ARBITRATION OF DEBT RECOVERY MATTERS

—*Shaunak Choudhury*[*]

ABSTRACT

In recent judgments of the Supreme Court and High Courts,[1] *the position about the conflict between the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBA) and Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and the Arbitration and Conciliation Act, 1996, (ACA) has led to inconsistent and convoluted interpretations concerning arbitration in debt recovery matters. The opinion of the Apex Court*[2] *had been that arbitration proceedings would not bar the financial institution from a proceeding under SARFAESI, but now, such matters have been declared non-arbitrable. All matters covered under the RDDBA have been deemed to be non-arbitrable as well. This may lead to further trepidations with regards to the fidelity and value of the arbitration clause or agreement, alongside the recoverability of certain categories of debts. This paper investigates the relationship between the RDDBA, SARFAESI, and the ACA, interpretation of the said law with respect to the doctrine of election and arbitrability, consequences of said interpretations, and provides suggestions accordingly.*

1. INTRODUCTION

The advent of arbitration in India has been spreading to all sectors of industry and business due to the prolific efforts of individuals and the government in creating an infrastructure and environment for arbitration.[3] The judiciary has, time and again, highlighted the importance of arbitration and other forms of alternate dispute again, resolution to relieve the weight of case backlogs on the civil courts, High Courts and the Supreme Court.[4] The Apex court has also taken a positive approach towards arbitral awards

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1. Vidya Drolia v. Durga Trading Corpn., (2021) 2 SCC 1; HDFC Bank Ltd. v. Satpal Singh Bakshi 2012 SCC OnLine Del 4815.
2. M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. (2017) 16 SCC 741.
3. The New Delhi International Arbitration Centre Act 2019 (Act 17 of 2019).
4. Salem Advocate Bar Assn. v. Union of India (2003) 1 SCC 49.

by taking a stance of non-interference in some very recent Judgments.[5] But there have also been Judgments acting detrimental to the proliferation of a culture of arbitration.[6]

The issue that this paper is concerned with is one of such cases where arbitration was put in the back seat while restricting the conflict resolution to litigation for a whole category of cases, those being debt recovery by banks and financial institutions (FIs). The primary law for debt recovery by banks and FIs is the Recovery of Debts Due to Banks and Financial Institutions Act, 1993[7] (RDDBA). As given in its preamble, the RDDBA was enacted to create a timely system for recovering debts from defaulters by creating debt recovery tribunals and Debt Recovery Appellate Tribunals. In 2016, their responsibilities were expanded to handle matters about individual and partnership bankruptcy and insolvency.[8] But even after the implementation of the same, the Debt Recovery Tribunals (DRTs), were unable to provide relief to creditors in a timely fashion. Hence, when the RDDBA did not suffice, in 2002, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (SARFAESI)[9] was enacted as an enforcement mechanism to recover debts from secured loans taken from banks and FIs. The purpose of this legislation was to create a fast, non-adjudicatory mechanism to enforce secured interests of non-performing assets. As of 2019-2020, it has been more efficient and effective than the Debt Recovery Tribunals (DRTs) in recovering monies from defaulters.[10]

One may question why it matters that arbitration be allowed if SARFAESI is an easy way forward? It is because of Section 17 of the SARFAESI, which gives power to the borrower (or anyone) aggrieved by the measures taken under Section 13 (enforcement of security) to appeal to the Debt Recovery Tribunal, which further slows down the process again. In 2019-2020, matters worth Rs. 1,96,582 Crores were being handled through SARFAESI,

5. Amazon.com NV Investment Holdings LLC v. Future Retail Ltd. (2022) 1 SCC 209 : 2021 SCC OnLine SC 557; Noy Vallesina Engg. SpA v. Jindal Drugs Ltd. (2021) 1 SCC 382 : 2020 SCC OnLine SC 957; Vijay Karia v. Prysmian Cavi E Sistemi SRL (2020) 11 SCC 1 : 2020 SCC OnLine SC 177.
6. Bina Modi v. Lalit Kumar Modi 2020 SCC OnLine Del 1678; Vimal Kishor Shah v. Jayesh Dinesh Shah (2016) 8 SCC 788.
7. Recovery of Debts Due to Banks and Financial Institutions Act 1993 (Act 51 of 1993).
8. The Insolvency and Bankruptcy Code 2016, sch. V (Act 31 of 2016).
9. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (Act 54 of 2002).
10. Reserve Bank of India, Report on Trend and Progress of Banking in India (2019-2020), 64.

