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IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON : 29.11.2021

PRONOUNCING ORDERS ON : 03.12.2021

Coram:

THE HONOURABLE JUSTICE MR.N.ANAND VENKATESH

A.No.3014 of 2021

in

C.S.No.193 of 2021

Om Shakthy Agencies (Madras) P Ltd.,
Om Shakthi TowerII, TS-64,
SIDCO Industrial Estate,
Ekkattuthangal, Guindy,
Chennai 600 032 .. Applicant/ 1st defendant

/versus/

1. Mahindra World City Developers Limited
   Door No.17/18, Patullous Road,
   Chennai 600 002. ..1st Respondent / Plaintiff

2. M.Raghunathan

3. C.Sasi

4. S.Udaykumar

5. N.R.Manikandan

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6. K.Loganathan

7. K.Mani

8. M.Sathyaraj

9. Habeeb Abdul Lathif .. Respondents No.2 to 9/ Defendants

Prayer:: Judge's Summons filed under Order XIV Rule 8 of Original Side Rules read with under Section 151 of C.P.C.

(a) Why this application should not be treated as urgent;

(b) Why this Hon'ble Court shall not be pleased to allow to refer the suit in C.S.(Com).No.193 of 2021 on the file of this Court and the parties to arbitration under Section 8 of the Arbitration and Concilliation Act, 199?

(c)Why this Hon'ble Court shall not be pleased to pass such further order or orders as it may deem fit and proper in the circumstances of the case.

For Plaintiffs : Mr.E.Omprakash
Senior Counsel

For Defendants : Mr.Srinath Sridevan for R1
Mr.R.Vishnu (for D9)

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JUDGMENT

This application has been filed under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act), by the applicant/1st defendant, to refer the parties to Arbitration, on the ground that the subject matter in the suit forms its basis on the land procurement agreement dated 20.12.2007, supplementary agreement dated 05.12.2008, deed of addendum dated 21.07.2010, deed of amendment dated 21.07.2011, revised addendum dated 31.10.2013 and deed of undertaking dated 04.11.2015 and that the parties namely the applicant and the 1st respondent/ plaintiff have categorically agreed for dispute resolution, by means of arbitration.

2. The 1st respondent / plaintiff had advanced monies to the applicant herein for land procurement. For this purpose, the parties entered into a land procurement agreement dated 20.12.2007. This is the basic document which defined the rights and liabilities of the parties and also provided for dispute resolution mechanism by means of arbitration. There were several subsequent documents through

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which the terms got altered/modified etc. For the purposes of deciding this application, it is not necessary for this Court to enter into the various changes that took place through subsequent agreements and that will be a matter to be considered while deciding the merits of the case in the suit.

3. The 1st respondent has paid substantial amounts to the applicant for land procurement and therefore, was insisting for some security. Accordingly, defendants 2 to 9 came forward to offer collateral security for the monies paid by the 1st respondent to the applicant. These defendants deposited the original title deeds with respect to properties more fully described in Schedules A to H in the plaint. These defendants came forward and executed registered mortgage deeds in favour of the 1st respondent.

4. At a particular stage, the applicant was not in a position to procure the lands due to various reasons and hence, the parties agreed to bring the agreement to an end and they reconciled the accounts during January 2016, in order to ascertain the excess amount that was

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lying in the hands of the applicant. According to the 1st respondent, the excess amount that was lying in the hands of the applicant was arrived at a sum of Rs. 34,69,11,734/-. Timelines were fixed for the repayment of the amount and it did not go through and according to the 1st respondent, the amounts were not paid as agreed by the applicant. The applicant took a stand through letter dated 06.01.2020 that the outstanding advances only worked out to Rs.11 Crores. This became the trigger point for the 1st respondent to file the above suit against the defendants. On a plain reading of the pleadings made in the plaint and the reliefs sought for, it is clear that the 1st respondent has filed a mortgage suit in line with Order XXXIV of Code of Civil Procedure, 1908 (hereinafter referred to as CPC). During the pendency of the suit, the present application came to be filed under Section 8 of the Act.

5. The 1st respondent has filed a counter affidavit by taking a stand that mortgage suits are not arbitrable in nature and hence the dispute cannot be referred for arbitration. The 9th defendant/ respondent has also filed a counter. Curiously, this respondent has taken a stand to the effect that the Schedule H property has already

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been sold in favour of the applicant, through his power of attorney agent, by registered sale deed dated 18.03.2009. In spite of the same, the mortgage deed was registered on the same day as Document No. 865 of 2009, as if this respondent mortgaged this property. In short, the 9th respondent has taken a stand to the effect that at the time of execution of the mortgage deed, he ceased to be the owner of the property and it was the 1st defendant who had by then become the owner of Schedule H property.

6. Heard Mr.E.Omprakash, learned Senior counsel for the applicant and Mr.Srinath Sridevan learned counsel for 1st respondent and Mr.R.Vishnu, learned counsel for the 9th respondent.

