HDFC Bank Ltd. Vs Satpal Singh Bakshi

Court: Delhi High Court

Date of Decision: Sept. 13, 2012

Acts Referred: Arbitration And Conciliation Act, 1996 â€" Section 5, 8, 11, 31, 31(7)
Code Of Civil Procedure, 1908 â€" Section 9, 89
Companies Act, 1956 â€" Section 442, 446, 537
Constitution Of India, 1950 â€" Article 226
Interest Act, 1978 â€" Section 4
Debt Recovery, Banks And Financial Institutions Act, 1993 â€" Section 2(b)(i), 2(d), 2(g), 2(h), 17, 18, 34, 34(2)

Citation: (2012) 193 DLT 203 : (2013) 134 DRJ 556 : (2013) 1 ILR Delhi 583

Hon'ble Judges: A.K. Sikri, Acting C.J.; Sanjay Kishan Kaul, J; Rajiv Shakdher, J

Bench: Full Bench

Advocate: Punit K. Bhalla and Ms. Chetna Bhalla, for the Appellant; Parag P. Tripathi, Amicus Curiae with Mr. Anuj Bhandari, for the Respondent

Final Decision: Dismissed

Judgement

A.K. Sikri, A.C.J.

1. This writ petition is filed by the HDFC Bank Limited (hereinafter referred to as the bank) questioning the validity of orders dated 9th March,

2011 passed in Appeal No. 116/2011 by the Debts Recovery Appellate Tribunal, Delhi (DRAT for short) which had confirmed the orders dated

8th October, 2010 passed by the Debts Recovery Tribunal - II (DRT-II for short) in OA 178/2009. The bank had filed OA before the DRT for

recovery of the outstanding amount against the loan disbursed to the respondent and in this OA, the respondent herein had filed application u/s 8 of

the Arbitration and Conciliation Act, 1996 (""Arbitration Act"") on the ground that Clause 14.7 of the loan agreement provided for adjudication of

disputes through arbitration by a sole arbitrator and, therefore, the respondent prayed for stay of the proceedings of the OA. This application was

allowed by the Presiding Officer vide order dated 8th October, 2010 holding that once there was an arbitration agreement between the parties,

provisions of the Arbitration Act as contained in Section 8 of the Arbitration Act would prevail over the Recovery of Debts Due to Banks and

Financial Institutions Act, 1993 (""RDB Act""). The DRT, thus, dismissed the OA as not maintainable giving liberty to the bank to refer the matter to

the arbitration as per law. The bank went in appeal but this order is maintained by the DRAT dismissing the appeal in limine. The present writ

petition is filed against the aforesaid orders. It is clear from the brief description of the factual matrix noted above that the core issue is which of the

two enactments, namely, Arbitration Act and RDB Act is to prevail over the other. The Division Bench has framed this legal question in the

following format:

Whether the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) are excluded in respect of

proceedings initiated by banks and financial institutions under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter

referred to as the RDB Act).

2. When the matter came up for hearing before the Division Bench, another judgment of Division Bench of this Court in Kohinoor Creations and

Ors. v. Syndicate Bank, IV (2005) BC 156 (DB)=2005 (2) Arb. LR 324 (Del), was referred to wherein it has been inter alia held that in view of

the provisions of Section 34 of the RDB Act, the provisions of Arbitration Act stand excluded and on that basis, it was argued that the view held

by DRT and DRAT in the impugned orders did not reflect the correct legal position which was contrary to the aforesaid judgment of this Court.

The Division Bench considered it proper that the matter required to be settled by a larger bench giving the following reasons therefore:

Learned Counsel for the petitioner has referred to a judgment of Division Bench of this Court in Kohinoor Creations and Ors. v. Syndicate Bank,

2005 (2) ARBLR 324 Delhi wherein it has been inter alia held that in view of the provisions of Section 34 of the RDB Act, the provisions of the

Arbitration Act stand excluded. In coming to this conclusion, specific emphasis is laid on Sub-section (2) of Section 34 of the RDB Act. Section

34 of the RDB Act reads as under-

34. Act to have over-riding effect-

(1) Save as otherwise provided in Sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith

contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made there under shall be in addition to, and not in derogation of the Industrial Finance Corporation Act,

1948,. the State Financial Corporation Act, 1951, the Unit Trust of India Act, 1963, the Industrial Reconstruction Bank of India Ltd., 1984, the

Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989.

