IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 13052 OF 2016

Mr. Sudhir Krishnaji Kulkarni
And Anr. ...Petitioners
Versus
M/s. Shriram City Union Finance Ltd.
And Ors. ...Respondents

....
Mr. P.J. Thorat, Advocate for the Petitioners.
Mr. P. Saikumar, Advocate for the Respondents.
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CORAM : R. G. KETKAR, J.

DATE : 25th NOVEMBER, 2016

P.C.

1. Heard Mr.P.J. Thorat, learned Counsel for the petitioners and Mr.P. Saikumar, learned Counsel for respondent No.1, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 18.6.2016 below Exhibit-35 as also the judgment and order dated 24.9.2016 below Exhibit-43 in Arbitration Darkhast No.367/2014 passed by the learned Ad-hoc District Judge-1, Nashik. By order dated 18.6.2016 below Exhibit-35, the learned District Judge rejected the application made by the petitioners,

hereinafter referred to as the judgment debtors No.4 & 5 for staying operation of Jangam warrant issued against them as also for deciding preliminary issue as to whether the Court has jurisdiction to entertain and try the Arbitration Darkhast. By order dated 24.9.2016 below Exhibit-43, the learned District Judge rejected the application made by the judgment debtor No.4 challenging the legality of the award made by the sole arbitrator on 12.10.2013 on the ground that the Arbitral Tribunal has no jurisdiction to decide the question of enforcing the mortgage in dispute.

3. In support of this Petition, Mr. Thorat invited my attention to Clause 11.1 of the loan agreement entered into by and between the first respondent, hereinafter referred to as the 'claimant', and respondent No.2, hereinafter referred to as borrower. Clause-11 deals with arbitration, jurisdiction and governing law. By clause-11.1, the claimant was entitled to refer the dispute to the arbitration by a sole arbitrator to be appointed by it. The place of arbitration was as mentioned in clause-17 of the schedule. Clause-17 provided Navi Mumbai as a place for arbitration. Clause-18 provided that the agreement shall be subject to the exclusive jurisdiction of the Court at

Solapur.

4. Mr. Thorat submitted that the claimant could not have unilaterally appointed the sole arbitrator. He relied upon Section 11 of the Arbitration and Conciliation Act, 1996 (for short, 'Act') and in particular sub-sections (2) and (6) thereof. He also relied upon the decision of this Court in the case of ***Zenith Fire Services (India) Pvt. Ltd., Mumbai v. Charmi Sales, Ahmedabad, 2013(2) Mh.L.J. 623***.

5. Mr. Thorat submitted that the notice dated 8/15.5.2013 issued by the claimant appointing Sole Arbitrator was not received by the judgment debtors. He further submitted that after appointment of the Sole Arbitrator, no notices were issued to the judgment debtors and, therefore, the award made by the sole arbitrator is a nullity being in gross violation of principles of natural justice. Judgment debtors No.4 & 5 did not get any opportunity before the Sole Arbitrator. Mr. Thorat invited my attention to paragraph-8 of the award dealing with Point (d). The Sole Arbitrator held that respondents No.1 to 5 before him are jointly and severally liable to pay the amounts to the claimant company to the tune of Rs.73,20,549/- along

with future interest @ 10% per annum from the date of reference of the claim petition till the date of award and @ 18% per annum from the date of the award till date of realization.

6. Mr. Thorat submitted that however the Sole Arbitrator was incompetent to issue following directions :

> "in case of default claimant is entitled to recover the entire amount payable by the respondents by selling away the mortgaged property of the judgment debtors as per the schedule appended therein."

7. Mr. Thorat submitted that the aforesaid direction is beyond the jurisdiction of the Sole Arbitrator. He relied upon Order XXXIV Rule 4 of C.P.C. as also decision of Apex Court in the case of ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors., 2011(5) SCC 532*** and in particular paragraphs-27 and 28 thereof. Mr. Thorat submitted that a mortgage suit for sale of the mortgaged property is an action in *rem,* for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the enforcement of a right in rem, will have to be decided by Courts of law and not by arbitral tribunals. The scheme

relating to adjudication of mortgage suits contained in Order 34 of C.P.C., replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Sections 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Sections 92 to 94 and 96). He submitted that the suit for sale, foreclosure or redemption of a mortgaged property should only be tried by a Public forum and not by an Arbitral Tribunal. He, therefore, submitted that the learned Judge was not justified in passing the impugned orders.

