice of the court that its jurisdiction has been taken away in terms of the procedure prescribed under a special statute, the civil court should first see whether there is ouster of jurisdiction in terms or compliance with the procedure under the special statute. The general law should yield to the special law--generalia specialibus non derogant. In such a situation, the approach shall not be to see whether there is still jurisdiction in the civil court under the general law. Such approaches would only delay the resolution of disputes and complicate the redressal of grievance and of course unnecessarily increase the pendency in the court."*

(emphasis supplied)

vii. The appellant has also relied on M.D. Frozen Foods Exports (P) Ltd. (supra), to argue that both the RDDB Act (Recovery of Debts Due to Banks and Financial Institutions Act, 1993) and the SARFAESI Act can be resorted to simultaneously, and thus the arbitration proceedings are only an alternative to the RDDB Act. Section 37 of the SARFAESI Act, in fact, makes it clear that the provisions of the Act are in addition to and are not in derogation of any other law for the time being in force. The Supreme Court observed in this decision as follows:

"Question (i)

26. *A claim by a bank or a financial institution, before the specified laws came into force, would ordinarily have been filed in the civil court having the pecuniary jurisdiction. The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to civil court recovery*

proceedings.

27. *On the SARFAESI Act being brought into force seeking to recover debts against security interest,* ***a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act.*** *This issue was clearly answered in favour of such simultaneous proceedings in Transcore v. Union of India [Transcore v. Union of India,* MANU/SC/5319/2006 : (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116]. *A later judgment in Mathew Varghese v. M. Amritha Kumar [Mathew Varghese v. M. Amritha Kumar,* MANU/SC/0114/2014 : (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254] *also discussed this issue in the following terms: (Mathew Varghese case [Mathew Varghese v. M. Amritha Kumar,* MANU/SC/0114/2014 : (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254], SCC pp. 640-41, paras 45-46)

> *"45.* ***A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other.*** *In this context reliance can be placed upon the decision in Transcore v. Union of India [Transcore v. Union of India,* MANU/SC/5319/2006 : (2008) 1 SCC 125: (2008) 1 SCC (Civ) 116]. *In para 64 it is stated as under after referring to Section 37 of the SARFAESI Act:*(SCC p. 162)
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> *'64. ... According to American Jurisprudence, 2d, Vol. 25, p. 652,* ***if in truth there is only one remedy, then the doctrine of election does not apply.*** *In the present case, as stated above, the* ***NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply.*** *Even according to Snell's Principles of Equity (31st Edn., p. 119),* ***the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.'***
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> *46. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the*

RDDB Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws is not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956; the Securities Contracts (Regulation) Act, 1956; the Securities and Exchange Board of India Act, 1992; the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force."

(emphasis in original)

28. *These observations, thus, leave no manner of doubt and the issue is no more res integra, especially keeping in mind the provisions of Sections 35 and 37 of the SARFAESI Act, which read as under:*

> ***"35. The provisions of this Act to override other laws.--****The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.*
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> ***
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> ***37. Application of other laws not barred.****--The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."*

29. *The aforesaid two Acts are, thus, complementary to each other and it is not a case of election of remedy.*

30. *The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings.* ***In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative.*** *[HDFC Bank Ltd. v. Satpal Singh Bakshi,* MANU/DE/5308/2012 : (2013) 134 DRJ 566] *That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.*

31. .....The jurisdiction of the civil court is barred for matters

covered by the RDDB Act, but the parties still have freedom to choose a forum, alternate to, and in place of the regular courts or judicial system for deciding their inter se disputes. All disputes relating to the "right in personam" are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. *A claim of money by a bank or a financial institution cannot be treated as a "right in rem", which has an inherent public interest and would thus not be arbitrable.*

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 RDDB 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,* MANU/SC/5319/2006 : (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."

(emphasis supplied)

15. The appellant has also relied on Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. (supra) wherein, the agreement provided that the disputes should be settled by arbitration or by the court. The Supreme Court held that there being an option, and the option of arbitration having been exercised, the arbitration should proceed. The Supreme Court observed:

"4. To appreciate the controversy, it is required to be seen whether there is an arbitration clause for resolution of the disputes. Clause 15 of the agreement as translated in English reads as follows:

"15. Dispute handling.--Common processing contract disputes, the parties should be settled through consultation; consultation fails by treatment of to the arbitration body for arbitration or the court."