but the amount recovered was only Rs. 52,563 Crores (26.73%), which is far better than the recovery rate for DRTs (4.07%) but it is evident that this is not perfect.[11] Banks and NBFCs also happen to be some of the highest users of arbitration in India.[12] If the borrower and lender wish to enter into arbitration as per their agreement, they should be allowed to, not only for the sake of their conflict but also to relieve the burden on courts and tribunals. Moreover, if the creditor wishes to continue the relationship with the debtor, SARFAESI or litigation may not be the best option. It should ultimately be upon the parties to decide what is best for them.

The analysis of this paper shall be focused on three cases, *HDFC Bank* v. *Satpal Singh Bakshi*,[13] *M.D. Frozen Foods* v. *Hero Fincorp*,[14] and *Vidya Drolia* v. *Durga Trading Corpn*.[15] The reason behind focusing solely on these three case laws is that they create a fundamental pathway for the interpretation of whether arbitration shall take precedence over SARFAESI, or whether such matters shall even be arbitrable. The RDDBA, SARFAESI and the Arbitration and Conciliation Act, 1996[16] (ACA) shall be analysed specifically with respect to the doctrine of election and the question of non-arbitrability.

Chapter 2 of this paper deals with firstly, the applicability and meaning of the doctrine of election and secondly, the arbitrability of debt recovery matters. Chapter 3 provides suggestions to resolve the incoherency in the present framework and Chapter 4 concludes the paper.

2. ANALYSIS

A. Doctrine of Election

The doctrine of election does not directly pertain to arbitration or debt recovery instead has its roots in Section 35 of the Transfer of Property Act.[17] The relevance of it lies in the general principle it creates. It arises out of the rule of estoppel and imposes a restriction upon a party having two

11. Reserve Bank of India (n 10).
12. Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India (Chaired by Justice B.N. Srikrishna, 2017), 28.
13. HDFC Bank Ltd. v. Satpal Singh Bakshi 2012 SCC OnLine Del 4815.
14. M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. (2017) 16 SCC 741.
15. Vidya Drolia (n 1).
16. Arbitration and Conciliation Act 1996 (Act 26 of 1996).
17. The Transfer of Property Act 1882 (Act 4 of 1882) s 35.

or more contradicting alternative rights or claims to choose from; only one right can be claimed, the rest must be renounced fully.[18]

The option in our hands is going either to the DRT, or arbitration. This issue is pertinent when discussing the arbitrability of debt recovery because between the *HDFC Bank case* and the *Vidya Drolia case*, the doctrine of election in this situation poses a question about which path towards debt recovery is open to the FI. If a party opts for arbitration, will the rights of the banks and FIs be stalled till the arbitration proceedings come to an end? this question is applied to both, DRTs and SARFAESI. It may seem counter-intuitive to discuss this matter before the issue of arbitrability of debt recovery because if these matters are indeed non-arbitrable, this question is rendered infructuous. But this question must take chronological precedence over the other because it creates a necessary groundwork for further discussion.

Under the doctrine of election, one must first and foremost, decide whether the alternatives available to the party are indeed conflicting or not. If they are conflicting, the doctrine shall apply, and the parties shall have to act accordingly. It is the first way that arbitration may get side-lined or propelled, before getting extinguished in toto.

1. *RDDBA v. SARFAESI*

It is worth taking a brief look at a particular case before moving on to the doctrine of election for arbitration because this case has been used as a precedent for arbitration matters as well. The case of *Transcore* v. *Union of India*[19] sets the precedent that the doctrine of election shall not apply to banks and FIs when it comes to selecting a mode of recovery between the RDDBA or SARFAESI. The two statutes were found to be complementary. While SARFAESI is an enforcement mechanism, the DRTs under the RDDBA act as adjudicatory bodies. Section 19(1) of the RDDBA provides that a bank or FI may proceed against the borrower under SARFAESI after an application has been made from the DRT to withdraw the case in the tribunal.[20] But the court found that since the application may also take