7. This Court has carefully considered the submissions made on either side and the materials available on record.

8. A careful reading of the land procurement agreement dated 20.12.2007 shows that the applicant had agreed to procure the lands and the 1st respondent had agreed to make the payments, which

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is evident from clause 9 of the agreement. It is further seen from clause 18(d) that the applicant had agreed to execute security documents to guarantee the completion of their obligations under the agreement. Defendants 2 to 8 are none other than the employees/ directors of the applicant company. A careful reading of the memorandum of deposit of title deeds executed by defendants 2 to 8 shows that they are creating the mortgage on their respective properties for securing the repayment by the applicant. Even the supplemental agreement dated 05.12.2008 makes a specific reference to the collateral security given for ensuring the repayment of the amount by the applicant. Even the revised addendum dated 31.10.2013 makes a specific reference to the creation of collateral security to ensure payment of the advance amount made by the 1st respondent to the applicant.

9. Even the letter communication made by the applicant to the 1st respondent on 18.07.2017 and 08.06.2018, proceeds on the basis that they have offered collateral security for the repayment of the advance amount.

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10. It is sufficiently clear from all the above documents that the land procurement agreement entered into by the applicant with the 1st respondent is inextricably inseparable from the mortgage deeds executed by defendants 2 to 8. This fact has not been seriously disputed by the learned counsel appearing on either side. Insofar as the mortgage deed which covers Schedule H in the plaint, it absolutely belongs to the applicant since the 9th defendant had already sold the property in favour of the applicant through Document No. 861 of 2009 dated 18.03.2009, well prior to the execution of the mortgage deed through Document no. 865 of 2009 on the same day.

11. According to the learned senior counsel appearing on behalf of the applicant, all the parties including defendants 2 to 9 must be referred to arbitration since the mortgage deeds are subordinate documents to the main land procurement agreement dated 20.12.2007 and hence, the concept of right in *rem* applicable to mortgage suits should not be applied in the present case. On the other hand, the learned counsel for the 1st respondent submitted that the present suit

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has not been filed for the enforcement of the agreement dated 20.12.2007 and the suit has only been filed for recovery of the advance amount paid to the applicant and which has been secured through mortgage deeds executed by the other defendants and hence, the present case will squarely fall under the category of mortgage suits under Order XXXIV of CPC.

12. To properly appreciate the submissions made on either side and to come to a correct conclusion, it is necessary to place reliance upon some of the judgments that were cited on either side.

13. To start with, this Court must first ascertain as to whether the issue involved in the present suit can be bifurcated by referring the applicant and the 1st respondent for arbitration based on the land procurement agreement dated 20.12.2007 and enforce the guarantee independently as against the other defendants, based on the mortgage deed executed by them in this suit. Without any doubt, such a course can never be adopted. The mortgage deed executed by each of the defendants (D2 to D8) is directly linked to the land procurement

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agreement. While considering a somewhat similar issue, the Bombay High Court in ***MSTC Ltd. v. M/s. Omega Petro Products Pvt. Ltd &Ors.***reported in 2018 SCC OnLine Bom 487, held as follows.

10. The binding authority of M.R. Engineers' case neither cited before nor considered by the learned Single Judge in Sahyadri Earthmovers (supra). The law stated by the learned Single Judge in that case, namely, having signed the deed of guarantee which specifically mentions and refers to the loan agreement between the parties, which contains an arbitration agreement, the guarantor is bound by the arbitration agreement under the loan agreement, is clearly contrary to the law stated by the Supreme Court in M.R. Engineers and is per incurim. Every guarantee is necessarily linked to another contract, which is said to be the main contract, and must by definition refer to the main contract. After all, Section 126 of the Contract Act defines a 'contract of guarantee' as "a contract to perform the promise, or discharge the liability, of a third person in case of his default." The promise or the liability arising

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thereunder, which forms part of that other contract, is the very basis of a contract of guarantee and without making a reference to that promise or liability, it is unthinkable that a contract of guarantee can be entered into. Every contract of guarantee, therefore, by definition must make a reference to the main agreement, the promise whereunder is sought to be performed or the liability whereunder is sought to be discharged under the contract of guarantee. By making a mere reference to such contract, the contract of guarantee cannot be said to either incorporate the terms of the main contract or particularly incorporate the arbitration agreement contained thereunder. We are bound by the decision of the Supreme Court in the case of M.R. Engineers and unless the three conditions laid down in that case, namely, (i) clear reference to the document contained in the arbitration clause, (ii) such reference indicating an intention to incorporate the arbitration clause, and (iii) the arbitration clause being appropriate or capable of being applied in respect of all

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disputes under the referring contract and not being repugnant to any term of that contract, are satisfied, there is no warrant for treating the arbitration clause in the referred document as having been incorporated into the referring contract. The proposition laid down by the Supreme Court in M.R. Engineers was once again affirmed by the Supreme Court in the case of DuroFelguera S.A. (supra).

11. The learned Single Judge of Delhi High Court in the case of Canbank Financial Services Ltd. can also accordingly be treated as having been impliedly overruled and the law stated therein as not good law after the judgment of the Supreme Court in the case of M.R. Engineers. Anyway, Canbank case is distinguished by the Delhi High Court itself later in STCI Finance Ltd. v. Sukhmani Technologies Pvt. Ltd.[9] *This later decision was rendered after considering the cases of Chloro Controls as well as M.R. Engineers and S.N.*

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Prasad (supra). The Delhi High Court in STCI Finance held that an agreement to stand as a surety for due performance of the contract between the principal debtor and the lender, although linked to the principal contract, is nonetheless an independent contract and unless the arbitration agreement contained in the principal contract is specifically incorporated in the agreement of surety by a specific reference, the surety cannot be said to be bound by the arbitration agreement contained in the main contract.