7. To appreciate the clause in question, it is necessary to appositely understand the anatomy of the clause. It stipulates the caption given to the clause "dispute handling". It states that the disputes should be settled through consultation and if the consultation fails by treatment of to the arbitration body for arbitration or the court. On a query being made, the learned counsel for the parties very fairly stated that though the translation is not happily worded, yet it postulates that

the words "arbitration or the court" are indisputable as far as the adjudication of the disputes is concerned. There is assertion that disputes have arisen between the parties. The intention of the parties, as it flows from the clause, is that efforts have to be made to settle the disputes in an amicable manner and, therefore, two options are available, either to go for arbitration or for litigation in a court of law.

8. This Court had the occasion to deal with such a clause in the agreement in Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd. [Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd., MANU/SC/3778/2008 : (2008) 10 SCC 308] In the said agreement, Clause 13 dealt with the settlement of disputes. Clauses 13.2 and 13.3 that throw light on the present case were couched in the following language : (SCC p. 311, para 6)

> "6. ... '13.2. Subject to Clause 13.3 all disputes or differences arising out of, or in connection with, this agreement which cannot be settled amicably by the parties shall be referred to adjudication;
>
> **13.3**. If any dispute or difference under this agreement touches or concerns any dispute or difference under either of the sub-contract agreements, then the parties agree that such dispute or difference hereunder will be referred to the adjudicator or the courts as the case may be appointed to decide the dispute or difference under the relevant sub-contract agreement and the parties hereto agree to abide by such decision as if it were a decision under this agreement.'"

9. Interpreting the aforesaid clauses, the Judge designated by the learned Chief Justice of India held thus: (Indtel Technical Services case [Indtel Technical Services (P) Ltd. v. W.S. Atkins Rail Ltd., MANU/SC/3778/2008 : (2008) 10 SCC 308], SCC p. 318, para 38)

> "38. Furthermore, from the wording of Clause 13.2 and Clause 13.3 I am convinced, for the purpose of this application, that the parties to the memorandum intended to have their disputes resolved by arbitration and in the facts of this case the petition has to be allowed."

The aforesaid passage makes it clear as crystal that emphasis has been laid on the intention of the parties to have their disputes resolved by arbitration.

10. In the case at hand, as we find, Clause 15 refers to arbitration or court. Thus, there is an option and the petitioner has invoked the arbitration clause and, therefore, we have no hesitation, in the obtaining factual matrix of the case, for appointment of an arbitrator and, accordingly, Justice Prakash Prabhakar Naolekar, formerly a Judge of this Court, is appointed as sole arbitrator to arbitrate upon the disputes which have arisen between the parties. The learned arbitrator shall be guided by the Arbitration and Conciliation (Amendment) Act, 2015. The learned arbitrator shall make positive efforts to complete the arbitration proceedings as per the 2015 Act.

11. The Registry is directed to send a copy of this order to the sole arbitrator. The learned counsel for the parties is also at liberty to bring it to the notice of the arbitrator.

16. Per contra, Mr. Rajat Aneja, learned Counsel appearing for the respondent, has

argued that there cannot be a valid arbitration clause providing for arbitration of claims of one party, and providing for any other remedy for a for claim of the other party.

17. It has further been argued that Section 7 of the Arbitration Act permits classification of disputes, but does not permit classification of claims. The present arbitration clause, as reproduced by us above, is permitting the classification of claims, which is contrary to the "spirit of mutuality" contained in an arbitration agreement. Learned Counsel for the respondent has relied upon:

- Union of India v. Bharat Engineering Corporation,
- Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd.
- Emmsons International Ltd. v. Metal Distributors (UK)

18. We have heard learned Counsels for the parties and gone through the documents. We are of the view that the present appeal is devoid of merit and deserve to be rejected. Our reasons for saying so are as under:

19. The relevant portion of the arbitration clause which according to us is contrary to law reads as under:

> "12.18....Notwithstanding anything contained hereinabove, in the event due to any change in the legal status of TCHFL or due to any change or amendment in law or notification being issued by the Central Government or otherwise, TCHFL 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 TCHFL to enforce the security under the SARFAESCI Act or proceed to recover dues from the Borrower under the SARFAESCI Act and/or the DRT Act, the Arbitration provision hereinbefore contained shall at the option of TCHFL, cease to have any effect and if arbitration proceedings are commenced but no award is made, then at the option of TCHFL 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 TCHFL exercises its option of terminating the mandate or arbitrator, as the case may be. Provided that neither a change in the legal status of TCHFL nor a change/amendment in law or issuance of notification as referred to this sub paragraph above, will result in invalidating an existing award passed by an Arbitrator pursuant to the provisions of this Agreement...."

20. The entire arguments before us have centered around the issue: whether the above clause is a valid Arbitration clause.

21. The wording of the above clause allows the appellant the option to enforce the security under the SARFAESI Act. The moment the Appellant exercises the option, the arbitration agreement ceases to have any effect i.e., the option of arbitration can be abandoned at the will of Appellant only. The above clause nowhere mentions that the respondent has the same right. Thus, the option to give a go-bye to the Arbitration agreement is only available to the Appellant and not to the Respondent. Such a clause destroys the essential feature of an Arbitration agreement i.e. of mutuality.

22. The clause negates the essential element of an arbitration agreement, which is,

mutual promise to submit differences to arbitration i.e. mutuality. Mutuality does not permit reservation of the right of reference to arbitration to only one party. For a valid Arbitration agreement, it is essential that either of the parties have the right to ask for a reference. We are supported in our view by Union of India v. Bharat Engineering Corporation

> "13. The ambiguity in clause 64 makes two interpretations possible: either the clause means, as the contractor says, that only he can demand a reference; or, as is contended by the Railway, that both parties can invoke it. The question which at once arises is whether, in law, there can be an arbitration agreement reserving the right of reference to only one party. For, if there cannot be an arbitration agreement of that kind, the only way of sustaining the clause is by consturning it as conferring bilateral rights. This is how the question, which I posed at the beginning of this judgment, has arisen.
>
> **45.** A new aspect canvassed was 'that a one-sided option, is an infringement of the doctrine of "mutuality". It was stifled with the retort 'that the doctrine of mutuality which was one of the defences in English Law to an action for specific performance has been deliberately left out from the Specific Relief Act by the Legislature and .... is not applicable to India'. Certainly this is unexceptionable. Indeed, in the Specific Relief Act 1963, section 20(4) now expressly says: 'The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party'. But it is one thing to say that specific performance may be granted despite want of mutuality in a contract, and quite another to say that the inherent requirement, of a particular category of contracts is 'mutuality'. An arbitration agreement is unthinkable except as comprising mutual promises. Its very nature so dictates. The law of specific performance does not touch this question. It may well be that Mr. Aston misapprehended the submission made to him.
>
> **46.** 'Mutuality' was expressly recognised as an indispensable ingredient of an arbitration agreement in Harittina Italian Steamship Company v. Burjor Framrose Joshi, MANU/MH/0131/1929 : I.L.R. (1930 54 Bombay 278 (10).
>
> The facts of that case are similar to those of Burjor F.R. Joshi v. Ellerman City Lines, Ltd., MANU/MH/0108/1925 : A.I.R. 1925 Bombay 449 (5) and it seems the plaintiff was the same person. Again, potatoes were carried from Neples to Bombay, and the suit was for damages Clause 27 of the bill of lading provided that failing an amicable settlement 'either the shipper or the consignee, desiring to proceed against the company in Court of law' could do so before the judicial authority in Genoa, Neples, Cagliari or Venice 'in case of a dispute for not more than Iiras 500' and only in Genoa 'for sums over that amount'. Stay of proceedings in the suit was refused, and against that order there was an appeal. Right at the outset, Kemp, Ag. C.J., speaking for the Division Bench, ruled:
>
> '..... in order to extract the guiding principle from the cases which have been cited to as we may state, shortly, that they lay down that where there is no mutuality in the reference, i.e., where both the parties are not bound to refer the dispute to a particular tribunal, such a clause does not amount to a submission under section 4 of the Indian Arbitration Act.'