18. National Insurance Co. Ltd. v. Mastan (2006) 2 SCC 641; Nagubai Ammal v. B. Shama Rao AIR 1956 SC 593 : 1956 SCR 451; C. Beepathumma v. Velasari Shankaranarayana Kadambolithaya AIR 1965 SC 241; Prashant Ramachandra Deshpande v. Maruti Balaram Haibatti 1995 Supp (2) SCC 539.
19. Transcore v. Union of India (2008) 1 SCC 125.
20. RDDBA (n 7) s. 19(1) reads as "Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it,

a long time to be disposed of, the bank may proceed under SARFAESI, while the case is ongoing in the tribunal. This is allowed since the whole point of SARFAESI is to act as a speedy debt recovery mechanism to avail the full value of the security.[21] Moreover, Section 13(10) of SARFAESI explicitly provides that a bank or FI may approach the RDDBA again to recover any outstanding amount left after the sale of the collateral. Section 37[22] read with 35 (non-obstante clause)[23] only means that in the event of any inconsistencies between SARFAESI and RDDBA, the former shall prevail. This was then followed in *Mathew Varghese* v. *M. Amritha Kumar*[24] as well. All in all, the laws are not contrasting alternatives, thus the doctrine of election is not applicable in this situation.

2. *SARFAESI v. Arbitration*

Coming to the main matter at hand, the applicability of the doctrine of election on the debt recovery mechanisms and arbitration. The *Deccan Chronicles Holdings* v. *Union of India*,[25] an Andhra Pradesh High Court judgment is an important case that gives its opinion on this matter. Contrary to what is considered good in law today, the Andhra Pradesh judgment ruled in favour of the doctrine of election. The logic behind this conclusion was that Section 8 of the ACA says that instituting other proceedings is

withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 (30 of 2004) for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:

Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefore".

21. Mardia Chemicals Ltd. v. Union of India (2004) 4 SCC 311.
22. SARFAESI (n 9) s 37 reads as "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".
23. SARFAESI (n 9) s. 35 reads as "The provisions of this Act to override other laws - The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained".
24. Mathew Varghese v. M. Amritha Kumar (2014) 5 SCC 610.
25. Deccan Chronicles Holdings Ltd. v. Union of India 2014 SCC OnLine AP 104.

prohibited if an arbitration agreement exists. Moreover, SARFAESI cannot be put at a higher pedestal thus, the enforcement mechanism could not be initiated by IBFSL since it had initiated arbitration proceedings under its agreement with Deccan Chronicles Holdings. This matter was reversed by India bulls Housing Finance v. Deccan Chronicles Holdings.[26] But we shall come back to Indiabulls after we take a look at M.D. Frozen Foods.

M.D. Frozen Foods sets the initial tone for arbitration in debt recovery matters. Once the lender had invoked the arbitration clause, could it also proceed against the borrower with SARFAESI and have both run side by side; this was the first issue and the most relevant one for this paper. This Division Bench of the Supreme Court unequivocally agreed with the decision of the Delhi High Court in the HDFC Bank[27] case which had held that debt recovery matters which are covered under the RDDBA will be arbitrable.[28] The judgment clearly stated that the case law provided support to the FI's argument (Hero Fincorp) and not that of the borrower and taking that premise in hand went on to confirm that between SARFAESI and the arbitration, there lies no doctrine of election. Arbitration is an alternative to adjudication in the courts, and in this case it is an alternative to the RDDBA. It uses the Transcore and Mathew Varghese judgments to support its reasoning. On the face of it, the analogy seems like a false equivalency. M.D. Frozen Foods is talking about SARFAESI and arbitration, whereas Transcore and Mathew Varghese talk about RDDBA and SARFAESI. But the Court interpreted the matter in a way that, since SARFAESI was put above RDDBA in the event of a conflict, as per Mathew Varghese, the logic would extend to the ACA. Nothing is above Section 35 of SARFAESI, not even Section 5 of the ACA[29] which is limited in nature. But since Section 37 of SARFAESI does not act in derogation to laws, whatever is not inconsistent shall survive.[30]

26. Indiabulls Housing Finance Ltd. v. Deccan Chronicles Holdings Ltd. (2018) 14 SCC 783.
27. HDFC Bank (n 13).
28. M.D. Frozen Foods (n 14), 753 para 31.
29. ACA (n 16) s 5 reads as: "Extent of judicial intervention - Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part."
30. Madras Petrochem Ltd. v. Board of Industrial and Financial Reconstruction, (2016) 4 SCC 1.

