

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

Reserved on: 11.05.2017
Pronounced on: 04.08.2017

+ **EFA (OS) (COMM) 3/2017 & C.M. APPL.5425/2017**

SANJEEV NARULA

..... Appellant

Through: Sh. Nakul Mohta and Sh. Johnson Subba,
Advocates.

versus

TATA CAPITAL FINANCIAL SERVICES LTD..... Respondents

Through: Sh. Saurabh Kirpal, Sh. Aditya Shankar,
Ms. Meghna Mishra, Sh. Rohan Sharma and Sh.
Naman Joshi, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE YOGESH KHANNA

MR. JUSTICE S. RAVINDRA BHAT

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1. The appellant is aggrieved by a judgment dated 10.01.2017 of a learned Single Judge rejecting his objection to the maintainability of execution proceedings filed by the Respondent, Tata Capital Financial Services Limited (hereinafter, also referred to as “Tata Capital”) for the enforcement of an arbitral award.

2. The facts of the case briefly, that Tata Capital sanctioned a term loan to Lilliput Kidswear Ltd. (“Lilliput”, together with Mr. Narula referred to as the “Appellants”) for a tenure of 48 months together with interest and other terms set out in the sanction letter dated 28th July 2011. Sanjeev Narula was

a Director of Lilliput at the relevant time. He acted as guarantor and signed a deed of personal guarantee on 28th July 2011 in his personal capacity to secure the loan. The guarantee was furnished in favour of Tata Capital, irrevocably, unconditionally and personally, guaranteeing repayment of all the amounts due and payable by Lilliput under the term loan agreement. As guarantor, Mr. Narula created equitable mortgage of built-up immovable property admeasuring 586.44 sq yards at 94, Block-D, Okhla Industrial Estate, Phase-1, New Delhi (herein, also referred to as the “described property”) in favour of Tata Capital by depositing the original title deeds. A Memorandum of Entry dated 13th October, 2011 recorded this. Due to non-payment of the outstanding dues, despite repeated reminders, to both Lilliput and Mr. Narula, Tata Capital filed Arbitration Petition No. 782 of 2012 in the High Court of Bombay, under Section 9 of the *Arbitration and Conciliation Act, 1996* (“the Act”) against both Lilliput and Mr. Narula.

3. The parties later sought to resolve their disputes on mutually agreed consent terms dated 8th February 2013 in the said proceedings in the Bombay High Court. In the meanwhile, a sole Arbitrator had already been appointed by the parties. The Bombay High Court in Arb. P. No. 782/ 2012 passed an order dated 8th February 2013 recording that the consent terms had been tendered. They were taken on record and the said petition was disposed of in its terms. On 28th February 2013, the parties appeared before the sole Arbitrator and he passed the following consent Award:

“Heard advocates for parties. Both advocates have informed me that by an order dated February, 2013 in Arbitration Petition No. 782 of 2012 the parties have tendered the consent terms before the Hon'ble High Court. The copy of the said consent terms are tendered today. A copy of the order dated

8th February, 2013 is taken on record along with the copy of the consent terms. The consent terms dated February, 2013 which is sought to be tendered before me has been filed in the aforesaid petition and Hon'ble High Court has disposed of the petition in terms of these consent terms.

As per clause 9 of the consent terms parties have agreed to file these consent terms before me and to pass the consent award in terms on these consent terms. Since, the Hon'ble High Court has accepted these consent terms by order dated February, 2013 these directions mentioned in clause 9 are binding on me. I therefore pass the Consent Award in terms of these consent terms which is tendered today. The parties shall pay Arbitrator's fees for 2 days (4 hours) @20000/- per hour shared equally and reading fees Rs. 50000/- shared equally amounting to Rs. 65000/- each for the Claimant and the Respondent respectively. The payment should be sent on or before 10th March, 2013 to the Sole Arbitrator."

4. The consent terms recorded parties' agreement that in the event of failure by Lilliput and Mr. Narula to pay any two installments/EMIs in any financial year and such default remained unremedied after the expiry of 30 days from the date of the notice (given by Tata Capital) to remedy the breach in the event of a second default, then the right, title and interest of the Sanjeev Narula in the described property would stand transferred to the books of Tata Capital, upon payment of requisite stamp and registration of the consent terms. It was also stated that the consent terms in such event would operate as a Conveyance Deed in respect of the described Property.