8. On the other hand Mr. P. Saikumar supported the impugned orders. He submitted that the notice dated 8/12.5.2013 appointing Sole Arbitrator was served on all the respondents including the judgment debtors No.4 & 5. Not only that notice dated 15.6.2013 issued by the Sole Arbitrator fixing the arbitration proceeding on 29.7.2013 was served on the judgment debtors No.4 & 5. Judgment debtors No.4 & 5 did not appear either in person or through authorized representative on 29.7.2013. The Sole Arbitrator therefore issued second notice on 29.7.2013 fixing the arbitration proceedings on 2.9.2013. Even that notice was duly served on judgment debtors No.4 & 5. He invited my attention to paragraph-2 of the award which recorded

that respondents No.1 to 5 before the Sole Arbitrator remained absent despite service of address of the claim petition and were set exparte. He,therefore, submitted that though the judgment debtors were given fair and reasonable opportunity to participate in the arbitration proceedings, they did not avail of those opportunities. He, therefore, submitted that it cannot be said that the judgment debtors were not served after appointment of Sole Arbitrator or were not served in arbitration proceedings.

9. Mr. Saikumar submitted that the decision in the case of ***Zenith Fire Services*** (supra) is not applicable in the facts of the present case. He invited my attention to Clause-11.1 of the loan agreement in the present case and clause-25 in the case of ***Zenith*** (supra). He relied upon Sections 7 & 11(2) of the Act to contend that the claimant was competent to appoint the Sole Arbitrator. He submitted that the contention that the award made by the Sole Arbitrator is a nullity on the ground that only the Civil Court has jurisdiction to deal with the later part of the direction issued by the Sole Arbitrator in the event of default in making payment is totally misconceived. He relied upon the

decision of this Court in the case of ***Sunil Pawar and another v. Prathibha Shipping Company Limited (In Liquidation) and others, 2015 DGLS (Bom.) 389*** and in particular paragraph-10 thereof. He, therefore, submitted that no case is made out for interfering with the impugned orders.

10. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the petitioners have challenged the order dated 18.6.2016 below Exhibit-35. Judgment debtors No.4 & 5 contended that only the Principal District Judge can entertain and try the Arbitration Darkhast and not the learned Ad-hoc District Judge-1, Nashik. It is not possible to accept this submission. While rejecting the application, the learned District Judge referred to Section 36 of the Act and observed that the award made under the Act is a decree and it can be executed as per the provisions of C.P.C. In paragraph-4 it was observed that the Principal District Judge, Jalna in exercise of administrative powers, assigned the matters to District Judge-2 and Ad-hoc District Judge-2, Jalna. As the judgment debtors did not challenge the award, it attained

finality and the award made under the Act being a decree can be executed under the provisions of C.P.C. I, therefore, do not find that the learned District Judge Committed any error in rejecting the application Exhibit-35.

11. As far as order dated 24.9.2016 below Exhibit-43 is concerned, the learned District Judge overruled the objection raised on behalf of judgment debtors No.4 & 5 that the Sole Arbitrator did not have the jurisdiction to decide the question of enforcing alleged mortgage. Mr. Thorat relied upon the decision of ***Booz Allen and Hamilton Inc.*** (supra) and in particular paragraphs-27 and 28 thereof. The relevant portion of paragraphs-27 and paragraph-28 read thus :

> "27. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but create only a personal obligation. Therefore if specific performance is sought either in regard to an agreement to sell or an agreement to mortgage, the claim for specific performance will be arbitrable. On the other hand, a mortgage is a transfer of a right in rem. A mortgage suit for sale of the mortgaged property is an action in rem, for enforcement of a right in rem. A suit on mortgage is not a mere suit for money. A suit for enforcement of a mortgage being the

enforcement of a right in rem, will have to be decided by courts of law and not by arbitral tribunals. The scheme relating to adjudication of mortgage suits contained in Order 34 of the Code of Civil Procedure, replaces some of the repealed provisions of Transfer of Property Act, 1882 relating to suits on mortgages (Section 85 to 90, 97 and 99) and also provides for implementation of some of the other provisions of that Act (Section 92 to 94 and 96). Order 34 of the Code does not relate to execution of decrees, but provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of Transfer of Property Act read with Order 34 of the Code, relating to the procedure prescribed for adjudication of the mortgage suits, the rights of mortgagees and mortgagors, the parties to a mortgage suit, and the powers of a court adjudicating a mortgage suit, make it clear that such suits are intended to be decided by public fora (Courts) and therefore, impliedly barred from being referred to or decided by private fora (Arbitral Tribunals). We may briefly refer to some of the provisions which lead us to such a conclusion.

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28. A decree for sale of a mortgaged property as in the case of a decree for order of winding up, requires the court to protect the interests of persons

> other than the parties to the suit/petition and empowers the court to entertain and adjudicate upon rights and liabilities of third parties (other than those who are parties to the arbitration agreement). Therefore, a suit for sale, foreclosure or redemption of a mortgaged property, should only be tried by a public forum, and not by an arbitral tribunal. Consequently, it follows that the court where the mortgage suit is pending, should not refer the parties to arbitration."