Indiabulls[31] continues this trend. As mentioned before, Indiabulls reversed the Deccan Chronicles Holdings case, but the principle was overturned in M.D. Frozen Foods itself.[32] The judgment is in complete agreement with M.D. Frozen Foods and reiterates Transcore and Mathew Varghese. Thereby, it reaffirms HDFC as well. The Judgment treads into some new ground by stating that since the ACA is a general law and SARFAESI a special law, the latter must prevail over the former. This sets the solution to the dilemma between SARFAESI and ACA in concrete.

3. *Practical Implications*

There are two ways to look at the consequences of M.D Frozen Foods. One way to see it is in a celebratory manner, enjoying the freedom of the parties to cherry-pick the mode of conflict resolution, RDDBA, SARFAESI or ACA. But practically speaking, when given the option between SARFAESI and arbitration, even if the lender opts for arbitration, SARFAESI hangs over the borrower. Moreover, a consequence of SARFAESI and arbitration going hand in hand would lead to the conflict of which solution shall prevail. It is all well and good that the choice has been handed to the parties, but in the event of the arbitral award being passed, can the lender still proceed with SARFAESI? The question of whether matters falling under the RDDBA can be arbitrated was answered in the affirmative in the HDFC case, thus, under Section 8, a referral can be made, and the matter would be arbitrated [33] (but this shall change in Vidya Drolia). So till now the issue in the practical sense would lie between SARFAESI and arbitration.

Such a matter came to the Delhi High Court in *Lalit Mohan Madan* v. *Reliance Capital*.[34] A petition under Section 9 of the ACA asked for relief against a notice sent under Section 13(2) of SARFAESI. An arbitration award had already passed for an amount much lesser than the amount sought by the notice. But since an application under Section 34 of the ACA had been filed by the respondent (the NBFC), the award was not enforceable. And no remedy shall lie under Article 226 or 227 of the Constitution against the notice filed under SARFAESI; for that, the remedy shall be Section 17 of the enforcement mechanism (application against measures to

31. It is interesting to note that Justice A.K. Sikri presided over and authored the HDFC case and the Indiabulls case. He happened to be Acting Chief Justice of the Delhi High Court during the HDFC case.
32. M.D. Frozen Foods (n 14), 754 para 34.
33. HDFC Bank (n 13), 14 para 579; M.D. Frozen Foods (n 14), 753 para 30.
34. Lalit Mohan Madan v. Reliance Capital Ltd. 2017 SCC OnLine Del 12188.

recover secured debts). But after the amendment to the ACA in 2016 which took force from the 23rd of October 2015,[35] an application under Section 34 of the ACA would not render the award unenforceable unless the court is granting a stay under Section 36(3). There is no mention of a stay on the arbitral award in this case. In any way, the question is not dealt with in its finality in this case. However, in *Carnet Elias Fernandes* v. *District Magistrate*,[36] the Madhya Pradesh High Court stated that the rights under Section 14 of SARFAESI will continue to exist even after the arbitration award has been granted but is pending adjudication under Section 34 of the ACA. The arbitration agreement was also unilaterally changed in this case, so perhaps this is no model precedent.

Whether SARFAESI proceedings can take place after an arbitral award has been passed, or even after it has been executed but the amount in the award was insufficient, is a pertinent question that seems to be left open to interpretation because of M.D. Frozen Foods. How shall the switch from arbitration to SARFAESI be realised is not very clear either. Suggestions for the same shall be provided in Chapter 3 of this paper. The authors will now discuss arbitrability of debt recovery matters.