5. Tata Capital alleged that due to persistent defaults, it called upon Mr. Narula to immediately vacate the property and hand over the vacant and peaceful possession thereof, failing which they stated that they would institute appropriate proceedings to evict the appellants. On the failure of

Mr. Narula to hand over the possession of the described property to Tata Capital, it approached this court, through execution proceedings (OMP (Enf) (Comm) 46/2106. The appellant, Sanjeev Narula, objected to the maintainability of the execution proceedings, by filing IA No. 13972/2017. The objection to the execution petition was that the decision of the Supreme Court in *Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. & Ors.* (2011) 5 SCC 532 *per se* rendered the award unenforceable, because any arbitration in respect of mortgage disputes were incapable of resolution through arbitration. The appellant also argued that under Section 47 of the Code of Civil Procedure 1908 (CPC), it was within the jurisdiction of the executing court to examine if the award under execution had been validly passed. In support of this proposition, Mr. Mohta relied upon the decisions in *Kiran Singh v. Chaman Paswan* AIR 1954 SC 340; *Sushil Kumar Mehta v. Gobind Ram Bohra* (1990) 1 SCC 193 and the decision of the High Court of Kerala in *India Cements Capital Ltd. v. William & Ors* 2015 (4) KLJ 08. The appellant also placed reliance on Section 58(b) of the *Transfer of Property Act, 1882*, read with Section 60 and submitted that since the mortgagee was not yet in possession, there could be no arbitral award in respect of that property.

6. Tata Capital, argued that the decision in *Booz Allen (supra)* was distinguishable on facts; it urged that Sanjeev Narula never challenged the consent Award at any point of time. The execution petition was for the enforcement of only one portion of the award regarding Tata Capital's claim to possession of the property the title of which was already transferred to it. It was also contended that Tata Capital was not seeking the relief of enforcing the mortgage as a substantive portion of that relief had already

been granted.

7. The learned Single Judge, in consideration of the submissions made by the counsels for both parties, came to the following conclusion:

“19. ... the above decision (Booz Allen (supra)) is certainly distinguishable on facts as far as the present case is concerned as enforcement is not being sought at a stage where the proceeding arising out of the mortgage is still pending at the stage of trial. Here, there was consent by the parties involved and it was in accordance with the consent terms that the sole Arbitrator appointed by the parties passed the consent Award. When the consent Award was acted upon and given effect to, one important aspect of the consent Award regarding the transfer of the mortgaged property in the books of the Petitioner had already been implemented and there had been no protest at any stage by the Respondent. With the parties having accepted the consent Award and acted pursuant thereto without any objection, the question of the Respondent now being permitted to contend that the said consent Award is without jurisdiction cannot and does not arise.

20. While Section 47 of the CPC does not permit the Court seized with execution of a decree to entertain a challenge to the decree itself on the ground of nullity for lack of jurisdiction, that question does not arise in the present proceedings. With the consent Award having already been acted upon by the parties and substantially implemented, the question of now allowing one of the parties to question the consent Award on the ground of lack of jurisdiction will amount to an abuse of the process of law and cannot be permitted.

22. The present proceedings are confined to the recovery of possession of the property the title to which already stands transferred in the name of the DH. This is, therefore, only as a consequential step to the consent Award itself is possession sought.”

8. Thus the learned Single Judge found no merit in the objections raised by Mr. Narula against Tata Capital's execution petition. It was further noted by the Court that the said tenant i.e., LPT Retail Pvt. Ltd., of the described premises, through its counsel Ms. Shikha Sarin undertook to deposit the rent payable to Mr. Narula with the Registrar General of this Court till the disposal of the execution petition. By order dated 21st October, 2016, the two pay orders that had been deposited by the said tenant were directed by the Court to be handed over to Tata Capital, and also to file an affidavit, placing on record the complete details including copy of the lease deed by which it was inducted as tenant in the property in question, within two weeks of service of notice.

Contentions of parties

9. The Appellant submitted that the consent Award dated 26th February, 2013 passed by the Arbitrator is a nullity and, therefore, there is no award / decree in the eyes of law and in view of *Booz Allen (supra)* the Arbitral Tribunal lacked the inherent jurisdiction to decide/hear a claim for enforcement of mortgage; that the learned Single Judge erroneously distinguished the Supreme Court's judgment in *Booz Allen (supra)* on the basis that in the said case the challenge to the jurisdiction of the tribunal was taken at the stage of considering an application under Section 8 of the Act. It was further submitted by Mr. Mohta that the learned Single Judge erred in holding that since as per the consent terms the title in the property had vested with the respondent the award was not in the nature of a suit for enforcement of mortgage.

10. Learned counsel argued that the consent terms refers to the property as a mortgage property. It stipulated that the property would vest with the

Respondent in its books of account for the purpose of adjusting the dues of the Appellant. It was submitted that even after the conveyance of property in the books of Tata Capital, the consent terms gave a right of redemption to the Appellant. The consent terms were also submitted to be in the nature of a mortgage as defined under Section 58 of the *Transfer of Property Act, 1882*.