The submission of the learned Counsel for the petitioner thus is, relying on the aforesaid judgment, that if a claim is over Rs. 10 Lakh then

jurisdiction of the Civil Court is excluded qua banks and financial institution, and therefore banks and financial institution have to necessarily

approach the DRT for recovery of the amount in terms of the RDB Act. In other words, the applicability of the Arbitration Act stands ousted. In

our considered view, Sub-section (2) of Section 34 of the RDB Act only provides that the provision of that Act are in addition to certain acts

specified therein. The question which arises for consideration is whether by implication all other Acts not referred to in Sub-section (2) of Section

34 are overridden by the provisions of the RDB Act. While considering this aspect, it will have to be borne in mind that firstly, the Arbitration Act

was enacted after the enforcement of the RDB Act and secondly, the exclusivity of jurisdiction conferred on the DRTs'' is perhaps applicable to

public forums as against private forums such as an arbitral tribunal. To test the proposition, if one were to ask whether the DRT would refuse to

pass an order on a compromise application where parties agree to an (sic) of an arbitrator on a portion of a claim during the pendency of the

matter before it; the answer may perhaps be in the negative. There are therefore, to our mind, several unanswered aspects of the matter which

require closer examination.

We are thus of the view that this matter is of some importance and thus the question of law as aforesaid, needs to be settled by a Larger Bench of

this Court....

3. This is how the matter was placed before this Bench. Keeping in view the importance of the issue involved and also that the respondent has

failed to put in appearance inspite of service, we had requested Mr. Parag P. Tripathi, learned senior Counsel to assist the Court. Mr. Tripathi

stated that after examining the whole matter, he was of the view that RDB Act was a special statute which would prevail over the Arbitration Act.

He thus argued on these lines thereby supporting the cause of the bank. Mr. Tripathi opened his submission by explaining the special status of the

RDB Act and the raison d''etre behind this enactment. He impressed upon the fact that this Act was enacted in the background of swelling Non

Performing Assets (NPAs) and difficulty of banks and financial institutions to recover loans and enforcement of the same. Mostly, these institutions

are public financial institutions and monies are public money. The focus was therefore expeditious adjudication and recovery of debts. The validity

of the Act was upheld by the Supreme Court in Union of India and Another Vs. Delhi High Court Bar Association and Others, , which set aside

the judgment of the High Court. Referring to preamble of the RDB Act, he pointed out that the same provides for ""establishment of tribunals for

expeditious adjudication and recovery of debts due to banks and financial institutions"". Going by the Objects and Reasons behind the RDB Act, it

was crystal clear that the purpose was to unlock the locked potentials of NPAs. In this sense, he submitted, RDB Act was special statute enacted

for specific purpose. In this context, explaining the concept of a special law or statute, of Mr. Tripathi endeavoured to build step by step edifice of

his submissions in the following manner:

(a) Section 9 of CPC makes it clear that every party has a right of recourse to civil remedy before a duly constituted civil Court unless the remedy

is barred either expressly or by implication. It is also a settled law that any provision ousting the jurisdiction of civil Court must be strictly construed

[Sahebgouda (dead) by Lrs. and Others Vs. Ogeppa and Others,].

(b) He then explained the working of RDB Act pointing out that RDB Act is relatable to Entry 45 of List I (Banking). Preamble of this Act

provides for ""establishment of tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions...."". u/s 19, only a

bank or a financial institution [as defined u/s 2(d) and (h) of the RDB Act] can trigger the provisions of the RDB Act when the ''debt'' [as defined

u/s 2(g)] is more than Rs. 10 Lakhs [Section 1(4)]. Therefore, RDB Act operates within a very narrow compass and deals with a very special

situation of recovery of debts due to banks and financial institutions, which clearly makes it a special law dealing with a specific situation.

(c) On the other hand, Arbitration Act relates to Entry HA (Administration of Justice) and Entry 13 (Civil Procedure, including Arbitration) of List

III. As per the preamble of this Act, it ""consolidates and amends the law relating to domestic arbitration, the international arbitration and

enforcement of foreign arbitral awards as to define the law relating to Constitution...."". Premised on this, submission of Mr. Tripathi was that the

Arbitration Act takes within its sweep all possible arbitrations dealing with an exceptionally wide cross Sections and possible areas of disputes.