B. Arbitrability of Debt Recovery Matters

1. *HDFC Bank*

The full bench of the Delhi High Court in HDFC Bank had one question to decide: whether proceedings initiated under RDDBA can be arbitrable or not. The High Court answered it in the affirmative. It used the Booz Allen[37] case to determine whether such matters can be arbitrable. Three rubrics of arbitrability were raised in that case; whether the matter can be resolved in a private forum, whether the arbitration agreement covers the dispute between the parties, and whether the parties have referred the disputes to arbitration through a joint list of disputes. The first facet is the only important one. The High Court determined that issues relating to debt recovery are matters of "right in person am" and not "right in rem". Even though the amount may be huge, but the same would not mean that it is an action against society as a whole.[38]

35. The Arbitration and Conciliation (Amendment) Act 2015, s. 19 (Act 3 of 2016).
36. Aditya Birla Finance Ltd. v. Shri Carnet Elias Fernandes Vemalayam 2018 SCC OnLine MP 1317.
37. Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532.
38. HDFC Bank (n 13), 578, 579 paras 13, 14.

This conclusion is supported by the fact that there are criminal laws specifically created for incarcerating or penalising defaulters.[39] In those situations, the matter would certainly not be arbitrable, but when the dispute is only between the bank and borrower, debt recovery matters would easily pass the first facet. It upheld the freedom of the parties to choose a forum, and stated that by restricting the debt recovery matters to the DRT, that freedom would be lost.[40]

The amicus curiae, who supported the case of the bank, argued that Section 17 read with Section 18 of the RDDBA would mean that no authority would have the jurisdiction to decide matters about debt recovery of loans forwarded by banks and FIs.[41] This question was not answered in a detailed manner in the Judgment since its main focus was on the principles laid down in Booz Allen. The Court agreed with the argument that other courts will not be able to decide matters given in Section 17(1) of the RDDBA, but the Court specified that the question is about whether arbitration tribunals can decide the matters. If we look into the relevant portion of Section 18 of the RDDBA, it says:

> *On and from the appointed day,* ***no court or other authority*** *shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17.*
>
> *(Emphasis added)*

The key terms would be as highlighted above. The Delhi High Court agreed with the submission that courts cannot decide matters or exercise powers, but whether "other authorities" would include arbitration or not was not discussed. *Allahabad Bank* v. *Canara Bank* held that as far as adjudication of debt recovery goes, the DRTs shall have exclusive jurisdiction ousting the power of any other authority which would otherwise have had jurisdiction. *Kohinoor Creations* v. *Syndicate Bank*[42] explicitly lays down that the arbitration agreement or clause shall not oust the jurisdiction of the DRT

39. Fugitive Economic Offenders Act 2018 (Act 17 of 2018); Indian Penal Code 1860, ss. 403, 415.
40. HDFC Bank (n 13), 575 para 8.
41. Id., 572 para 5.
42. Kohinoor Creations v. Syndicate Bank 2005 SCC OnLine Del 650 : ILR (2005) 2 Del 69; Berhampur Cold Storage v. ICICI Bank 38 ILR (2011) 1 Cut 371; Neelesh Anand, 'The Overriding effect of RDB Act over Arbitration and Conciliation Act', (2015) PL June 64.

because the RDDBA is a special statute and ACA is a general statute. The case says that the non-obstante clause of the RDDBA shall prevail over the non-obstante clause of ACA because Section 18 of the RDDBA gives confers exclusive jurisdiction over debt recovery matters. Reading Section 34 of the Recovery Act along with Section 18 would mean that the RDDBA shall have an overriding effect on any laws inconsistent with it, including the ACA. Thus, a DRT may reject an application made under Section 8 of the ACA. Meaning that as per this Judgment, arbitration shall be considered under the banner of "other authorities". This is a rather vague approach since the case does not discuss the difference between judicial authorities (something that the legislation may have intended with "no court or other authority") and the authority of an arbitration tribunal.

2. *Vidya Drolia*

The case does not pertain to debt recovery, RDDBA, or SARFAESI. Its main issue was about the arbitrability of landlord and tenant disputes and whether it would be against public policy to allow arbitration in such matters. But it covered other matters under the wide net of arbitrability, thus, debt recovery got included. It mentions Transcore at length, M.D. Frozen Foods and Indiabulls, and does not show any dissent against them. But when it comes to HDFC Bank, it overrules it, because;

> *To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.*[43]

That is the extent of the analysis done on this matter. The Judgment also mentions that the M.D. Frozen Foods decision did not examine the Delhi High Court's Judgment in light of the legal principles of non-arbitrability.[44] It overrules HDFC Bank but not M.D. Frozen Foods and Indiabulls. As mentioned before, the Delhi High Court Judgment was the premise on