11. Mr. Mohta relied upon the conditions contained in the consent terms, particularly clauses 10 and 11 and submitted that they conferred rights to the appellant. According to him, the deed specifically stipulated an option that in the event of the appellant returning the dues – despite the registration and conveyance of the suit property (in Tata Capital's favour) within six months of such event, if the money were repaid, Sanjeev Narula could enforce the right to re-conveyance. In this regard, reliance was placed upon Section 58 (e) to say that the transaction in this case, was in reality by way of English mortgage. The said provision reads as follows:

“(e) English mortgage.—Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.”

12. Learned counsel argued that the right of redemption can never be extinguished; in support of this proposition, counsel relied upon the judgment reported as *Achaldas Durgaji Oswal v Gangabisan Heda* (2003) 3 SCC 614, where it was held that:

“the right of redemption of mortgagor being a statutory right, the same can be taken away only in terms of the proviso appended to Section 60 of the Act which is extinguished either

by a decree or by act of parties. Admittedly, in the instant case, no decree has been passed extinguishing the right of the mortgagor nor such right has come to an end by act of the parties.”

13. Likewise, argued counsel, the decision in *Harbans v. Om Prakash* AIR 2006 SC 686, Supreme Court approved Mulla's *The Transfer of Property Act*, 9th Ed, which observed that:

“The right of redemption is an incident of a subsisting mortgage and subsist as long as the mortgage itself subsists. It can be extinguished as provided in the section and when it is alleged to be extinguished by a decree, the decree should run strictly in accordance with the forum prescribed for the purpose. Dismissal of an earlier suit for redemption whether as abated or as withdrawn or in default would not be barred the mortgagor from filing a second suit for redemption so long as the mortgage subsists and the right of redemption is not extinguished by the efflux of time or decree of the court in the prescribed form.”

14. Mr. Saurabh Kirpal, learned counsel for the respondent, Tata Capital contended that there was no question of the rule in *Booz Allen (supra)* being attracted. It was submitted that the facts of the present case clearly demonstrate that whereas parties had approached the High Court for appointment of an arbitrator, they reached a settlement pending completion of that proceeding. The Bombay High Court, therefore, appointed an arbitrator; the process was to merely facilitate the embodiment of the consent terms into an award. The consent terms were self executing in nature, because in the contingency of the appellant defaulting in payment of installments (agreed to by the consent terms) the property was to be

registered and treated as Tata Capital's assets. Thereupon, when the event occurred, Tata Capital proceeded to show the asset in its books; the consent agreement – in accordance with its terms, operated as a conveyance; it was even registered.

15. Mr. Kirpal argued that the assistance of the court was not sought to enforce the mortgage, or even to bring to sale the property; in such event, arguably the rule against arbitration proceeding embracing claims to enforce mortgage would have been attracted. What was sought was the assistance of the court to get vacant and peaceful possession of the property, pursuant to the title that vested in Tata Capital. In such event, there was no question of Sanjeev Narula claiming back title, or seeking to redeem it, either under Section 58 (e) of the *Transfer of Property Act*, or under the general law relating to mortgages.

Analysis and conclusions

16. In the present case, Tata Capital filed an arbitration application under Section 9 of the Act against Liliput and Mr. Narula. During its pendency, the parties sought to resolve their dispute and tendered consent terms dated 8th February, 2013 in the Bombay High Court. Clause 5 of these consent terms stated how in case of a default in payment of outstanding dues, the right, title and interest of Mr. Narula in the described property would stand transferred to the books of Tata Capital. It is worded as follows:

“The Respondents agree that

(i) if the Respondent No.1 (Lilliput) fails to create the pari passu charge as contemplated in clause 4(a) above or

(ii) fail to file these Consent Terms before the Sole Arbitrator within a period of 30 days from date hereof or

(iii) if the Respondents fail and/or neglect to pay any 2 instalments/EMIs payable to the Petitioner in any Financial Year and such default remaining un-remedied after the expiry of 30 days from the date of the notice being given by the Petitioner to remedy the breach on the event of second default, then in either of the above events, right, title and interest of the Respondent No.2 (Sanjeev Narula) in the Mortgaged Property(mentioned in Annexure "A") shall stand transferred to the books of the Petitioner and only upon payment of requisite stamp duty and registration of this consent terms without any further act or deed on the part of the Respondents and these consent terms for the said purpose in that event will operate as a Conveyance Deed in respect of the Mortgaged Property more particularly described in Annexure 'A' hereto. Financial Year for the purpose of the consent terms means starting from April) and ending on March every year thereafter. The Mortgaged Property will be transferred in the books of Petitioner at a price, which will be calculated in the manner prescribed below:-

i. The Petitioner shall appoint Cushman & Wakefield (India) Private Limited and Jones Lang Lasalle (hereinafter jointly referred to as 'the Valuers'), as Valuers of the Mortgaged Property and such appointment will be valid and binding on the Respondents. For the purposes of the transfer, the average value of the Mortgaged Property will be taken as the value arrived at by the said Valuers.

ii. In the event of the Petitioner transferring the said Mortgaged Property in their books in accordance with this Para, the right, title, interest and ownership of the Mortgaged Property will vest in the Petitioner and the value arrived by the Valuer as mentioned in this Para will be adjusted against the Outstanding Dues payable by the Respondents.

iii. The Respondents agree and undertake to render all co-operations and to execute all requisite deeds and documents and to do all acts and things necessary to complete such sale

and convey good and marketable title to the satisfaction of the Petitioner.”