12. If the arbitration agreement contained in the main contract for supply of goods is not binding on the two Defendants purportedly sued as guarantors, there is no warrant for referring the parties to arbitration. As stated by the Supreme Court in the case of Sukanya Holdings (P) Ltd. (supra), the expression "a matter which is the subject of an arbitration agreement" used in Section 8 of the Act, must include "the entire subject matter of the suit and not merely a part of it". When the entire subject matter of the

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suit is not subject to arbitration agreement, the Plaintiff cannot be asked to bifurcate the subject matter of the suit in two parts, one to be decided by the arbitral tribunal and the other to be decided by ordinary civil courts. As held by the Supreme Court, bifurcation of the subject matter of action brought before a judicial authority is not permissible under Section 8 for various reasons. Neither was it contemplated nor anyway indicated in the language of the section and such bifurcation would result inevitably in delaying the proceedings and defeating the whole purpose of speedy disposal of a dispute with minimum cost of litigation. In the present case, the Plaintiff, as dominus litus, is well within its rights to choose to invoke the joint and several liability of the principal debtor and the guarantor in one action. The Plaintiff, in such a case, cannot be asked to prosecute his remedy separately against the principal debtor and the guarantor. Even under the old law, namely, Arbitration Act, 1940, which contained a provision for stay of suit in case of identity

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between the subject matters of a suit and an arbitration agreement (Section 34), Calcutta High Court in the case of Asiatic Shipping Co. (Private) Ltd. v. P.N. Djakarta Lloyd had held that the court was justified in refusing to stay a suit between a creditor, and his principal debtor and guarantor under Section 34, when there was an arbitration agreement only between the plaintiff creditor and principal debtor and the guarantor was not a party to it. The court held that any decision upon the liability of a guarantor necessarily involved determination of the liability of the principal debtor and as the same issue would have to be gone into both in the suit and the arbitration proceedings, there was every likelihood of conflicting findings and the suit, in the premises, should not be stayed.

14. The learned single judge of the Bombay High Court heavily relied upon the judgment of the Hon'ble Supreme Court in ***MR Engineers and Contractors pvt.Ltd. v. SomDatt Builders Ltd.*** reported in **2009 7 SCC 696** and ***DuroFelguera, SA* v. *Gangavaram Port Ltd.*** reported in **2017 9SCC 729.**

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15. As rightly held by the learned single judge, every contract of guarantee must necessarily make reference to the main agreement under which the promise to perform or the liability to be discharged is secured by the contract of guarantee. Having held so, the learned single judge went on to hold that the plaintiff cannot be asked to bifurcate the subject matter of the suit into two parts, one to be decided by the arbitral tribunal and the other to be decided by the Civil Court. In the present case, the land procurement agreement and the mortgage deeds are intricately interlinked and they have to be necessarily dealt with together. This is more so due to the fact that the persons who executed the mortgage are none other than the employees /directors of the applicant company and the applicant company in two of the letters, claim as if they have executed the guarantee to secure the repayment of the monies, advanced to the applicant by the 1st respondent.

16. The above finding is taken forward to the next issue wherein this Court has to deal with the contention as to whether the

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issue involved in the present suit is arbitrable in nature. There is absolutely no doubt that the suit filed by the 1st respondent is a mortgage suit in line with Order XXXIV of CPC. The question is whether such a claim made by the 1st respondent can be referred to arbitration. Certain important judgments of the Hon'ble Supreme Court will throw light on this issue.

17. The Hon'ble Supreme Court in ***Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd & Ors.*** (Hereinafter referred to as **Booz Allen case**) reported in 2011 5 SCC 532, specifically dealt with the issue as to whether a suit on mortgage can be referred to an arbitral tribunal or the same has to be only dealt by a Civil Court. The relevant portions of the judgment are extracted hereunder.

> *34. The term "arbitrability" has different meanings in different contexts. The three facets of arbitrability, relating to the jurisdiction of the Arbitral Tribunal, are as under:*
>
> *(i) Whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having*

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regard to their nature, could be resolved by a private forum chosen by the parties (the Arbitral Tribunal) or whether they would exclusively fall within the domain of public fora (courts).

(ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the "excepted matters" excluded from the purview of the arbitration agreement.

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the Arbitral Tribunal, or whether they do not arise out of the statement of claim and the counterclaim filed before the Arbitral Tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be "arbitrable" if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the Arbitral

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Tribunal.

35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration as the forum for settlement of such disputes.

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36. The well-recognised examples of non-arbitrable disputes are: (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes.

37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the

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title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

38. Generally and traditionally all disputes relating to rights in personam are considered to be amenable to arbitration; and all disputes relating to rights in rem are required to be adjudicated by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable.

39. The Act does not specifically exclude any category of disputes as being not arbitrable. Sections 34(2)(b) and 48(2) of the Act however make it clear that an arbitral award will be set aside if the court finds that "the subject-matter of the dispute is

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not capable of settlement by arbitration under the law for the time being in force".