43. Vidya Drolia n (1) 64, 65 para 58 (It is to be noted that there is no mention of the whether the Judgment shall act in a retrospective manner or prospective manner, whether all such arbitration agreements signed before the date of the Judgment shall still be valid or would they too be declared void. The fate of ongoing arbitration proceedings is also unknown).
44. Id., 64 para 58.

which M.D. Frozen Foods gave its verdict about SARFAESI and arbitration going hand in hand. That extends to Indiabulls. To uphold the two Division Bench Judgments and overrule M.D. Frozen Foods creates an incoherent conclusion and has inadvertently overruled the former two. The question of SARFAESI and arbitration going hand in hand becomes infructuous as soon as we say that those very matters that are covered under the RDDBA become non-arbitrable in toto.

In the opinion of the Court, when arbitration has been prohibited expressly or by necessary implication, such matters would be outside the purview of the ACA. This was also held in Booz Allen.[45] In the context of the RDDBA, the Court says that the statute prohibits arbitration by necessary implication. However, no provision or procedure gives such an impression. The point that arbitration can only come about through an agreement between the parties is lost to the Judgement, but this has been specifically mentioned at the end of HDFC Bank.[46] The RDDBA was indeed created to institute DRTs that would specialize in debt recovery adjudication and speedily resolve matters. But one of the reasons that SARFAESI came about and why arbitration is prevalent among banks and FIs is because even the DRTs became slow. Moreover, in a world where all matters of the RDDBA are deemed non-arbitrable, secured creditors can still fall back on SARFAESI (although this too is flawed), but unsecured creditors are left to wait in the DRTs and DRATs.

Justice D.Y. Chandrachud in *A. Ayyasamy* v. *A. Paramasivam*[47] states that where the ordinary civil court jurisdiction is excluded by a special statute, it is done so as a matter of public policy and is thus outside the jurisdiction of the arbitral tribunal. But the matters that have been identified as non-arbitrable time and again have been;

(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 and child custody,

(iii) Matters of guardianship,

(iv) Insolvency and winding up,

45. Booz Allen (n 37), 546 para 35.
46. HDFC Bank (n 13), 580 para 16.
47. A. Ayyasamy v. A. Paramasivam (2016) 10 SCC 386, 411 para 38.

(v) Testamentary matters, such as the grant of probate, letters of administration and succession certificates, and

(vi) Eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.[48]

The nature of the above matters is either right in rem or special rights granted to people. The RDDBA, as rightly pointed out by the Delhi High Court, in HDFC Bank does not grant any special powers to the DRT or the persons involved. The reason why the statute was introduced was for expeditious proceedings and after proceedings, not for conferring special rights.

We must consider Emaar MGF as well where the doctrine of election (although not expressly mentioned) was applied. The Judgment held that the National Consumer Disputes Redressal Commission was right in rejecting ACA Section 8 applications since there is no obligation put upon it to refer the matter to arbitration. But at the end of the Judgment, it is also stated that;

> *[I]n the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the additional/ special remedy and he is a party to an arbitration agreement,* ***there is no inhibition in disputes being proceeded in arbitration****. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.*[49]
>
> *(emphasis added)*

Thus, even though the Consumer Protection Act, 1986 provided special rights, the matters were not barred in toto from arbitration,[50] unlike Vidya Drolia. This aligns with the verdict of the Delhi High Court in Kohinoor Creations. Thus, by no means can any argument be made to reject the arbitrability of debt recovery matters for all situations.

48. Id., 409, 410 para 35; Booz Allen (n 37), 546, 547 para 36; Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751, 773 para 39; Vidya Drolia (n 1) 55 para 37.
49. Emaar MGF Land Ltd. v. Aftab Singh (2019) 12 SCC 751.
50. Criticism can be levied against the Emaar MGF Judgment as well but for the sake of brevity this paper shall not look into the details of the case.

3. SUGGESTIONS

After the analysis in Chapter 2, three questions arise. First, about arbitrability, second, about the referral to arbitration under Section 8 of the ACA, and third, the state of the arbitral award against SARFAESI enforcement. The first suggestion shall only pertain to the current legal regime, it shall be an exercise in interpretation, not legislation, and the second shall be for legislation.