17. Furthermore, Clause 9 (of the above consent terms) described the appointment of the sole Arbitrator by mutual consent of the parties and the agreement of the parties on the consent terms to be filed before the arbitrator and the passing of the consent award in those terms. Indisputably, the sole Arbitrator made the award that was not only previously negotiated with consent of the parties (in the consent terms), but was also affirmatively acted upon by Mr. Narula, as the title to the described passed to Tata Capital, in the event of occurrence of the contingency, contemplated by the parties. The contingency was default in payment of Tata Capital's dues by Narula and Lilliput, despite demand. The consent terms by agreement of parties, operated as a conveyance, enabling the transfer of title to Tata Capital. This condition was embodied in Clause 12 of the same document (consent terms); it reads as follows:

“Subsequent to the transfer of the said Mortgaged Property in the books of the Petitioner in pursuance of clause (5) above, if within 6 months from such transfer, the Respondents repay the entire OUTSTANDING DUES alongwith all costs, charges and expenses at the cost of the Respondents, to the Petitioner, it is ordered that the Petitioner shall transfer the mortgaged property to the Respondent No. 2 and/or his nominee/s within a period of 30 days from the date of full payment, being received by the Petitioner and at the request of the Respondents, the Petitioner shall execute all deeds, documents and writings in that behalf. Upon payment of the stamp duty on the conveyance (which shall be prepared by the Respondent No.2 or his advocate), the Petitioner shall execute the conveyance and shall attend the office of the Registrar/sub-Registrar of Assurances for the purpose of the registration of such Conveyance as

required under the provisions of the Indian Registration Act, 1908. In case of re-transfer of the Mortgaged Property to the Respondent No. 2, as stated above, the Stamp duty and Registration charges for such re-transfer/conveyance will be borne and paid by the Respondent No. 2. On such re-transfer, the Petitioner shall have no claim on the mortgaged property.

13. If the Respondents do not repay the Outstanding Dues to the Petitioner within the period of 6 months from the date of the Mortgaged property, the Petitioner will have absolute right to transfer/sell the mortgaged property to any person or deal with the same as the absolute owners in the manner they deem appropriate.”

18. The transfer of possession of the premises, however, did not take place because a third party tenant was in occupation. In fact, the consent Award was not in effect an enforcement of a mortgage, as the right, title and interest of Mr. Narula in the said property passed in pursuance of their terms. In effect, the terms agreed upon, which were embodied in the award, were self executory and did not depend upon the agency of the court. No doubt, initially Tata Capital's effort to have the conveyance (embodied in the consent award) was unsuccessful, because the Sub-Registrar initially refused to register the instrument, on the ground of limitation. However, on appeal, Tata Capital succeeded; the conveyance embodied in the consent award, was registered on 23rd October, 2015.

19. The facts in *Booz Allen (supra)* are inconsistent with the present case, and pertain to, *inter alia*, the arbitrability of the enforcement of a mortgage, whereas, in the present case, the enforcement of a mortgage is not in contention. In *Booz Allen (supra)*, there were two separate flats in Mumbai owned by two companies which borrowed loans from SBI Home Finance

Ltd. and as a security of the said loan, the said two flats had been mortgaged in favour of the SBI. Under two leave and license agreements, the said companies permitted Booz Allen to use their respective flats for a specified term. All the parties then signed the agreements in question. Under a tripartite deposit agreement entered into between the companies, Booz Allen and SBI Home Finance Ltd., a refundable security deposit of ₹ 6.5 crores was paid by Booz Allen to the said companies in equal proportion. Out of that deposit, a substantial portion of the amount was directly paid to SBI towards repayment of the loan taken by the companies. While the loan amount of one of the companies was fully cleared and of the other remained outstanding, the first company remained a guarantor for repayment of the second company whose loan was continuing. The flat belonging to the first company was mortgaged to SBI and remained as such towards security of the liability of the second company. When the loan amount that was outstanding was not paid, SBI filed a suit with the High Court of Bombay against the two companies as Defendant. The suit was in respect of the flat belonging to the first company. Booz Allen did not file a written statement but a reply to the application for temporary injunction. Thereafter, Booz Allen, prior to filing a written statement, applied to have the suit referred to arbitration as provided in Clause 16 of the deposit agreement. The learned Single Judge of the High Court dismissed the application. When the matter reached the Supreme Court, one of the questions formulated was whether the subject matter of the suit was arbitrable and whether the High Court ought to have referred the parties to arbitration under Section 8 of the Act.