49. No fault can be found with the first half of this passage upto the words 'The contract binds him'. It merely decides that by the seller exercising his option an arbitration agreement came into force by which the buyer was bound. The next sentence is a little inaccurate due to anticipation of events. As it stands the clause does not fulfil 'the definition of "submission" '; but after the option is exercised, it would. It is the sentence which follows that causes the difficulty. The words: 'The test is ..... whether both parties are bound by that clause', affirm the principle of mutuality. I can find nothing wrong with them. The problem is, what do the words and not whether a right had also been expressly given to the (buyer) to initiate arbitration proceedings' signify?"

23. As elaborated further in Bharat Engineering Corporation (supra), the 2 Halsbery's Laws (4th ed.) 260 para 510, while dealing with optional arbitration under the statute, it is remarked: "If, however, the right of reference is open to only one of the parties an essential ingredient of arbitration, as the word is usually understood, is lacking."

24. Moreover, the court in Bhartia Cutler Hammer Ltd. v. AVN Tubes Ltd., struck down the clause that consisted of the arbitration agreement since it gave the right to invoke arbitration only to the defendant which did not amount to a bilateral arbitration clause.

"5. I have heard the learned counsel for the parties and perused the record. The short point for determination in this case is whether clause 18 of the alleged Arbitration Clause is unilateral and not enforceable in law? In order to appreciate this argument we have to look to clause 18 which is reproduced as under:--

"18. Arbitration

Without prejudice to the above Clause 17, of the contract the Company, M/s. AVN Tubes Limited, reserves its right to go in for arbitration, if any dispute so arisen is not mutually settled within 3 months of such notice given by the Company to the Contractor. And, the award of the Arbitrator, to the appointed by the Company, M/s. AVN Tubes Limited, shall be final and binding on both the Company and the Contractor.

Mr. Banati contends that by no stretch of imagination this clause can be called bilateral. In fact the remedy of this clause shows that the defendant kept to himself the power to refer its disputes only to Arbitration. But no such power of invoking the Arbitration clause are given to plaintiff. This clause is one sided, it reserves the right of arbitration only to defendant company. This shows that the contractor, i.e. the present plaintiff has no right to invoke the provisions of Clause 18. The right is only reserved by the defendant M/s. AVN Tubes Limited. Such a clause cannot be called an arbitration clause. He has placed reliance on the decision of Court of Appeal in the case BARON v. SUNUERLAND CORPORATION reported in All England Report 1966 (1) 349(351). In the case before the Court of Appeal, the question for consideration was that if there was a want of mutuality, can such an agreement be called an arbitration agreement? The answer given was in the negative. Therefore, what the Court of the appeal held was that in order to invoke the arbitration clause, there has to be mutuality. But in the case in hand, the right had been reserved by the defendant of taking its disputes only to arbitration and nowhere the right was given

to the contractor i.e. the plaintiff for invoking the arbitration clause. Therefore, apparently this clause suffers for want of mutuality. He has then placed reliance on the decision of the Calcutta High Court in the case of Union of India v. Ratilal R. Taunk reported in MANU/WB/0297/1966 : ILR 1966 (2) Calcutta, Page 527. In the case before the Calcutta High Court, a contractor had instituted a suit for recovery against the UOI pleading therein that the contract agreement was voidable because of mutual mistake of facts and alternatively it was voidable as it was based on mis-representation. UOI took up the plea that the suit was not maintainable because of arbitration clause embodied in the contract document. The question before that Court was whether an arbitration agreement is unilateral if one of the party only had the option to refer the disputes and differences to arbitration; whether such option can be validly accepted in law at the instance of other parties. It was held that according to Section 2(a) of the Arbitration Act. When an arbitration agreement gives an option or liberty to only one of the parties to agree to submit, present or future differences to arbitration, it is not an arbitration agreement, there must be an unqualified or unconditional agreement in favour of all the parties to exercise the option to submit present or future differences to arbitration. In order to be valid and binding, such agreement must be bilateral and not unilateral. Mr. Banati, therefore contended that this arbitration clause 18 is unilateral because by this clause defendant reserved to itself the right to go in for arbitration. This clause does not confer any right on the plaintiff/contractor to invoke this clause. Therefore such a clause cannot be called an arbitration clause. There is no binding arbitration agreement between the parties nor the Court can stay the suit on the basis of clause 18. Relying on the Calcutta decision Mr. Banati contended that even if defendant has chosen to invoke the provisions of this clause, still such a clause would be void for want of mutuality.