40.Russell on Arbitration (22nd Edn.) observed thus (p. 28, Para 2.007):

"*Not all matters are capable of being referred to arbitration. As a matter of English law certain matters are reserved for the court alone and if a tribunal purports to deal with them the resulting award will be unenforceable. These include matters where the type of remedy required is not one which an Arbitral Tribunal is empowered to give."*

The subsequent edition of Russell (23rd Edn., p. 470, Para 8.043) merely observes that English law does recognise that there are matters which cannot be decided by means of arbitration.

41. Mustill and Boyd in their Law and Practice of Commercial Arbitration in England (2nd Edn., 1989), have observed thus:

"*In practice therefore, the question has not been whether a particular dispute is capable of settlement by arbitration, but whether it ought to be referred to arbitration or whether it has*

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given rise to an enforceable award. No doubt for this reason, English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. …

Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the State. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order….”

(emphasis supplied)

Mustill and Boyd in their 2001 Companion Volume to the 2nd Edn. of Commercial Arbitration, observe thus (p. 73):

“*Many commentaries treat it as axiomatic that 'real' rights, that is, rights which are valid as against the whole world, cannot be the subject of private arbitration, although some acknowledge*

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that subordinate rights in personam derived from the real rights may be ruled upon by arbitrators. The conventional view is thus that, for example, rights under a patent licence may be arbitrated, but the validity of the underlying patent may not … An arbitrator whose powers are derived from a private agreement between A and B plainly has no jurisdiction to bind anyone else by a decision on whether a patent is valid, for no one else has mandated him to make such a decision, and a decision which attempted to do so would be useless."

(emphasis supplied)

42. The distinction between disputes which are capable of being decided by arbitration, and those which are not, is brought out in three decisions of this Court. In Haryana Telecom Ltd. v. Sterlite Industries (India) Ltd. [(1999) 5 SCC 688] this Court held: (SCC pp. 689-90, paras 4-5)

"*4. Sub-section (1) of Section 8 provides that the judicial authority before whom an action is brought in a matter, will refer the parties to arbitration the said matter in accordance with the arbitration agreement. This, however, postulates, in*

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our opinion, that what can be referred to the arbitrator is only that dispute or matter which the arbitrator is competent or empowered to decide.

5. The claim in a petition for winding up is not for money. The petition filed under the Companies Act would be to the effect, in a matter like this, that the company has become commercially insolvent and, therefore, should be wound up. The power to order winding up of a company is contained under the Companies Act and is conferred on the court. An arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company. The matter which is pending before the High Court in which the application was filed by the petitioner herein was relating to winding up of the company. That could obviously not be referred to arbitration and, therefore, the High Court, in our opinion was right in rejecting the application."

(emphasis supplied)

43. A different perspective on the issue is found in Olympus Superstructures (P) Ltd. v. Meena Vijay Khetan [(1999) 5 SCC

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651] where this Court considered whether an arbitrator has the power and jurisdiction to grant specific performance of contracts relating to immovable property. This Court held: (SCC p. 668, para 34)

"*34. … We are of the view that the right to specific performance of an agreement of sale deals with contractual rights and it is certainly open to the parties to agree—with a view to shorten litigation in regular courts—to refer the issues relating to specific performance to arbitration. There is no prohibition in the Specific Relief Act, 1963 that issues relating to specific performance of contract relating to immovable property cannot be referred to arbitration. Nor is there such a prohibition contained in the Arbitration and Conciliation Act, 1996 as contrasted with Section 15 of the English Arbitration Act, 1950 or Section 48(5)(b) of the English Arbitration Act, 1996 which contained a prohibition relating to specific performance of contracts concerning immovable property."*

44. Approving the decision of the Calcutta High Court in KeventerAgro Ltd. v. Seegram Co. Ltd. [APO No. 498 of 1997

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decided on 27-1-1998 (Cal)] this Court held that disputes relating to specific performance of a contract can be referred to arbitration and Section 34(2)(b)(i) will not be attracted. This Court held: (Meena Vijay Khetan case [(1999) 5 SCC 651] , SCC p. 669, para 36)

"*36. Further, as pointed out in the Calcutta case [APO No. 498 of 1997 decided on 27-1-1998 (Cal)] , merely because there is need for exercise of discretion in case of specific performance, it cannot be said that only the civil court can exercise such a discretion. In the above case, Ms Ruma Pal, J. observed:*

'… *merely because the sections of the Specific Relief Act confer discretion on courts to grant specific performance of a contract does not mean that parties cannot agree that the discretion will be exercised by a forum of their choice. If the converse were true, then whenever a relief is dependent upon the exercise of discretion of a court by statute e.g. the grant of interest or costs, parties could be precluded from referring the dispute to arbitration.' "*

This Court further clarified that while matters like criminal

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offences and matrimonial disputes may not be the subject-matter of resolution by arbitration, matters incidental thereto may be referred to arbitration: (Meena Vijay Khetan case [(1999) 5 SCC 651] , SCC p. 669, para 35)

"*35. … Reference is made there to certain disputes like criminal offences of a public nature, disputes arising out of illegal agreements and disputes relating to status, such as divorce, which cannot be referred to arbitration. It has, however, been held that if in respect of facts relating to a criminal matter, say, physical injury, if there is a right to damages for personal injury, then such a dispute can be referred to arbitration (Keir v. Leeman [(1846) 9 QB 371 : 115 ER 1315]). Similarly, it has been held that a husband and a wife may refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter….*"

45. In ChiranjilalShrilalGoenka v. Jasjit Singh [(1993) 2 SCC 507] this Court held that grant of probate is a judgment in rem and is conclusive and binding not only on the parties but also

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the entire world; and therefore, the courts alone will have exclusive jurisdiction to grant probate and an Arbitral Tribunal will not have the jurisdiction, even if consented to by the parties to adjudicate upon the proof or validity of the will.