20. The Supreme Court held that a suit for enforcement of mortgaged property by sale should be tried by a Court and not by the arbitral tribunal.

The reason that weighed with the Court was that by the amended Order XXXIV Rule 1 of CPC, all persons having interest either in the mortgage security or in the right to redemption shall have the right to join as party to any suit relating to mortgage, whether they are party to the mortgage or not. With a view to avoid multiplicity of the proceedings and the possibility of divergent views, the Court held that the arbitral proceedings would not be suited. It was held that a suit for enforcement of mortgage will have to be tried by the Courts of law and not by the Arbitral Tribunal. The reason for this was that the enforcement of the mortgage is an exercise of a right *in rem*, and all disputes relating to rights *in rem* are to be adjudicated by courts and public tribunals, as they are unsuitable for private arbitration. In the present case, the vital difference, however, is that title of the property effectively passed to Tata Capital, and the subject of enforceability of a right *in rem* is not disputed; thus, the facts are distinct and the decision passed in this judgment is irrelevant, hence, inapplicable to the present case.

21. The fact that the title of the described property stood transferred to Tata Capital, in the absence of any dispute or contention by Mr. Narula demonstrates his consent to this transfer of title. The transfer of title was in pursuance of the tendered consent terms, and thus, did not amount to an enforcement of mortgage. For the Appellants in the instant case, to unduly expand the applicability of the decision in *Booz Allen (supra)* to assert the recovery of possession of the said property by contending nullity of the consent Award thereby, amounts to an abuse of the process of law, as was held in the order of the learned Single Judge. The relevant extracts from the said order are as follows:

“19. As rightly pointed out by Mr. Kirpal, the above decision is

certainly distinguishable on facts as far as the present case is concerned as enforcement is not being sought at a stage where the proceeding arising out of the mortgage is still pending at the stage of trial. Here, there was consent by the parties involved and it was in accordance with the consent terms that the sole Arbitrator appointed by the parties passed the consent Award. When the consent Award was acted upon and given effect to, one important aspect of the consent Award regarding the transfer of the mortgaged property in the books of the Petitioner had already been implemented and there had been no protest at any stage by the Respondent. With the parties having accepted the consent Award and acted pursuant thereto without any objection, the question of the Respondent now being permitted to contend that the said consent Award is without jurisdiction cannot and does not arise.

*20. While Section 47 of the CPC does not permit the Court seized with execution of a decree to entertain a challenge to the decree itself on the ground of nullity for lack of jurisdiction, that question does not arise in the present proceedings. **With the consent Award having already been acted upon by the parties and substantially implemented, the question of now allowing one of the parties to question the consent Award on the ground of lack of jurisdiction will amount to an abuse of the process of law and cannot be permitted.***”

22. The fact that Mr. Narula signed and consented to the consent order dated 08.02.2013 before the Bombay High Court and subsequently agreed to the consent Award dated 28.02.2013 demonstrates positive action on his part to enforce the consent terms. Hence, disputing this transfer at this advanced stage by the Appellants is contradictory to their conduct and untenable. A similar issue was considered in the decision of the Bombay High Court passed in the judgment of *Tata Capital Financial Services Limited v. Ramasarup Industries Limited* 2013 (6) Bom CR 230 where it was relevantly held as follows:

“34. The consent terms filed by both parties in application filed under section 9 under Arbitration Act, 1996 indicates that both parties had agreed to refer the dispute to the arbitration and had appointed the sole arbitrator. During the pendency of the arbitration proceedings, by consent of both parties, private receiver was appointed with power of sale such arbitration proceedings and steps were taken by the private receiver by consent of parties to sale the properties during the pendency of arbitration proceedings. In my view coercive steps can be stayed and not execution of consent orders. In my view consent terms filed in court by parties was an agreement and steps taken under such agreement cannot be stayed. It is clear that there is apparent distinguishment between the expression 'proceedings' and 'suit' used in section 22(1) of SICA. In my view, steps taken to enforce the consent order passed under section 9 of the Arbitration and Conciliation Act, 1996 would not be barred by section 22(1) of the SICA.”

23. Again in *Deepa Bhargava and Anr. V. Mahesh Bhargava and Ors.*(2009) 2 SCC 294 while adjudging whether the terms of a consent decree can be varied by the executing court, the court held that if the parties do not challenge the consent terms at a preliminary stage, and proceed to act on them, they cannot be permitted to revert their stance on such terms. The relevant extracts of the judgment are as follows:

“10. The parties had claimed their interest in the lands in suit from a common ancestor. They entered into a compromise. A decree was passed thereupon. A decree, as is well known, remains valid unless set aside. Respondents never challenged the validity or otherwise of the said consent decree. It was acted upon. They had disposed of a property pursuant thereto and, thus, took advantage of a part thereof. It was, therefore, impermissible for them to resile therefrom.