On the other hand Ms. Kumkum Sen appearing for the defendant contended that there is no question of want of mutuality in this case. The parties agreed to refer their disputes arisen between them to arbitration, therefore, no fresh consent was necessary to strengthen her argument. She placed reliance on the Division Bench Judgment of this Court in the case of P.C. Aggarwal, Appellant v. K.N. Khosla and others, respondents reported in MANU/DE/0048/1974 : A.I.R. 1975 Delhi page 54. Relying on the observation in that case, Ms. Sen contended that the consent by the plaintiff had been given in advance for submission to arbitration. This consent makes this clause bilateral and not unilateral this consent was given in advance it can be now acted upon. The defendant has in fact already acted upon the same. The previous consent will bind the plaintiff throughout. In this case the plaintiff after going through the contents of the arbitration clause entered into this agreement and thus bound himself with the same. Now since the disputes have arisen the matter has to be referred to arbitration. It does not behave on the part of the plaintiff to allege that it is unilateral clause. Even if it is mentioned in this clause that the reference will be in a particular manner, still it will be binding on the plaintiff The actual reference to the arbitration has to be recorded as a bilateral reference. The particular mode or the manner or the language used in Clause 18

of the agreement will not make it unilateral. Unilateral reference would mean that the agreement does not include reference of future disputes to Arbitration. If it is simply mentioned that in case of dispute those would be decided by Arbitration then such a clause cannot be called bilateral because it does not include reference of future disputes to Arbitration. But if the arbitration agreement between the parties includes the reference of future disputes to arbitration then the parties, or one of the parties, will have an option to proceed either under the provisions of Chapter II or under the provisions of Chapter III in proceeding with the reference. That is called bilateral clause. The Division Bench decision quoted by the respondent does not help him, because in that case the option was given to both the parties to invoke the arbitration clause. The arbitration clause which came up for interpretation before the Division Bench reads as under:--

> "In the event of any claim (whether admitted or not), difference or disputes arising between you and me/us out of these transactions the matter shall be referred to arbitration in Delhi as provided in the Rules. Bye-law and Regulations of Delhi Stock Exchange Association Ltd. Delhi."

A bare reading of the arbitration clause in the P.C. Aggarwal's case would show that both the parties had the option to invoke the clause. But that is not the case in hand. In the case in hand the right to invoke the arbitration is restricted only to the defendant. This to my mind, would not amount to bilateral arbitration clause nor the pre-consent can validate such a clause. The language used in Clause 18 clearly show it is one sided. Only disputes of defendants could be referred to Arbitration. The term arbitration agreement has been defined in the act which presupposes that the parties must agree mutually that in case of any dispute having arisen between them, the have the option to invoke the said clause. Therefore, the point for consideration before the Division Bench was not as in this case. In this case right is only given to the defendant to invoke the arbitration clause without any option to plaintiff. That being so this clause 18 cannot be called bilateral. Prior giving of consent for such a clause would not make it bilateral. The facts of this case are somewhat similar to the facts of Calcutta High Court which decision will squarely apply to the facts of this case. In view of my above observation I am of the opinion such a clause as clause 18 cannot be called an arbitration clause. On the basis of clause 18 suit cannot be stayed. Clause 18 is not a valid arbitration clause hence the application of the defendant deserve dismissal. The same is accordingly dismissed. The plaintiff should now get the summons for judgment issued by taking proper steps and appear before the Deputy Registrar on 12th July, 1991."