46. An agreement to sell or an agreement to mortgage does not involve any transfer of right in rem but creates 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 the courts of law and not by Arbitral Tribunals.

47. 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 the Transfer of Property Act,

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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). 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.

48. The provisions of the 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.

48.1. Rule 1 of Order 34 provides that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall have to be

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joined as parties to any suit relating to mortgage, whether they are parties to the mortgage or not. The object of this Rule is to avoid multiplicity of suits and enable all interested persons, to raise their defences or claims, so that they could also be taken note of, while dealing with the claim in the mortgage suit and passing a preliminary decree. A person who has an interest in the mortgage security or right or redemption can therefore make an application for being impleaded in a mortgage suit, and is entitled to be made a party. But if a mortgage suit is referred to arbitration, a person who is not a party to the arbitration agreement, but having an interest in the mortgaged property or right of redemption, cannot get himself impleaded as a party to the arbitration proceedings, nor get his claim dealt with in the arbitration proceedings relating to a dispute between the parties to the arbitration, thereby defeating the scheme relating to mortgages in the Transfer of Property Act and the Code. It will also lead to multiplicity of proceedings with the likelihood of divergent results.

48.2. In passing a preliminary decree and final decree, the court

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adjudicates, adjusts and safeguards the interests not only of the mortgagor and mortgagee but also puisne/mesne mortgagees, persons entitled to equity of redemption, persons having an interest in the mortgaged property, auction-purchasers, persons in possession. An Arbitral Tribunal will not be able to do so.

48.3. The court can direct that an account be taken of what is due to the mortgagee and declare the amounts due and direct that if the mortgagor pays into court, the amount so found due, on or before such date as the court may fix (within six months from the date on which the court confirms the account taken or from the date on which the court declares the amount due), the petitioner shall deliver the documents and if necessary re-transfer the property to the defendant; and further direct that if the mortgagor defaults in payment of such dues, then the mortgagee will be entitled to final decree for sale of the property or part thereof and pay into court the sale proceeds, and to adjudge the subsequent costs, charges, expenses and interest and direct that the balance be paid to the defendant/mortgagor or other persons entitled to receive the

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same. An Arbitral Tribunal will not be able to do so.

48.4. Where in a suit for sale (or in a suit for foreclosure in which sale is ordered), subsequent mortgagees or persons deriving title from, or subrogated to the rights of any such mortgagees are joined as parties, the court while making the preliminary decree for sale under Rule 4(1), could provide for adjudication of the respective rights and liabilities of the parties to the suit in a manner and form set forth in Forms 9, 10 and 11 of Appendix 'D' to the Code with such variations as the circumstances of the case may require. In a suit for foreclosure in the case of an anomalous mortgage, if the plaintiff succeeds, the court may, at the instance of any party to the suit or any other party interested in the mortgage security or the right of redemption, pass a like decree in lieu of a decree for foreclosure, on such terms as it thinks fit. But an Arbitral Tribunal will not be able to do so.

48.5. The court has the power under Rule 4(2), on good cause being shown and upon terms to be fixed by it, from time to

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time, at any time before a final decree is passed, extend the time fixed for payment of the amount found or declared due or the amount adjudged due in respect of subsequent costs, charges, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.

49. 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.

18. This judgment was subsequently reiterated by the Hon'ble

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Supreme Court in [***A. Ayyasamy v. A. Paramasivam]*** reported in **2016 10 SCC 386** and the relevant paragraph is extracted hereunder.

35. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration "subject to the dispute being governed by the arbitration agreement" unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , this Court held that (at SCC p. 546, para 35) adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as: (SCC pp. 546-47, para 36)

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(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;

(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.

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage

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has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishor Shah v. Jayesh Dinesh Shah [Vimal Kishor Shah v. Jayesh Dinesh Shah, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303] , this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.

19. A larger bench of the Hon'ble Supreme Court once again had an occasion to deal with this issue in [***Vidya Drolia v. Durga Trading Corporation]*** (hereinafter referred to as ***Vidya Drolia case)*** reported in 2021 2 SCC 1. The relevant portions of the judgement are extracted hereunder.

34. In Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] , elucidating on the question of non-arbitrability of a

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dispute, it has been observed : (SCC pp. 546-47, paras 35 & 37-38)

"*35. The Arbitral Tribunals are private fora chosen voluntarily by the parties to the dispute, to adjudicate their disputes in place of courts and tribunals which are public fora constituted under the laws of the country. Every civil or commercial dispute, either contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by arbitration unless the jurisdiction of the Arbitral Tribunals is excluded either expressly or by necessary implication. Adjudication of certain categories of proceedings are reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not expressly reserved for adjudication by public fora (courts and tribunals), may by necessary implication stand excluded from the purview of private fora. Consequently, where the cause/dispute is inarbitrable, the court where a suit is pending, will refuse to refer the parties to arbitration, under Section 8 of the Act, even if the parties might have agreed upon arbitration*

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as the forum for settlement of such disputes.