11. There is no doubt or dispute as regards interpretation or

application of the said consent terms. It is also not in dispute that respondents-judgment debtors did not act in terms thereof.”

24. In *Rangnath Haridas v. Dr. Shrikant B. Hegde* 2006 (7) SCC513, the parties had amicably settled their dispute and had filed consent terms. However, one of the parties did not comply with his obligations under the clauses of the consent terms. The Supreme Court thereby held such non-compliance to be incongruous and directed the parties to strictly adhere to and not deviate from the consent terms. The relevant paragraphs in from the judgment are as follows:

“10. The appellant herein contends that despite such reciprocal obligations on the part of the parties, the plaintiff-respondent did not fulfill his obligation in terms thereof. It was in the aforementioned context, another arrangement was said to have been arrived at on 27.07.1995, pursuant where to and in furtherance where of, the respondent herein offered to take an amount of Rs. 32 lakhs enabling him to purchase the flat of his choice in the vicinity instead of the concerned flat for which the appellant herein agreed to pay the said amount. For the reasons stated hereinafter, we may not consider that part of submissions of the learned Counsel for the purpose of this case.

11. It appears that a notice of motion was filed before the High Court by way of a Chamber summons, which was supported by an affidavit affirmed by the respondent herein. In the said affidavit, although the other clauses of the consent terms entered into by and between the parties on 01.11.1991 had been mentioned but erroneously Clauses 9 and 10, which impose obligation on his part, had been omitted. We do not appreciate such deliberate omission on the part of the respondent. The said notice of motion was withdrawn on 30.07.2001.

13. Having heard the learned Counsel for the parties, we are of

the opinion that as the High Court as also this Court are acting on the basis of the terms of the consent decree, the reciprocal obligations of the parties should be directed to be acted upon simultaneously.

We are not satisfied that the consent terms were in any manner substituted by another agreement between the parties. We, therefore, are of the opinion that the parties should be directed to give effect to the terms of the consent decree. We have noticed hereinbefore, whereas the appellant herein is to handover the flat to the respondent, the respondent was also obligated to transfer the land situated in the District of Pune. Both the parties have failed to comply with their mutual obligations.”

25. The court now deals with the appellants’ contention with respect to the transaction being either a mortgage by conditional sale or a sale with a condition of repurchase, or its being an English mortgage, with the further contention that the right to redeem was not extinguished. The guiding principles on this aspect are embodied in clause (c) of section 58 of the *Transfer of Property Act, 1886* (the “TP Act”) which defines “Mortgage by conditional sale” as follows:

“(c) Mortgage by conditional sale.

Where the mortgagor ostensibly sells the mortgaged property - on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale and the mortgagee a mortgagee by conditional sale.

Provided that no such transaction shall be deemed to be a mortgage, unless the condition is embodied in the document

which effects or purports to effect the sale.”

26. The contents of the transaction evidenced by the deed executed between the parties largely give form to the nature of such transaction. However, nomenclature of the transaction – given by the parties is always inconclusive of its true nature; it is guided by intention of the parties entering into the transaction; in addition to the conditions of repurchase and the extent of a debtor-creditor relationship between the parties, contained within such document.

27. In the case reported as *Vanchalabai Raghunath Ithape (D) by L.Rs. Vs. Shankarrao Baburao Bhilare (D) by L.Rs. and Ors.*(2013) 7 SCC 173 the question to be addressed by the Court was whether the transaction in question was a mortgage by conditional sale or a sale transaction with a condition of repurchase. The trial court, in consideration of the provisions of section 58(c) of the TP Act, did not consider it to be a sale transaction and held it to be a mortgage transaction by conditional sale. The plaintiff's suit for redemption was accordingly decreed by the trial court, which declared that the plaintiff was entitled to redeem the suit property after paying the requisite amount to the defendant. Aggrieved by this judgment, the defendant appealed. The District Judge allowed the appeal, holding that there was no relationship of debtor and creditor between the parties nor was it a case that the defendant was known to the plaintiff before the transaction and consequently, the transaction in question was an absolute sale with a condition of repurchase, and that the plaintiff failed to get the land re-conveyed within stipulated period. In the plaintiff's second appeal the High Court affirmed the District Judge's observations that the document in

question was one of absolute sale with condition of repurchase. The Supreme Court, in an appeal by special leave, by the plaintiff, noticed the findings of the lower appellate court, and highlighted how although there was a presumption that the transaction was a mortgage by conditional sale in cases where the whole transaction is in one document, but the mere incorporation of a term in the same document cannot always mean that the transaction agreed between the parties was a mortgage transaction. The Supreme Court, quoted the observations from *Williams v. Owen* 1840 5 My. And Cr. 303: English Reports (ER) 41 (Chancery) 386 where it was held as follows:

“It was held that in a mortgage the debt subsists and a right to redeem remains with the debtor, but a sale with a condition of repurchase is not a lending and borrowing arrangement; no debt subsists and no right to redeem is reserved by the debtor, but only a personal right to purchase. This personal right can only be enforced strictly according to the terms of the deed and at the time agreed upon.”