Any dispute, which is arbitrable in nature, would be governed by the provision of the Arbitration Act, which exposes its general nature as regards

the subject matter of disputes it deals with. Further, an arbitral tribunal is an alternative to civil Courts and its jurisdiction would coincide with a civil

Court [Executive Engineer, Dhenkanal Minor Irrigation Division v. N.C. Budharaj, I (2001) SLT 396=(2001) 2 SCC 721].

(d) Advancing his plea predicated on his aforesaid submission pointing out the nature of RDB Act and Arbitration Act, Mr. Tripathi argued that the

Arbitration Act is a general statute vis-a-vis RDB Act which is a special statute with regard to recovery of debts of banks and financial institutions

and, therefore, the provisions of special statute, i.e. RDB Act, would prevail over those of general statute, i.e. Arbitration Act.

(e) Mr. Tripathi accepted that Arbitration Act may be special statute when it is placed in juxtaposition with the jurisdiction of civil Courts to

entertain and adjudicate civil disputes inasmuch as in that sense, the Arbitration Act provided for special forum, chosen by the parties who wanted

to remain away from the civil Court for the adjudication of their inter se disputes. His submission, however, was that there have been instances

where the same statute has been treated as a special statute vis-a-vis one legislation and as a general statute vis-a-vis another legislation. The issue

arose in Life Insurance Corporation of India Vs. D.J. Bahadur and Others, , viz. whether in the context of a dispute between workmen and

management (of LIC), the LIC Act or the Industrial Disputes Act is a special statute. It was observed--

52. In determining whether a statute is a special or a general one, the focus must be on the principal subject matter plus the particular perspective.

For certain purposes, an Act may be general and for certain other purposes it may be special and we cannot blur distinctions when dealing with

finer points of law.

The Apex Court further held:

...vis-a-vis "industrial disputes" at the termination of the settlement as between the workmen and the Corporation the ID Act is a special legislation

and the L.I.C. Act a general legislation. Likewise, when compensation on nationalisation is the question, the L.I.C. Act is the special statute.

Similarly in the case of Damji Valji Shah and Another Vs. Life Insurance Corporation of India and Others, , the Supreme Court held:

Further, the provision of the special Act, i.e. the LIC Act, will override the provisions of the general Act, viz., the Companies Act which is an Act

relating to companies in general.

He also drew our attention to the decision of Snehadeep Structures Private Limited Vs. Maharashtra Small Scale Industries Development

Corporation Limited, , where the Supreme Court while dealing with applicability of provisions of the interest on delayed payment to Small Scale

and Ancillary Industrial Undertaking Act, 1993 vis-a-vis Arbitration Act, held:

38. The preamble of Interest Act shows that the very objective of the Act was "to provide for and regulate the payment of interest on delayed

payments to small scale and ancillary industrial undertakings and for matters connected therewith or incidental thereto. Thus, as far as interest on

delayed payment to Small Scale Industries as well as connected matters are concerned, the Act is a special legislation with respect to any other

legislation, including the Arbitration Act. The contention of the respondent that the matter of interest payment will be governed by Section 31(7) of

the Arbitration Act, hence, is erroneous. Section 4 of the Interest Act endorses the same which sets out the liability of the buyer to pay interest to

the supplier "notwithstanding anything contained in any agreement between the buyer and the supplier or in any law for the time being in force".

Thus, Interest Act is a special legislation as far as the liability to pay interest, or to make a deposit thereof, while challenging an award/

decree/order granting interest is concerned.

He, thus, impressed that insofar as comparison of RDB Act with Arbitration Act is concerned, RDB Act is to be treated as special statute vis-a-vis

Arbitration Act and on the application of settled principle of generalia specialibus non derogant the former would prevail over the latter to the

limited extent of proceeding initiated by the Banks/Financial Institutions for the recovery of debts.