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37. It may be noticed that the cases referred to above relate to actions in rem. A right in rem is a right exercisable against the world at large, as contrasted from a right in personam which is an interest protected solely against specific individuals. Actions in personam refer to actions determining the rights and interests of the parties themselves in the subject-matter of the case, whereas actions in rem refer to actions determining the title to property and the rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property. Correspondingly, a judgment in personam refers to a judgment against a person as distinguished from a judgment against a thing, right or status and a judgment in rem refers to a judgment that determines the status or condition of property which operates directly on the property itself. (Vide Black's Law Dictionary.)

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

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by courts and public tribunals, being unsuited for private arbitration. This is not however a rigid or inflexible rule. Disputes relating to subordinate rights in personam arising from rights in rem have always been considered to be arbitrable."

35.Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] states that civil or commercial dispute, whether contractual or non-contractual, which can be decided by a court, is in principle capable of being adjudicated and resolved by an Arbitral Tribunal unless the jurisdiction of the Arbitral Tribunal is either expressly or by necessary implication excluded. Legislature is entitled to exclusively reserve certain category of proceedings for public forums, be it a court or a forum created or empowered by the State to the exclusion of private forum. Exclusion of the jurisdiction of the Arbitral Tribunal are matters of public policy. When public policy mandates and states that a case or a dispute is non-arbitrable, the court would not allow an application under Section 8 (or even Section 11 as observed supra) even if the parties have agreed upon arbitration as the

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mechanism for settlement of such disputes.

36. Exclusion or non-arbitrability when clearly expressed would pose no difficulty and should be respected. However, exclusion or non-arbitrability of subjects or disputes from the purview of a private forum like arbitration by necessary implication requires setting out the principles that should be applied.

37.Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] draws a distinction between actions in personam, that is, actions which determine the rights and interests of parties themselves in the subject-matter of the case, and actions in rem which refer to actions determining the title of the property and the rights of the parties not merely amongst themselves but also against all the persons at any time claiming an interest in that property. Rights in personamare considered to be amenable to arbitration and disputes regarding rights in rem are required to be adjudicated by the courts and public tribunals. The latter actions are unsuitable for private

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arbitration. Disputes relating to subordinate rights in personam arising from rights in rem are considered to be arbitrable. Para 36 of the judgment in Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to certain examples of non-arbitrable disputes and reads : (SCC pp. 546-47)

"*36. The well-recognised examples of non-arbitrable disputes are : (i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences; (ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights, child custody; (iii) guardianship matters; (iv) insolvency and winding-up matters; (v) testamentary matters (grant of probate, letters of administration and succession certificate); and (vi) eviction or tenancy matters governed by special statutes where the tenant enjoys statutory protection against eviction and only the specified courts are conferred jurisdiction to grant eviction or decide the disputes."*

38. Landlord-tenant disputes governed by rent control legislation are not actions in rem, yet they are non-arbitrable.

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In Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] reference was made (at SCC p. 547, para 40) to Russell on Arbitration (22nd Edn.) in Para 2.007 at p. 28 wherein the author has observed that certain matters in English Law are reserved for the court alone and if an Arbitral Tribunal purports to deal with them the resulting award would be unenforceable. These matters would include where the type of remedy required is not one which the Arbitral Tribunal is empowered to give. Reference was made (at SCC p. 548, para 41) to Law and Practice of Commercial Arbitration in England (2nd Edn. 1989) by Mustill and Boyd which states that certain types of remedies which the arbitrator can award are limited by consideration of public policy and as arbitrator is appointed by the parties and not by the State. Arbitrator cannot impose fine, give imprisonment, commit a person for contempt or issue a writ of subpoena nor can he make an award binding on third parties and affect public at large, such as a judgment in rem. Mustill and Boyd in their 2001 Companion Volume have observed that

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axiomatically rights that are valid as against the whole world, cannot be a subject of private arbitration, although subordinate rights in personam derived from such rights may be ruled upon by the arbitrators. Therefore, rights under a patent licence may be arbitrated but the validity of the underlying patent may not be arbitrable. Similarly, an arbitrator who derives its power from a private agreement between A and B, plainly has no jurisdiction to bind a third person by a decision on whether the patent is valid or not, for no one else has mandated him to make the decision and the decision which attempts to do so would be useless.

39. Analysing the provisions of Order 34 of the Code of Civil Procedure, 1908, Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] holds that this Order not only relates to execution of a decree, it provides for preliminary and final decrees to satisfy the substantive rights of mortgagees with reference to their mortgage security. The provisions of the Transfer of Property Act read with the Code relating to

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mortgage suits makes it clear that all persons having interest either in the mortgage security or in the right of redemption have to be joined as parties whether they are parties to the mortgage or not. The object of the provisions is to avoid multiplicity of suits/proceedings and to enable all the interested persons to raise their defences and claims, which are to be taken note of while dealing with the claim in the mortgage suit. By passing a preliminary decree or final decree, the court adjudicates, adjusts and safeguards the interests of not only the mortgager or mortgagee but also puisne/mesne mortgagees, persons entitled to the equity of redemption, persons having an interest in the mortgaged property, auction-purchasers and persons in possession, which an Arbitral Tribunal cannot do. Therefore, a suit for foreclosure or redemption of mortgage property can be dealt with by a public forum and not by a private forum.