12. Apex Court while answering the question No.4 referred in paragraph-13 ultimately held that the suit for enforcement of a mortgage by sale can be tried only by Court and not by an arbitral tribunal. The question in the present case is whether the Arbitral proceedings were in relation to enforcement of a mortgage by sale or foreclosure or redemption of a mortgaged property or for recovery of money. In order to appreciate this submission, it is necessary to refer to the award made by the Sole Arbitrator. Perusal of the award shows that the claimant had submitted claim petition on 15.6.2013 for making an award for recovery of Rs.73,20,549/- from respondents No.1 to 5. In paragraph-4, the Sole Arbitrator framed following points for consideration :

"a. Whether the claimant company is entitled to recover the claim amount of Rs.73,20,549/- from the respondents 1 to 5 ?

b. Whether the claimant company is entitled to further interest @ 30% P.M. ?"

13. The Sole Arbitrator dealt with Point No.(a), extracted hereinabove, in paragraph-5 and answered that the claimant is entitled to recovery of Rs.73,20,549/- from the respondents and in paragraph-6, the Sole Arbitrator dealt with point No.(b) as regards payment of future interest. Ultimately in paragraph-8, the Sole Arbitrator held that respondents No.1 to 5 are jointly and severally liable to pay the amounts. Clause-(i) of Point(d) reads as under :-

> "(i) The respondents No.1 to 5 shall pay the claim amount of Rs.73,20,549/- along with future interest @ 10% P.A. on the said amount, from the date of reference of this claim petition till the date of this award and @ 18% P.A. from the date of award till date of realization and in case of default claimant is entitled to recover the entire amount payable by the respondents by selling away the as per the schedule herein mortgaged property of the 4 & 5 respondents as per the schedule herein."

Perusal of clause (i) along with paragraphs-5 and 8 clearly shows that the claim petition was essentially for recovery of amount from the respondents and not for either enforcement of the mortgage, foreclosure or redemption of the mortgaged property. In view thereof, the decision of ***Booz Allen and Hamilton Inc.*** (supra) is not applicable to the present case.

14. Mr. Saikumare relied upon the decision of this Court in ***Sunil Pawar*** (supra). In that case, the learned Single Judge of this Court considered the decision of ***Booz Allen and Hamilton Inc.*** (supra). In paragraph-10 it was observed thus :

> "10. In view of the rival submissions, the two questions to be considered in the present Chamber Summons are whether the dispute taken by the claimant to the arbitral tribunal related to mortgage of immovable property and whether the sale after attachment of the property in question amounts to bringing mortgaged property to sale for payment of a money decree. It is obvious from the arbitral proceedings and the Award that, the same did not relate to the mortgage of immovable property. It was a
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> money claim for recovery of the loan advanced by the claimant to respondent no.1 for repayment of which the applicants had stood guarantee. There would

certainly be a clear distinction between the two types of suit i.e. the suit for recovery of the amount lent and advanced with immovable property mortgaged by way of security towards repayment of the loan and the suit for recovery of the claim amount arising under the transaction of mortgage. Although both the types of suits involve claim for recovery of money and mortgage of immovable property, in the first category of suits, the transaction of loan and recovery of the amount of loan would be the subject matter of the dispute, whereas, in the second category the transaction of mortgage would be the subject matter of the dispute. Therefore, the first contention of Mr. Purandare, that the Award under execution is infact a nullity, is without substance. The second argument of Mr. Purandare based on Rule 14 of Order 34 must also be rejected because it cannot be said that the claimant has obtained a decree for payment of money in satisfaction of a claim arising under the mortgage. The construction of expression "claim arising under the mortgage" was considered by the Division Bench in the case of Bhaichand (supra) cited by Mr. Purandare. In the facts of that case, a house property was mortgaged with possession for a specified amount at the specific rate of interest. The mortgagor had executed a rent note in favour of the mortgagee and continued in possession of the house. The rent agreed upon was equivalent of the amount of interest upon

> the sum advanced under the mortgage. When that rent was overdue, suit had been filed for recovery of the rent. In those facts of the case, it was held that, the claim under the suit arose under the mortgage. The facts of the present case are however different. The main proceedings before the arbitral tribunal were, not for exercise of any right available under the mortgage of immovable property but was purely a monetary claim i.e. for recovery of the loan advanced to respondent no.1.As regards the sale of the mortgaged property, it has been rightly submitted by Mr. Shah, for the claimant that the property belonging to the applicants, would even otherwise be available to the claimant for sale in execution of the decree."

15. In my opinion, the present case squarely falls under the first category and, therefore, also it cannot be said that the award passed by the Sole Arbitrator is a nullity. In view thereof, I do not find that the learned District Judge committed any error in passing the order dated 18.9.2016 below Exhibit-43. Hence, the Petition fails and the same is dismissed.

16. At this stage, Mr. Thorat submits that the auction is being conducted today and, therefore, interim protection may be given for a period of four weeks. In view thereof,

notwithstanding dismissal of the Petition, the sale shall not be confirmed for a period of four weeks from today subject to the judgment debtors No.4 & 5 neither creating third party interest nor parting with the possession of the mortgaged property. By way of abundant caution, it is clarified that this Court has not stayed the auction proceedings.

(R. G. KETKAR, J.)

Deshmane (PS)