25. Clause 12.18, as detailed above also confers a unilateral option i.e., exclusive right on the appellant. Such clauses cannot be upheld since the same are against public policy.

26. The learned counsel for the Respondent has also relied on Emmsons International Ltd. v. Metal Distributors (UK), wherein the court while adjudicating upon clause 13 which provided arbitration as dispute redressal mechanism, also adjudicated upon

whether the same was against public policy and was hit by Section 28 of the Indian Contract Act 1872. The court observed that unilateral option clauses were void as they restrained one party's recourse to legal proceedings, in contravention of Section 28 of the Indian Contract Act, 1872. The court noted additionally that a unilateral clause would be void for being contrary to the public policy of India.

> "13. Learned counsel for defendant No. 1-applicant has submitted that the above authority would not govern the facts of the present case inasmuch as the three clauses contained in Clause 13 "Governing Law and forum for resolution of dispute" contain three distinct conditions namely:
>
> > (i) The contract shall be construed in accordance with and governed by English Law,
> >
> > (ii) Sellers shall be entitled at their opinion (should be option) to refer any dispute arising under this contract to arbitration in accordance with the rules and regulations of the London Metal Exchange; and
> >
> > (iii) to institute proceedings against buyers in any Courts of competent jurisdiction,
>
> **14.** Learned counsel for defendant No. 1 further submits that these clauses are independent and separable from each other, therefore, cannot be termed as unilateral and on that basis unenforceable. On the face of the above position, the important question with which this Court is confronted is as to whether such a condition in the contract is a valid condition capable of enforcement in Indian Courts or the same is against the pubic policy of India and/or hit by Section 28 of the Indian Contract Act 1872, Section 28 of the Indian Contract Act provides that agreements in restraint of legal proceedings will be void and reads as under:
>
> > **2 8 .** Agreements in restraint of legal proceedings, void-(Every agreement)
> >
> > > (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, or
> > >
> > > (b) which extinguishes the rights of any party thereto, or discharges any party thereto, from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent."
>
> **15.** The basis of the above legal provision is that no man can exclude himself from the protection of courts by contract. In other words, every citizen has the right to have his legal position determined by the ordinary tribunals, except, subject to contract (a) when there is an arbitration clause which is valid and binding under the law; and (b) when parties to a contract agree as to the jurisdiction to which dispute in respect of the contract shall be discharged. The section renders void those agreements which absolutely restrict a party to a contract from enforcing the rights under that contract in ordinary tribunals. As noticed above, Clause 13 of the agreement between the parties in the case in

hand imposes an absolute bar on the buyer of the goods i.e. the plaintiff from enforcing its rights under the contract before ordinary tribunals or through the Alternate Dispute Resolution mechanism. In the opinion of this Court, such type of absolute restriction is clearly hit by the provisions of Section 28 of the Contract Act besides it being against the public policy. Had it been a case where the restriction imposed by the contract was against the enforcement of the rights of the buyer before the ordinary tribunals but the agreement had provided for selection of one of several ordinary tribunals in which ordinarily a suit would lie, the defendant would have been within its right to enforce such an agreement.

16. Thus, having considered the matter from different angles and in depth this Court is of the considered view that Clause 13 being in the nature of a unilateral covenant depriving the plaintiff to enforce its right under the contract either through the ordinary tribunals set up by the State or through alternate dispute resolution mechanism is void and cannot be enforced in India. This Court has, therefore, no hesitation in holding that the present suit before this Court for enforcement of rights of the plaintiff under the contract is perfectly maintainable and is not hit by Clause 13 of the contract. The application has, therefore, no merits and is accordingly dismissed."

27. The reliance of the counsel of respondent on Emmsons (supra) maybe misplaced, in view of 2016 amendment to the Arbitration& Conciliation Act 1996, wherein, the scope of "public policy" has been clarified to be read as under:

"34. Application for setting aside arbitral award.--

(1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).

(2) An arbitral award may be set aside by the Court only if.

..

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice."