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48. A judgment in rem determines the status of a person or thing as distinct from the particular interest in it of a party to

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the litigation; and such a judgment is conclusive evidence for and against all persons whether parties, privies or strangers of the matter actually decided. Such a judgment "settles the destiny of the res itself" and binds all persons claiming an interest in the property inconsistent with the judgment even though pronounced in their absence. [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North &Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] By contrast, a judgment in personam, "although it may concern a res, merely determines the rights of the litigants inter se to the res". [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992), p. 362.] Distinction between judgments in rem and judgments in personam turns on their power as res judicata, [G.C. Cheshire & P.M. North, Private International Law, 12th Edn. by North & Fawcett (Eds.) (London : Butterworths, 1992).] i.e. judgment in rem would operate as res judicata against the world, and judgment in personam would operate as res judicata only against the parties in dispute. Use of expressions "rights in rem"

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and "rights in personam" may not be correct for determining non-arbitrability because of the interplay between rights in rem and rights in personam. Many a times, a right in rem results in an enforceable right in personam. Booz Allen & Hamilton Inc. [Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 : (2011) 2 SCC (Civ) 781] refers to the statement by Mustill and Boyd that the subordinate rights in personam derived from rights in rem can be ruled upon by the arbitrators, which is apposite. Therefore, a claim for infringement of copyright against a particular person is arbitrable, though in some manner the arbitrator would examine the right to copyright, a right in rem. Arbitration by necessary implication excludes actions in rem.

49. Exclusion of actions in rem from arbitration, exposits the intrinsic limits of arbitration as a private dispute resolution mechanism, which is only binding on "the parties" to the arbitration agreement. The courts established by law on the other hand enjoy jurisdiction by default and do not require mutual agreement for conferring jurisdiction. The Arbitral

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Tribunals not being courts of law or established under the auspices of the State cannot act judicially so as to affect those who are not bound by the arbitration clause. Arbitration is unsuitable when it has ergaomnes effect, that is, it affects the rights and liabilities of persons who are not bound by the arbitration agreement. Equally arbitration as a decentralised mode of dispute resolution is unsuitable when the subject-matter or a dispute in the factual background, requires collective adjudication before one court or forum. Certain disputes as a class, or sometimes the dispute in the given facts, can be efficiently resolved only through collective litigation proceedings. Contractual and consensual nature of arbitration underpins its ambit and scope. Authority and power being derived from an agreement cannot bind and is non-effective against non-signatories. An arbitration agreement between two or more parties would be limpid and inexpedient in situations when the subject-matter or dispute affects the rights and interests of third parties or without presence of others, an effective and enforceable award is not possible. Prime objective

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of arbitration to secure just, fair and effective resolution of disputes, without unnecessary delay and with least expense, is crippled and mutilated when the rights and liabilities of persons who have not consented to arbitration are affected or the collective resolution of the disputes by including non-parties is required. Arbitration agreement as an alternative to public fora should not be enforced when it is futile, ineffective, and would be a no result exercise. [Prof. Stavros Brekoulakis, "On Arbitrability : Persisting Misconceptions and New Areas of Concern" essay in the edited collection, Arbitrability : International and Comparative Perspectives (Kluwer, 2009) pp. 19-45.]

76. In view of the above discussion, we would like to propound a fourfold test for determining when the subject-matter of a dispute in an arbitration agreement is not arbitrable:

76.1. (1) When cause of action and subject-matter of the dispute relates to actions in rem, that do not pertain to subordinate rights in personam that arise from rights in rem.

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76.2. (2) When cause of action and subject-matter of the dispute affects third-party rights; have ergaomnes effect; require centralised adjudication, and mutual adjudication would not be appropriate and enforceable.

76.3. (3) When cause of action and subject-matter of the dispute relates to inalienable sovereign and public interest functions of the State and hence mutual adjudication would be unenforceable.

76.4. (4) When the subject-matter of the dispute is expressly or by necessary implication non-arbitrable as per mandatory statute(s).

76.5. These tests are not watertight compartments; they dovetail and overlap, albeit when applied holistically and pragmatically will help and assist in determining and ascertaining with great degree of certainty when as per law in India, a dispute or subject-matter is non-arbitrable. Only when

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the answer is affirmative that the subject-matter of the dispute would be non-arbitrable.

20. The larger bench while considering the issue, confirmed the earlier judgment in **Booz Allen case** referred *supra.* It propounded a fourfold test for determining when the subject matter of a dispute in an arbitration agreement is arbitrable. While applying this test and in particular taking into consideration paragraphs 76.1, 76.2 & 76.5, this Court finds that the subject matter of the dispute would be non-arbitrable.