4. In his attempt to carry home these points, other submissions of Mr. Tripathi were as follows:

(i) Section 17 of the RDB Act makes it clear that the DRT alone is to decide the applications of the Banks and Financial Institutions for recovery

of debts due to them. Also, Section 18 of the Act clearly bars the jurisdiction of any other Court/ except High Court and Supreme Court, from

entertaining matters specified in Section 17 . Furthermore, Section 31 of the Act transfers all such cases pending before any Court to the DRT. It is

therefore evident from the scheme of the RDB that an exclusive jurisdiction has been given to the DRT. He argued that the law on this point has

already been conclusively settled by the Supreme Court in the matter of Allahabad Bank Vs. Canara Bank and Another, , where the issue was

with regard to jurisdiction of DRT and Recovery Officers under the DRT Act vis-a-vis Company Court (when a winding up petition is pending, or

a winding up order has been passed). It was held that the adjudication of liability and execution of the certificate in respect of debt payable to

banks and financial institutions is within the exclusive jurisdiction of the DRT and the concerned Recovery Officer, and in such a case the

jurisdiction of the Company Court u/s 442, 537 and 446 of the Companies Act, 1956 stands ousted.

(ii) On the other hand, the Arbitration Act is a substitute for a civil Court within the meaning of Section 9 to adjudicate civil disputes, subject to the

additional limitation where it is a right in rem, which is to be adjudicated. Taking sustenance from the judgment of Supreme Court in the matter of

Booz Allen and Hamilton Inc. Vs. SBI Home Finance Ltd. and Others, , he pointed out that the Supreme Court while dealing with the issue of

''arbitrability'' of dispute held that Arbitral Tribunals are ''private fori'' chosen by the parties in place of Courts or Tribunals which are ''public fori''

constituted under the laws of the country. All disputes relating to ''right in personam'' are considered to be amenable to arbitration and all disputes

relating to ''right in rem'' are required to be adjudicated by Courts and public tribunals, being unsuited for private arbitration. He attempted to apply

the ratio of the aforesaid judgment to the given case arguing that when the legislature has expressly made a particular kind of dispute to be decided

by a public forum, then the same has been by implication excluded from the purview of arbitrability and therefore cannot be decided by a private

forum like arbitration.

(iii) Mr. Tripathi also tried to draw support from Section 34 of the RDB Act which provides a non obstante clause. Section 34(2) stipulates that

RDB Act is ""in addition to and not in derogation"" to any law or force. On the contrary, the Arbitration Act does not have any non obstante clause

except a limited extent insofar as judicial intervention is concerned as provided in Section 5 of the Arbitration Act. He thus submitted that where

there are two Acts, the one having a non obstante clause will prevail over the other and for this reason also, RDB Act should prevail over

Arbitration Act. Ho also submitted that a finer reading of the provisions of RDB Act, particularly Section 34 thereof, would reveal that application

of Arbitration Act had been expressly as well as impliedly excluded. He also submitted that even if the Arbitration Act is a latter Act, the concept

of arbitration was well known to Parliament right from Arbitration Act, 1891 through to the Arbitration Act, 1940. Apart from Section 34, even

Section 18 of the RDB Act ousts jurisdiction of all other Courts in relation to matters specified in Section 17. Since arbitration is an alternative to

the jurisdiction of civil Courts and its jurisdiction would be confined and in alternative to cases where civil Courts have jurisdiction, therefore, when

the jurisdiction of civil Courts are ousted, it would impliedly oust the jurisdiction of the Arbitral Tribunal also. It is Section 18 which is somewhat in

pari materia with Section 5 of the Arbitration Act.

(iv) Mr. Tripathi concluded his submissions by referring to the judgment of the Supreme Court in Nahar Industrial Enterprises Ltd. Vs. Hong Kong

and Shanghai Banking Corporation, , and submitted that the issue at hand stands settled by the aforesaid judgment. In that case, the issue was

whether the High Court or Supreme Court has the power to transfer a suit pending in a Civil Court to DRT. The Court enunciated the law as

under:

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17

and 18 of the Act, it is difficult to hold that a civil Court''s jurisdiction is completely ousted. Indisputably the banks and the financial institutions for

the purpose of enforcement of their claim for a sum below Rs. 10 lakh would have to file civil suits before the civil Courts. It is only for the claims

of the banks and the financial institutions above the aforementioned sum that they have to approach the Debts Recovery Tribunal. It is also without

any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to

file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set off or counter-claims only when a claim

application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate

order for getting the claims of set-off or the counter claims, determined by a civil Court. The Tribunal is not a high powered tribunal. It is a one man

Tribunal. Unlike some Special Acts, as for example Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 it does not contain a deeming

provision that the Tribunal would be deemed to be a civil Court.