A) It has been clearly shown in the above analysis that considering past precedents and the legislation as it is, in no way can the law be construed as declaring debt recovery matters as non-arbitrable in toto.

B) For arbitration to be fully realised without provisions of the RDDBA being a hurdle to the dispute resolution, we must have a cogent sense of the interpretation that must be adopted, so that; first, arbitral tribunals are allowed to hear matters on debt recovery and pass awards, and second, DRTs may refer the matters to arbitration when a Section 8 ACA application is made.

i) **Jurisdiction** – Section 18 of the RDDBA and Section 5 of the ACA are the provisions that need to be considered here. "Other authorities" in Section 18 of the RDDBA should ideally not include arbitration tribunals because the nature of arbitral tribunals is quite different from that of courts and tribunals set up by statutes. Section 5 of the ACA does state that no judicial authority will intervene in the matters of Part I of the Act unless otherwise stated; ideally, the DRTs should also be considered under that banner. And when speaking of the "other authorities," Section 18 of RDDBA intends to exclude other judicial authorities like Courts. In *Bhagwandas Auto Finance* v. *HDFC Bank*,[51] the contention of the appellant that arbitral tribunals shall be included under the banner of "other authorities", under Section 18 of RDDBA was rejected. *Amrit Jal* v. *Ventures Pvt. Ltd.* v. *SREI Infrastructure Finance Ltd.*[52] also holds that "other authority" shall not include arbitration as the Act speaks of bodies given statutory existence, whereas arbitral tribunals are birthed through their agreements. On the other hand, the DRTs being a body created from a statute would be considered as a judicial

51. Bhagwandas Auto Finance Ltd. v. HDFC Bank Ltd. 2010 SCC OnLine Cal 187; Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. (2009) 8 SCC 520; Paramjeet Singh Patheja v. ICDS Ltd. (2006) 13 SCC 322.
52. Amrit Jal Ventures (P) Ltd. v. SREI Infrastructure Finance Ltd. 2016 SCC OnLine Cal 4245.

authority, being restricted by Section 5 of the ACA. This would thus mean that debt recovery matters can be determined through arbitration.

ii) **Referral** – There is a chance that the parties wish to get the matter referred to arbitration as per their pre-existing arbitration clause or agreement. If we observe Section 8 of the ACA which speaks about referring parties to arbitration, we shall find that the section says, "*A judicial authority, before which an action is brought in a matter which is the subject matter of an arbitration agreement…*". If the legislation wanted to limit this mandate on referral, the section would have mentioned "court" and not "judicial authority". As explained previously, the DRTs being a creation of a statute and adjudicating matters as per the powers given to them by the statute, they are considered as judicial authorities. This would mean that DRTs would have to refer the matter to arbitration if the agreement exists. But the hurdle here is the non-obstante clause of the RDDBA. It is a matter of perspective if we wish to give the ACA more importance or the RDDBA. If we are to look at the purpose with which the RDDBA was instituted, it was because debt recovery matters were not being dealt with in a speedy fashion, thus separate tribunals had to be formed. If we see why parties would opt for arbitration, one of the reasons is that DRTs are slow as well. Giving precedence to arbitration would thus be more purposeful and in line with the intention of the legislature and practices that prevail in the industry. This would be a departure from *Emaar MGF and Kohinoor Creations*, but seeing that the former was about another legislation, the latter was a case before HDFC Bank, and the overall purpose of the legislations is being served through this interpretation, it would not be too difficult to realise it.

A) For future legislation, it would be pertinent to provide an order of preference for the parties when it comes to debt recovery. Parties to a contract should indeed have the freedom to choose the forum of dispute, that is one of the fundamental principles of alternate dispute resolution. But at the same time when one of the parties, (here the lender), has powers under a special statute to act against the other, we would lose the point of settlements. Parties should also be bound by the path they have selected but should be able to avail of other options with the appropriate procedure for the same.

When arbitration has been initiated by the lender, it should be the only path available until such time that the proceedings are not terminated under Section 32 of the ACA. This is also given credence with the fact that Section 19(1) of the RDDBA requires that the application be withdrawn before proceeding with SARFAESI (although the same need not be disposed

of). Thus, allowing the borrower one path to follow at a time. Once the proceedings are terminated the parties, may move with the DRTs or with SARFAESI.

