***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD**
***FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

* HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HON'BLE SRI JUSTICE N. BALAYOGI

+ C.R.P.No.5035 of 2011

% Date: 14-06-2018

Between:

Mohammed Ilyas Ali Khan,
S/o. Mohd. Rasool Khan,
R/o. H.No.20-4-559/A/1, Khilwath,
Hyderabad – 500 002.

Petitioner/Plaintiff

Vs.

1. Indiabulls Housing Finance Limited, rep. by its Branch Manager, Venkat Plaza, Panjagutta, Hyderabad.
2. Indiabulls Housing Finance Limited, having its registered office at F-60, II Floor, Malhotra Building, Connaught Place, New Delhi – 110001.

Respondents

! Counsel for the petitioner : Mr. Mirza Nisar Ahmed Baig Nizami

^ Counsel for the respondents : Mr. Rusheek Reddy K.V.

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? Cases referred

THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
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ORDER: (Per VRS,J.)

Aggrieved by an order passed by the trial Court allowing an application under Section 8 of the Arbitration and Conciliation Act, 1996, the plaintiff in a suit for foreclosure of a mortgage loan, has come up with the above civil revision petition.

2. Heard Mr. Mirza Nisar Ahmed Baig Nizami, learned counsel for the petitioner and Mr. Rusheek Reddy K.V., learned counsel for the respondents.

3. It appears that the petitioner and his brothers obtained a home loan from the respondents, way back in the year 2006. On the ground that in the course of repayment of the loan amounts there was a drastic increase in the rate of interest, the petitioner filed a suit in O.S.No.189 of 2010 on the file of the II Additional Chief Judge, City Civil Court, Hyderabad, praying for foreclosure of the loan account and for a direction to the respondent herein to render accounts. In the suit, the respondents herein took out an application under Section 8 on the ground that there was an arbitration agreement. This application was allowed by the trial Court, forcing the plaintiff in the suit to come up with the above revision petition.

4. The sheet anchor of the case of the petitioner is the decision of the Supreme Court in Booz Allen & Hamilton Inc. v. SBI Home Finance Limited[1]. In the said case, the Supreme Court made a distinction between *rights in rem and rights in personam*. The cases which

[1] (2011) 5 SCC 532

fall under category of *rights in rem* may not be arbitrable. Therefore, the claim of the petitioner is that the dispute between the petitioner and the respondents is not arbitrable and that therefore, Section 8 ought not to have been allowed.

5. In response, it is submitted by Mr. Rusheek Reddy, learned counsel for the respondents that insofar as the mortgage is concerned, the respondents have already initiated proceedings under the SARFAESI Act, 2002. A notice under Section 13(2) was issued on 13.10.2010 and the same was followed by a possession notice on 04.12.2012. Challenging the possession notice, a securitization application has been filed in SA No.99 of 2014, renumbered as 34 of 2017. It appears that an additional order was passed in the said application and the appeal itself has been heard and orders reserved. Therefore, it is the contention of the learned counsel for the respondent that the subject matter of the suit will not fall under the category of enforcement of a *right in rem*.

6. We have carefully considered the above submissions. It may be true that the right arising in respect of a mortgage may be a *right in rem*. But it is always open to the mortgagee to set up a claim only for recovery of money. So long as the mortgagee does not seek the enforcement of the mortgage before a civil Court, he is not seeking to enforce a *right in rem*.

7. In a petition under Section 8, all that is required of the Court is to see what the plaintiff wants. The Court cannot say that the defendant has a right which is a *right in rem* and there is a possibility of the defendant enforcing such a right. On the basis of what a defendant would do, the Court cannot decide an application under Section 8.

8. Moreover, the Supreme Court made an observation in *Booz Allen* about mortgages falling under the category of *right in rem* without directly adjudicating as to whether mortgages clearly fall out of arbitration or not. In fact, in Afcons[2] Infrastructure Ltd., v. Cherian Varkey Construction Co. Pvt. Ltd., the dispute relating to the specific performance of an agreement of sale relating to immovable property was held to be arbitrable. Therefore, it is not as though all rights arising in respect of immovable properties go out of the purview of arbitration. This distinction was brought out by the Madras High Court in M/s. L & T Finance Ltd., v. J.K.S. Constructions Pvt. Ltd.,[3]. Therefore, the trial Court was right in allowing the application under Section 8, as the suit before the trial Court was not the one relating to enforcement of *right in rem*. Hence the Civil Revision Petition is dismissed. There shall be no order as to costs.

9. As a sequel, pending miscellaneous petitions, if any, shall stand closed.

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V. RAMASUBRAMANIAN, J.

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N. BALAYOGI, J.

14th June, 2018
Js.

[2] (2010) 8 SCC 24
[3] 2014-1-LW 888

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