Mr. Puneet Bhalla, learned Counsel appearing for the bank adopted the aforesaid arguments. In addition, he heavily relied upon the reasons given

by the Division Bench in Kohinoor Creations (supra) and submitted that the approach of the Division Bench in the said case was in tune with the

legal position which should be maintained.

5. From the detailed submissions made by Mr. Tripathi and Mr. Bhalla as noted above and the reading of judgment of the Division Bench in

Kohinoor Creations (supra), it is clear that the entire rationale sought to be projected is the exclusiveness of the RDB Act to deal with the matters

which fall within the jurisdiction of the Debts Recovery Tribunals constituted under the said Act. On that basis, the attempt is to show that all those

matters which are covered by the RDB Act for which special machinery in the form of Debts Recovery Tribunal and Debts Recovery Appellate

Tribunal is constituted, such matters come within the sole and exclusive domain of Debts Recovery Tribunal and no other body or forum has any

jurisdiction to deal with such disputes.

6. There is no doubt that those matters which are covered by the RDB Act and are to be adjudicated upon by the Debts Recovery Tribunal/Debts

Recovery Appellate Tribunal, jurisdiction of civil Courts is barred. Up to this point, we are in agreement with the learned Counsels. However, the

answer to the question posed before us does not depend upon the aforesaid principle. That principle only ousts the jurisdiction of civil Courts.

Focus of the issue, however, has to be somewhat different viz. even when a special Tribunal is created to decide the claims of banks and financial

institutions of amounts more than Rs. 10 lakh, can the parties by mutual agreement still agree that instead of the Tribunal constituted under the RDB

Act, these disputes shall be decided by the Arbitral Tribunal. If answer to this question is in the negative, then those submissions made by the

Counsel shall prevail. On the other hand, if we find that it is permissible for the parties, by agreement, to agree for domestic forum of their own

choice, namely. Arbitral Tribunal under the Arbitration Act to deal with such claims, then the edifice of the apparent forceful submissions of Mr.

Tripathi would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.

7. No doubt, for determination of disputes the State provides the mechanism in the form of judicial Fora, i.e. administration of justice through the

means of judicial system established in this country as per the Constitution and the laws. However, it is also recognized that that is not the only

means for determination of Us or resolution of conflicts between the parties. Still the parties are given freedom to choose a forum, alternate to and

in place of the regular Courts or judicial system for the decision of their inter se disputes. There has been a recognition of the concept that

notwithstanding the judicial system, parties are free to chose their own forum in the form of arbitration. This was first recognized by enacting

Arbitration Act, 1891. Introduction of Section 89 in the CPC by amendment to the said Code in the year 2002 takes this concept further by

introducing various other forums, known as Alternate Dispute Resolution. Thus, even when the matter is pending in the Court, parties to the dispute

are given freedom to resort to Lok Adalat, conciliation, mediation and also the arbitration.

8. All civil societies demand a proper, effective and independent judicial system to resolve the disputes that may arise. Resolution of disputes by

Municipal Courts is, therefore, prevalent in all countries and independence of judiciary is endeavoured in democratic setups. While Courts are

State machinery discharging sovereign function of judicial decision making, various alternate methods for resolving the disputes have also been

evolved over a period of time. One of the oldest among these is the arbitration. This is a forum for dispute resolution in place of municipal Court.

Important feature of arbitration is that parties to the dispute voluntarily agree to get the disputes decided by one or more persons, rather than the

Court. Though the Indian Arbitration and Conciliation Act, 1996 does not contain a definition of ""arbitration"", Statement of Objects and Reasons

contained therein gives an indication of the general principles on which arbitration is founded. These are:

(i) The object of arbitration is to ensure a fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.

(ii) The parties should be free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest.

(iii) Intervention of the Courts should be restricted.

9. Thus, the Courts have not been the only forum for conflict resolutions. As already pointed about above, arbitration in the form of statute was

given recognition in the year 1899 though even earlier to that, arbitration in some or other form prevailed in this country. What is important is that

arbitration as an alternate to resolution by municipal Courts is recognized and in the process, sanctity is attached to the domestic forum which is

chosen by the parties themselves. In that sense, party autonomy is recognized as paramount. It is a recognition of the fact that the parties are given

freedom to agree how their disputes are resolved. Even the intervention by the Courts is restricted and is minimal.