28. It was held that it was not in dispute that after transfer of the land to the respondent, they came in possession and used and enjoyed the suit property as an absolute owner, and it was only after 11 years that the plaintiff filed the suit alleging that the suit property was mortgaged in favour of the respondent with a condition to reconvey the land. Thus, the Supreme Court upheld the High Court’s decision of not interfering with the findings of the first appellate court. In *C. Cheriathan v. P. Narayanan Embranthiri and Ors.* AIR 2009 SC 1502, interpreting the vexed question of whether a deed amounted to one of absolute conveyance with a condition of repurchase or a mortgage with conditional sale, reading the ingredients of section 58(c), the Supreme Court held as follows:

“...One of the ingredients for determining the true nature of transaction, therefore, is that the condition of repurchase should be embodied in the document which effects or purports to effect the sale. Indisputably, the said condition is satisfied in the present case....A document, as is well known, must be read in its entirety. When character of a document is in question, although the heading thereof would not be conclusive, it plays a significant role. Intention of the parties must be gathered from the document itself but therefore circumstances attending thereto would also be relevant; particularly when the relationship between the parties is in question.”

29. There, the Supreme Court did not sustain the impugned judgment wherein the High Court allowed interpreting the document in contention to be a deed of mortgage and consequently holding that, *inter alia*, redemption was maintainable, and set it aside. In an earlier judgment, *Tamboli Ramanlal Motilal (dead) by L.Rs. Vs. Ghanchi Chimanlal Keshavlal (dead) by L.Rs. & Anr* AIR 1992 SC 1236, likewise, in considering whether the document in question was a mortgage by conditional sale within the meaning of section 58 (c) of the TP Act, or a sale with option to repurchase, highlighted the decision in *Pandit Chunchun Jha v. Sheikh Ebadat Ali & Anr.* [1955] 1 SCR 174, and stated as follows:

“...Having regard to the nice distinctions between a mortgage by conditional sale and a sale with an option to repurchase, one should be guided by the terms of the document alone without much help from the case law. Of course, cases could be referred for the purposes of interpreting a particular clause to gather the intention. Then again, it is also settled law that nomenclature of the document is hardly conclusive and much importance cannot be attached to the nomenclature alone since it is the real intention which requires to be gathered. It is from this angle we propose to analyse the document. No doubt the document is styled as a deed of conditional sale, but as we have

just now observed, that is not conclusive of the matter.

What does the executant do under the document? He takes a sum of Rs. 5,000/- in cash. The particulars are (a) Rs. 2,499/- i.e. Rs. 899/- by mortgage of his house on 27.1.1944 and (b) Rs. 1,600/- by a further mortgage on 31.5.1947 totalling to Rs. 2,499/-. Thereafter, an amount of Rs. 2,501/- in cash was taken from the transferee. The purpose was to repay miscellaneous debts and domestic expenses and business. It is to be carefully noted that this amount of Rs. 5,000/- was not taken as a loan at all. As rightly observed by the High Court, by executing this document the executant discharges all the prior debts and outstandings. Where, therefore, for a consideration of a sum of Rs. 5,000/- with the conditional sale is executed, we are unable to see how the relationship of the debtor and the creditor can be forged in. In other words, by reading the documents as a whole, we are unable to conclude that there is a debt and the relationship between the parties is that of a debtor and a creditor. This is a vital point to determine the nature of the transaction.

The property is sold conditionally for a period of five years and possession is handed over. At the same time, the document proceeds to state "Therefore, you and your heirs and legal representatives are hereafter entitled to use, enjoy and lease the said houses under the ownership right. (Emphasis supplied)

...The further clause in the document is to the effect that the executant shall repay the amount within a period of five years and in case he fails to repay neither he nor his heirs or legal representatives will have any right to take back the said properties. Here only the right of the transferor is emphasised, while the right of the transferee to foreclose the mortgage is not spoken to. That would be so, if the document were to be a mortgage by conditional sale. Only in such a case the first condition spoken to under Section 58(c) will come into play. It is well-settled in law that the right of redemption and foreclosure are co-extensive. The absence of such a right of the

mortgagee could only mean that it is a conditional sale.

The last important clause is after the period of five years the transferee will have a right to get the municipal records mutated in his name and pay tax. Thereafter, the transferee will have an absolute right to mortgage, sell, or gift the suit property. Neither executant nor anyone else could dispute the title. All the above clauses are clearly consistent with the express intention of making the transaction a conditional sale with an option to repurchase.”