28. The judgment of Emmsons (supra) explained the law as in stood prior to insertion of Explanation 1, above.

29. In view of the above judgments, we are of the view that the clause 12.18, in question, cannot amount to a valid arbitration agreement since the clause lacks an essential element of an arbitration agreement-"mutuality." in as much as, the clause only gives one party i.e., the appellant the right to walk out of arbitration, and the same right is not conferred on the respondent.

30. In the present case it is only an option that is available to the Appellant i.e., one party while the respondents have no right to invoke the same provision, thus, there being no mutuality in reference.

31. The other contention of the appellant is that the arbitration clause will cease to have effect only as far as the right of the Appellant against the Respondent is concerned, but will continue to have effect as far as the claims of the Respondents against the Appellant are concerned.

32. Section 7 of the Arbitration Act, 1996, defines Arbitration Agreement as under:

> "SECTION 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; or
>
> (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."

33. A bare perusal of the section clearly shows that while "some or all disputes" can be referred to the arbitration, the parties are not at the liberty to split the claims which arise out of the same defined legal relationship i.e. there cannot be a valid arbitration clause providing for arbitration of claims of one party and providing for the remedy of the Court or any other fora for the claim of the other party.

34. In the present case, the appellant is within the purview of the SARFAESI Act even though it was not on the date of entering into the agreement containing the arbitration clause. The moment the appellant comes within the purview of the SARFAESI Act and DRT Act, the appellant has the option to enforce the security under the SARFAESI Act and to proceed to recover dues under the SARFAESI Act or the DRT Act and then the Arbitration provisions, at the option of the appellant, will cease to have effect. However, the appellant asserts that loss of security in the form of original title deeds will not come with the purview of SARFAESI Act. Hence in the case of loss of documents, resort to arbitration is the only option available to the respondent, meaning thereby, that in respect of the claim of the appellant i.e. recovery of dues from the respondent, the arbitration will cease and the SARFAESI will be enforced but since there are no dues recoverable and only recovery of loss documents remains, the arbitration will continue to have the effect (the claims of Respondent against the appellant).

35. In our opinion, this cannot be allowed. Since the claims arise in respect of the same legal relationship, the same cannot be split to be adjudicated by arbitration - in respect of claims of one party and, simultaneously, the claim of the other party arising in respect of the same legal relationship to be adjudicated/determined by the SARFAESI/DRT Act. If this is permitted, it may very well be possible that the respondent/plaintiff in the present suit in respect of the same injury would pursue his claims under the Arbitration and Conciliation Act, while the appellant - relying on the aforesaid clause, pursues his claim under SARFAESI/DRT Act. This would not only be permitting splitting up of claims and causes of action, but also result in multiplicity of proceedings and a possibility of conflicting judgments on the same issues.

36. The appellant, has placed reliance on Zhejiang Bonly Elevator Guide Rail Manufacture Co. Ltd. v. Jade Elevator Components, MANU/SC/0985/2018 : (2018) 9 SCC 774 wherein it held that there being an option, and the option of arbitration having been exercised, the arbitration should proceed. We have no quarrel with the said proposition and the same is binding. However, in our opinion, the reliance on the same is misconceived as all that the judgment states concerns two Acts that are complementary to each other, and it is not a case of election of remedy. In the present case, it is the election available to the appellant - and the appellant alone, which vitiates the fountain head of the Arbitration Clause.

37. The appellant has further relied on Sundaram Finance Ltd. and M.D. Frozen Foods Exports (P) Ltd. (Supra), to support his arguments. In all the cases cited by the appellant, the arbitration clause was not in dispute. However, in the present case, the challenge exists to the arbitration agreement, which is wanting in the essential element of valid arbitration agreement- "mutuality."

38. In our opinion, Bharat Engineering Corporation (supra) is squarely applicable to the facts of the present case. We are of the view that the option given to the appellant under Clause 12.18 is the antithesis to "the spirit of mutuality" contained in the arbitration clause, and the learned Single Judge in his order of 04.03.2020 has correctly dismissed IA No. 11823/2019 under Section 8 of the Arbitration and Conciliation Act holding that the arbitration agreement in the present case is invalid. In view of the facts, the appeal is dismissed.