10. What follows from the above? When arbitration as alternate to the civil Courts is recognized, which is the common case of the parties before

us, creation of Debts Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any

difference? We are of the firm view that answer has to be in the negative. What is so special under the RDB Act? It is nothing but creating a

tribunal to decide certain specific types of cases which were earlier decided by the civil Courts and is popularly known as "tribunalization of

justice". It is a matter of record that there are so many such tribunals created. Service matters of the civil servants and employees of public

bodies/authorities which were hitherto dealt with by the civil Courts and the High Court are now given to the Central Administrative Tribunal and

State Administrative Tribunals with the enactment of Administrative Tribunals Act, 1985. Disputes of defence personnel are now dealt with by

special tribunals called Armed Forces Tribunal constituted under the Armed Forces Tribunal Act, 2007. With the creation of all these special

tribunals, the matters which were up to now dealt with by civil Courts or High Courts are to be taken up by these tribunals in the first instance (We

would like to point out that insofar as High Court is concerned, constitutional remedy provided under Article 226 of the Constitution of India

remains intact as held in L. Chandrakumar Vs. India and others, . However, it is not necessary to dilate on this issue as that does not have any

bearing on the present issue).

11. With the creation of these alternate Fora with all trappings of the Court and with the decision of the disputes which were hitherto dealt with by

the civil Courts, can it be said that parties are now totally precluded and prohibited of exercising their choice of domestic forum in the form of

Arbitral Tribunal. Before we answer this question, we would like to refer to the judgment in the case of Booz Allen and Hamilton Inc. (supra). The

Supreme Court in that case dealt with the issue of ""arbitrability of disputes"" and held that all disputes relating to "right in personam" are considered

to be amenable to arbitration and disputes relating to "right in rem" are those disputes which are not arbitrable and require to be adjudicated by

Courts and public tribunals, being unsuited for private arbitration. Law in this respect is explained by the Supreme Court with utmost clarity,

precision and erudition in the following terms:

32. The nature and scope of issues arising for consideration in an application u/s 11 of the Act for appointment of arbitrators, are far narrower than

those arising in an application u/s 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an application u/s 11 of the

Act, the Chief Justice or his designate would not embark upon an examination of the issue of "arbitrability" or appropriateness of adjudication by a

private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the

decision of the Arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award

by filing an application u/s 34 of the Act, relying upon Sub-section 2(b)(i) of that section.

33. But where the issue of "arbitrability" arises in the context of an application u/s 8 of the Act in a pending suit, all aspects of arbitrability have to

be decided by the Court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the

parties, and even if the dispute is covered by the arbitration agreement, the Court where the civil suit is pending, will refuse an application u/s 8 of

the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can

only be granted by a special Court or Tribunal.

34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral

Tribunal, are as under-

(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature,

could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public

Fora (Courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration

agreement as matters to be decided by arbitration or whether the disputes fall under the ''excepted matters'' excluded from the purview of the

arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral

Tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the Arbitral Tribunal. A dispute, even if it is

capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be ''arbitrable'' if it is not enumerated in the

joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings

before the Arbitral Tribunal.

35. Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of Courts and Tribunals

which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can

be decided by a Court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of Arbitral Tribunals is

excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the Legislature exclusively

for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by a public fora

(Courts and Tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is

inarbitrable, the Court where a suit is pending, will refuse to refer the parties to arbitration, u/s 8 of the Act, even if the parties might have agreed

upon arbitration as the forum for settlement of such disputes.

36. The well recognized examples of non-arbitrable disputes are-

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody;

(iii) guardianship matters;

(iv) insolvency and winding up matters;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and

(vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified

Courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as

contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions

determining the rights and interests of the parties themselves in the subject matter of the case, whereas actions in rem refer to actions determining

the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that

property. Correspondingly, judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or

status and judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself

(Vide Black"s Law Dictionary).