30. Therefore, whether a transaction amounts to a mortgage by conditional sale or a sale with an option of repurchase has to be determined in the light of the ingredients of the contended document, read in the light of section 58(c) of the TP Act, as interpreted in the various precedents as demonstrated above. In the present case, as noticed earlier, the deed was not an “ostensible sale”: the first ingredient necessary to attract Section 58 (c). It merely recognized a pre-existing creditor debtor relationship and reiterated the equitable mortgage created earlier; the terms of the consent award then conferred an option upon the creditor, Tata Capital, to treat the instrument as a conveyance in the event of default in re-payment. Thus, the instrument was never a sale, to begin with; it became a sale deed, by default, as it were, upon the default of the debtor/Sanjeev Narula. So far as English mortgage goes, the terms of Section 58 (e) are categorical; the mortgagor should “bind” himself to pay the amount by a certain date and *transfer the property absolutely*. Here, the question of transfer “absolutely” never happened. It was contingent upon the happening of an event, i.e. the appellants’ default.

31. The above discussion was necessary not only because the appellant contended that the right to redeem property was not extinguished, but also to

discern the true character of the transaction. The right to redeem a mortgage is characterized as a valuable statutory one, and not easily derogable. It is only by the conduct of parties, or by decree of court, that it can be extinguished (Ref Proviso to Section 60, TP Act, and *Achaladas Durgaji Oswal*(supra)). In this case, by the act of parties, the appellant consented to the consent terms enlarging it into a conveyance (with its attendant methodology of receiving consideration, as agreed, for such sale). Therefore, the proviso to Section 60 operated to preclude redemption. In view of the foregoing discussion, the court is satisfied that the appellant's right to redemption was not unfairly or in an unconscionable manner, extinguished.

32. In the light of the above discussion, the appellants' contention that the consent Award is a nullity in the light of *Booz Allen (supra)* is rejected as insubstantial since in the present case, the *ratio* of that judgment is inapplicable and the property described as above stands transferred to the books of Tata Capital and the enforcement of the mortgage, *per se*, is not in dispute at all. The title to the property passed in effect of the consent terms and thus, the Appellants cannot be permitted to revert the status of the property at this stage.

33. This court is of opinion that the learned Single Judge correctly concluded on the inapplicability of the decision in *Booz Allen (supra)* to the present case, though, the conclusion reached on the position of the described property is incorrect. The sequitur to the non-application of the decision in *Booz Allen (supra)* does not render the arbitral award (and the transfer of title of the described property) a nullity. Yet, that does not result in automatic rejection of the appellants' objections.

34. What can be seen is that the agency of the court was not necessary for

enforcement of the mortgage; it enlarged upon the occurrence of the event agreed to by the parties, i.e. default in repayment of the appellants' dues. The conveyance embodied in the consent terms operated to confer title to the property, to Tata Capital. Therefore, the ownership of the property changed. Because of this development, neither did Tata Capital need to approach the court either to seek enforcement of its dispute pertaining to any mortgage nor for sale of property. Those are situations covered by *Booz Allen (supra)*. As far as Sanjeev Narula's argument with respect to re-conveyance is concerned, the terms of the consent award clearly envisioned that Tata Capital could register the property by virtue of the consent terms.

35. The transfer of title to the described property meant that the rights of parties under the consent award worked itself out. However, neither the terms of consent, nor did the award confer, however, any right upon Tata Capital to claim possession of the suit property. The absence of any right to possession, and the submissions of Tata Capital, that the award did not enforce the mortgage, but merely recorded the consent of parties to agree to convey the described property in its favour, which worked itself out, without court intervention, meant that the execution petition, in effect, really sought something over and above the award. In other words, while Tata Capital's contentions about inapplicability of *Booz Allen (supra)* are sound, yet, those arguments preclude it to use the remedy of execution, which is not appropriate to work out substantive remedies, such as a claim to possession. Consequently, Tata Capital's claim over the possession of the property by way of filing an execution petition for enforcement of the consent Award was not maintainable, as it is not the case that a dispute has arisen from the enforcement of the mortgage that was subsequently arbitrated.

36. In the light of the above discussion, it is held that the appellants' objection to maintainability of the execution proceeding, OMP (EN) (COMM) No. 46/ 2016 for enforcement of the consent Award dated 28.02.2013 has to succeed, as execution is not the appropriate remedy for claiming possession. However, the appellants' contentions with respect to nullity of the award are rejected as insubstantial. As the result of this discussion, Tata Capital has to file a separate suit for seeking possession of the premises. Tata Capital is granted six weeks' time to approach the Court; till such time, the directions made by the learned Single Judge in the order of 30.03.2017 maintaining *status quo* of the described property shall bind the parties. The appeal is partly allowed in the above terms. No costs.

S. RAVINDRA BHAT
(JUDGE)

YOGESH KHANNA
(JUDGE)

AUGUST 04, 2017