We have seen in the cases discussed above that the lenders were the ones who initiated the arbitration proceedings and then backed away because of SARFAESI (seen in HDFC Bank, M.D. Frozen Foods, Carnet Elias Fernandes). Thus, the option of SARFAESI will be open but not in an arbitrary manner. It goes without saying that once an arbitration award has been passed, in light of it being treated as a decree under Section 35 and 36 of the ACA, the parties would be bound by it unless set aside by a court. (The paper is not arguing the non-obstante clause of SARFAESI versus Section 5 of the ACA since SARFAESI does not involve any judicial authority and hence there would be no point in the discussion, the paper only argues for the exception to be made for arbitration when an award has been passed since that is the final solution for the dispute).

B) In a situation where the award has been passed and the court has stayed the award, pending a Section 34 ACA order, the bank should not be able to proceed with SARFAESI because the stay is not an automatic one[53] and as per Section 36 of ACA, the application shall not render the award unenforceable. This means that the stay would have been given for a prominent reason that would have to be recorded by the court. In such a circumstance if something prima facie is found to warrant a stay it would be rare if the proceedings have gone on without illegalities. In pursuance of this understanding, stay on such awards should also be scarcely given since the purpose of the whole system is to recover the debt as soon as possible.

C) The DRTs already have the mandate to deal with debt recovery along with the requisite specialised resources; referral, interim orders and execution should be done through the tribunal itself, instead of taking it to any other Court. This maintains the jurisdiction of the DRTs in relation to other courts. This can only take place with an amendment that clearly directs DRTs to refer the matter to arbitration when the clause or agreement exists, making it mandatory and not discretionary to refer to arbitration.

D) It is also recommended that the arbitration clause or agreement specifically state that it shall not be in derogation of the rights under RDDBA or SARFAESI, thereby maintaining the rights under those statutes. This would essentially be a sole option hybrid agreement, that

53. Hindustan Construction Co. Ltd. v. Union of India AIR 2020 SC 122; National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540.

would clearly lay down that the rights of the bank would not be affected under the two aforementioned legislations if it engages arbitration. The path to switch from arbitration to litigation or enforcement as laid down above would additionally ensure that this movement is not arbitrary.

4. CONCLUSION

There should either be no arbitration for debt recovery matters, or the agreement must be given priority. Vidya Drolia took the former view, M.D. Frozen Foods took the middle path and HDFC Bank, although correct in its view, did not analyse the issue enough to give a cogent process. We are not sure of the fate of Vidya Drolia or even if its decision on debt recovery will be held as a precedent, but if it is considered as one, it would be an arbitrary ruling that was not analysed fully since its main subject matter did not deal with this issue and hence, heard no arguments about it.

M.D. Frozen Foods erred in its decision by referring to Transcore. The RDDBA has a procedure to deal with circumstances where the bank or FI wants to move with SARFAESI; the ACA does not. Section 19(1) of the RDDBA allows a clear path for the party to switch methods of debt recovery yet the same cannot be said about the ACA. Thus, it is not just Vidya Drolia that did not appropriately interpret the law, the HDFC Bank and M.D. Frozen Foods had their shortcomings as well.

This paper has argued for the choice of the parties, embodied in the arbitration clause or agreement. The purpose of RDDBA and SARFAESI was to speed up the process for debt recovery due to the piling of non-performing assets over the years. The purpose of having alternate modes of dispute resolution, such as arbitration, exists to alleviate the burden on the judicial system. Both principles go hand in hand, but the procedures may not. Parties should get to choose their forum to decide what form of dispute resolution suits them the most. Moreover, arbitration acts as the only alternative to the sluggish DRT proceedings when it comes to unsecured creditors. This paper has thus provided a cogent line of interpretation to not only allow the arbitrability of debt recovery matters but also the referral of it along with methods of switching from arbitration to DRTs or proceeding under SARFAESI.

The legislature has so far ignored this issue and the interpretations have not been too kind either, it would be in the best interest of banks, FIs and borrowers that these positions are clarified with legislation, hopefully in favour of arbitration.