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to

rights in rem are required to be adjudicated by Courts and public Tribunals, being unsuited for private arbitration. This is not however a rigid or

inflexible rule. Disputes relating to sub-ordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

12. What is discernible from the above is that all disputes relating to ''right in personam'' are arbitrable and choice is given to the parties to choose

this alternate forum. On the other hand, those relating to ''right in rem'' having inherent public interest are not arbitrable and the parties? choice to

choose forum of arbitration is ousted. Examined in this line, it is obvious that a claim of money by the bank or financial institution against the

borrower cannot be treated as ''right in rem''. Each claim involves adjudication whether, on the facts of that case, money is payable by the

borrower to the bank/financial institution and if so to what extent. Each case is the decision on the facts of that case with no general ramifications.

A judgment/ decision of the Debts Recovery Tribunal deciding a particular claim can never be ''right in rem'' and is a ''right in personam'' as it

decides the individual case/claim before it with no elements of any public interest.

13. Merely because there were huge NPAs and lot of monies belonging to the banks and financial institutions was stuck up and the legislature in its

wisdom decided to create a special forum to have expeditious disposal of these cases would not mean that decisions rendered by Debts Recovery

Tribunal come in the realm of ''right in rem''. At the same time, we find from the judgment in Booz Allen and Hamilton Inc. (supra) that certain

kinds of disputes for which Tribunals are created are held to be non-arbitrable. Examples are Rent Control Tribunal under the Rent Control Act

and Labour Court/Industrial Tribunal under the Industrial Disputes Act, 1947. Obviously, question that would immediately strike is as to what

would be the yardstick to determine some kind of disputes to be decided by the Tribunals are non-arbitrable whereas some other disputes become

arbitrable. According to us, cases where a particular enactment creates special rights and obligations and gives special powers to the Tribunals

which are not with the civil Courts, those disputes would be non-arbitrable. It is a matter of common knowledge that Rent Control Act grants

statutory protection to the tenants. Wherever provisions of Rent Control Act are applicable, it overrides the contract entered into between the

parties. It is the rights created under the Act which prevail and those rights are not enforceable through civil Courts but only through the Tribunals

which is given special jurisdiction not available with the civil Courts. Likewise, Industrial Disputes Act, 1947 creates special rights in favour of the

workman or employers and gives special powers to the industrial adjudicators/Tribunals to even create rights which powers are not available to

civil Courts. Obviously such disputes cannot be decided by means of Arbitral Tribunals which are substitute of civil Courts. On the other hand,

insofar as Tribunal like Debts Recovery Tribunal is concerned, it is simply a replacement of civil Court. There are no special rights created in

favour of the banks or financial institutions. There are no special powers given to the Debts Recovery Tribunal except that the procedure for

deciding the disputes is little different from that of CPC applicable to civil Courts. Otherwise, the Debt Recovery Tribunal is supposed to apply the

same law as applied by the civil Courts in deciding the dispute coming before it and is enforcing contractual rights of the Banks. It is, therefore,

only a shift of forum from civil Court to the Tribunal for speedy disposal. Therefore, applying the principle contained in Booz Allen and Hamilton

Inc. (supra), we are of the view that the matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

14. Once that conclusion is arrived at, obviously the parties are given a choice to chose their own private forum in the form of arbitration.

15. Another significant fact which has to be highlighted is that the bank entered into agreement with the respondent herein on its own standard form

formats. The terms and conditions of the loan were set out and decided by the bank. The respondent signed on dotted lines. In this scenario, when

it was the proposal of the bank to have an arbitration clause to which the respondent had agreed, bank cannot now be permitted to say that this

arbitration clause is of no consequence. Accepting the contention of bank would mean that the arbitration clause is rendered nugatory. It defeats

the very effect of the said arbitration clause which was foisted by the bank itself upon the respondent, though in law, it becomes mutually

acceptable between the parties.

16. Matter can be looked into form another angle as well. Had the bank invoked the arbitration on the basis of aforesaid clause containing

arbitration agreement between the parties and referred the matter to the Arbitral Tribunal, was it permissible for the respondent to take an

objection to the maintainability of those arbitration proceedings? Answer would be an emphatic No. When we find that answer is in the negative,

the Court cannot permit a situation where such an arbitration agreement becomes one sided agreement namely, to be invoked by the bank alone at

its discretion without giving any corresponding right to the respondent to have the benefit thereof. For all the aforesaid reasons, we find that orders

of authorities below are without blemish. Finding no merit in this writ petition, the same is dismissed. However, since nobody had appeared on

behalf of the respondent, we are not imposing any costs.