21. For better appreciation, let us take a hypothetical case where all the parties to this suit are referred to arbitration. There is no guarantee that defendants 2 to 8 will not take a stand in future that they are not parties to the land procurement agreement dated 20.12.2007 and that their collateral security which is secured by way of mortgage is not arbitrable. If such a stand is taken, the 1st respondent will be left high and dry and even in the extreme case of an award passed in favour of the 1st respondent, the same will be interfered

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under Section 34 of the Act, on the simple ground that, the dispute in so far as defendants 2 to 8 is non-arbitrable. For coming to such a conclusion, the Court has to simply place reliance upon the judgment of the Hon'ble Supreme Court in **Booz Allen case** and **Vidya Drolia case**, referred supra. The 1st respondent will not have any answer in such a situation since it goes to the root of the matter. One such instance where this court interfered with the award on this ground can be noticed in [***A. Ranjit Kumar and Ors. v. Cholamandalam Investment & Finance Company Ltd. and Ors.]*** reported in 2021 3 MLJ 468. The relevant portions in the judgement are extracted hereunder.

> *6. Though several grounds were articulated in the OP, learned counsel restricted his submissions into two points and they are as follows:*
>
> *a) AT has virtually adjudicated upon a mortgage suit, which is impermissible as the same is not arbitrable as held by Hon'ble Supreme Court in Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. and Others MANU/SC/0533/2011: (2011) 5 MLJ 373: LNIND 2011 SC 422: (2011) 5 SCC 532: AIR 2011 SC*

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2507; and

b) Impugned award is an infarct of Section 31(3) of A and C Act as it does not give reasons upon which it is based and is therefore vitiated by patent illegality within the meaning of Section 34(2A) of A and C Act.

7. In response, learned counsel for first respondent in captioned OP NBFC/claimant made submissions, which are as follows:

a) Clause 26 of said contract is the arbitration clause, it provides for arbitration of all the disputes, differences and claims arising out of said contract and therefore, it cannot be gainsaid that a mortgage suit has been decided by AT when the mortgage forms part of said contract;

b) Though details regarding repayment made by petitioners, number of EMIs, quantum have not been set out in the impugned award, Statement of Outstanding was produced before AT, it was marked as Ex. C6 and Ex. C6 before AT contains all these details, though the same have not been articulated in the impugned award.

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14. The first point is on arbitrability. To be noted, in terms of challenge to an award this arbitrability ground turns on Section 34(2)(b)(i) of A and C Act. In Lion Engineering case law Lion Engineering Consultants v. State of Madhya Pradesh MANU/SC/0313/2018 (2018) 16 SCC 758, Hon'ble Supreme Court has held that a preliminary issue can be raised for the first time in a Section 34 application also and therefore, the respondents not having appeared before AT and obviously not having raised this point is not of any consequence when it comes to considering this ground. Learned counsel for petitioners in support of his contention that vide the impugned award AT has virtually decided a mortgage suit, which is impermissible as it is not arbitrable, pressed into service Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others (supra). As mentioned supra, in Booz Allen and Hamilton Inc. v. SB! Home Finance Limited and Others (supra), learned Counsel drew the attention of this Court to Paragraphs 46 to 47 and Paragraph 53. As this Court finds that Paragraph 48 of Booz Allen and Hamilton Inc. v. SBI Home Finance Limited and Others

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(supra) is also relevant, this Court deems it appropriate to extract and reproduce Paragraphs 46,48,48.1 to 48.5 and Paragraph 53, which read as follows:

..

15. This Court has already extracted and reproduced operative portion of the impugned award elsewhere supra in this order. AT has framed an issue as to whether the Claimant NBFC is entitled to the claim as prayed for and while answering this issue (Issue No. 4 in the impugned award) AT has held as follows:

'It is though only a dispute for recovery of money, since there is an equitable mortgage effected with the intention to create security for the due repayment of the outstanding the Claimant shall take appropriate legal action/proceedings to enforce/sell the security.

16. The above extract of the operative portion of the impugned award makes it clear that AT has decided on enforcernent of a mortgage by sale of mortgaged property. As rightly pointed out

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by learned counsel for petitioners, in the light of Booz Allen principle, this is impermissible and therefore it vitiates the impugned award. Learned counsel for petitioners submits that this point regarding Booz Allen principle could have been articulated with greater clarity and specificity in the grounds. but it is covered by the swap of ground (d) in the OP which talks about failure follow procedure established in law.

17. This court accepts the submission. In this regard, this Court is unable to accept the argument of learned counsel f NBFC that Clause 26 of said contract is very wide and it includes mortgage, as mortgage forms part of transaction qua said contract. The reason is, this tantamounts to begging the question. The question is whether enforcement of a mortgage can be decided i.e., whether a mortgage suit can be decided by an Arbitral Tribunal. The answer that mortgage forms part of the transaction between the parties is begging the question and is therefore unacceptable. That AT has decided NBFC's claim as a claim on the foot of a mortgage is indisputable in the light of the extracts supra.

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18. Therefore, this Court finds for the petitioners and holds that impugned award is vitiated for infarct of Booz Allen principle as it has decided on enforcement of a mortgage.

22. While deciding an application under Section 8 of the Act, this court has to necessarily look at the subject matter and see if it can be brought within the scope of the arbitration agreement. In the present case, the 1st respondent has filed a mortgage suit based on the land procurement agreement and the mortgage deeds put together. Since the action involved pertains to enforcement of a right in *rem*, the suit has to be necessarily dealt with only by this Commercial Division, and the parties cannot be referred for arbitration.

23. In view of the above discussion, this Court has absolutely no hesitation to dismiss the present application and accordingly, the same is dismissed. There shall be a direction to the applicant to pay costs of a sum of Rs 25,000/- to the 1st respondent / plaintiff on or before 10.12.2021.

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