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CRP. No.3384 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 04.09.2024

DELIVERED ON: 19.10.2024

CORAM:

THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR

and

THE HON'BLE MR.JUSTICE P.B.BALAJI

C.R.P. No.3384 of 2024
and CMP. No.18217 of 2024

Housing and Urban Development Corporation
Limited (HUDCO),
having its registered Office at
New Delhi and Office among other
places including a Regional Office at
Manipal Centre, North Block,
7th Floor, Unit No.703 and 704,
No.47, Dickenson Road, Bangalore,
Karnataka 560 042.

.. Petitioner

Vs

- 1.Syamjee Jagadees
- 2.Ashuthosh Misra
- 3.S.Rajaraman
- 4.Krishnaraj Raju
- 5.Sanjeev Kumar
- 6.Kambam Balaji Prasad Rao
- 7.Rajan Achary

..Respondents



Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order dated 09.07.2024 in MA No.35 of 2023 on the file of Debt Recovery Appellate Tribunal, Chennai confirming the order dated 25.07.2023 in IA. No.3180 of 2022 in OA. No.801 of 2014 on the file of the Debt Recovery Tribunal -I, Karnataka at Bengaluru.

For Petitioner : Mr.A.Arokia Satheesh
For Respondents : Mr.V.Prakash,
Senior Counsel
for Mr.P.Chandrasekaran

ORDER

(Order of the Court was made by MR.JUSTICE P.B.BALAJI, J.)

The Revision has been preferred by the petitioner, aggrieved by the order dated 09.07.2024 in M.A. No.35 of 2023 on the file of the Debt Recovery Appellate Tribunal, Chennai.

2. We have heard Mr.A.Arokia Satheesh, learned counsel for the Revision Petitioner and Mr.V.Prakash, learned Senior Counsel appearing for Mr.P.Chandrasekharan, learned counsel for the respondents.

3. The learned counsel for the Revision Petitioner would submit that the Revision Petitioner is the Applicant in O.A.No.801 of 2014 before the



Debt Recovery Tribunal (DRT)- 1, Karnataka at Bangalore, which has been filed for recovery of Rs.76,37,741/- against M/s.Spectrum Realtors and its partners who are defendants 1 to 5 in the said proceedings. Defendants 6 to 33 are purchasers of Flats, Residential Apartments constructed in and over the mortgaged property, who proceeded to acquire interest in the said property, without obtaining NOC from the appellant.

4. The learned counsel for the Revision Petitioner would submit that at the time of development of the property, a project loan was granted to the borrower on the strength of the mortgaged property. Further, the specific case of the Revision Petitioner is that repayment of loan itself was structured in such a manner that as and when an apartment is sold, the sale consideration has to be paid to the Bank as part of repayment of the loan and on such payment of the sale consideration, the Bank would issue a No Objection Certificate for sale of the Apartment in favour of the purchaser thereby releasing its charge over the proportionate undivided share of land and the Apartment.

5. The learned counsel for the petitioner would further submit that the borrower has sold 47 Apartments after obtaining NOC from the petitioner



and 28 Apartments however have been sold without obtaining NOC and only in respect of these 28 purchasers, the O.A. had been filed impleading them as defendants 6-33.

6. The said O.A. 801 of 2014 was allowed in and by an order dated 29.05.2015 and none of the purchasers viz., defendants 6-33 appeared and contested the proceedings and consequently, they were set exparte. However, three of the defendants viz., defendants 27, 30 & 33 filed an Application to recall the order dated 29.05.2015 passed exparte. The Debt Recovery Tribunal allowed the said Application of the defendants 27, 30 & 33, as against which the petitioner preferred an Appeal in MA No.22 of 2018. The Appeal was allowed on 03.01.2019 with a direction that a sum of Rs.1,50,000/- each would be deposited in the name of the appellant-Revision Petitioner Institution before the Registry of DRT, as a pre-condition to permit the defendants 27, 30 & 33 to participate in the hearing of the OA. The defendants complied with the said order and subsequently, similar Applications were taken out by defendants 6, 9, 10, 11, 15, 16, 17, 20, 23, 25, 26, 28, 29 & 32 in IA.No.3741 of 2015. Similar permission was granted to them to contest the Debt Recovery case.



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7. The case of the purchasers as set forth in the written statement was that they have availed a loan from the HDFC Limited for buying Flats in the project and they were not aware about the mortgage of the property by the borrowers in favour of the Revision Petitioner and that they were innocent and bonafide purchasers. The OA was heard and argued and orders were reserved. At that juncture, Application in I.A. No.3180 of 2022 came to be filed seeking to implead 57 other persons who had purchased the flats from the borrower, as parties to the OA without giving any details or filing documents indicating how they were interested in the lis. Therefore, the petitioner opposed the said Application. However, in and by order dated 25.07.2023, the DRT allowed the said Application and aggrieved by the same Revision Petitioner preferred an Appeal before the DRAT, Chennai.

8. According to the learned counsel for the petitioner, the DRAT also without properly appreciating the facts and circumstances of the case, dismissed the Appeal preferred by the Revision Petitioner as against which the present Revision has been preferred. The learned counsel for the Revision Petitioner would emphasise on the point that in respect of the 57 persons viz., purchasers who were sought to be impleaded at the instance of the contesting defendants, the Revision Petitioner had no objection for their



respective purchases. Even at the time of their purchase, proportionate amount of loan was paid to the petitioner and therefore, necessary No Objection Certificate was also issued, expressing the petitioner's no objection to such of the 57 persons who purchased undivided shares of land and also the Apartments proportionate to their respective undivided share of land.

9. The learned counsel for the petitioner would further submit that being the Applicant, the Revision Petitioner was the *dominus litis* and it is for the Applicant to choose the persons against whom the Applicant wants relief in the proceedings and it is not for the defendants to compel impleadment of purchasers against whom, admittedly, the petitioner did not have any grievance or seek any relief. He would therefore, pray for the Revision being allowed.

10. Per contra, the learned Senior Counsel, Mr. V.Prakash, appearing for the contesting respondents would submit that the DRT as well as the DRAT have rightly allowed the Application for impleadment of the 57 purchasers. He would further submit that the mortgage in favour of the petitioner was a single act and was indivisible. Therefore, the purchasers



despite getting No Objection Certificate from the petitioner cannot be left out of the litigation, as according to him, the land was held as undivided and jointly by all the purchasers, including the contesting defendants and the purchasers who had obtained a No Objection Certificate from the petitioner.

11. The learned Senior Counsel would also place reliance on the decision of the Division Bench of this Court in *Eswara Krishna Iyer and Another v. Mariya Susai Reddiar and others*, reported in (1939) SCC Online Mad 424, where deciding an Appeal against a suit to enforce a mortgage, this Court referring to Section 60 of Transfer of Property Act, 1882, held that a mortgage is indivisible and it has to be either redeemed entirely or not at all. However, the Hon'ble Division Bench also took note of the exception which was provided viz., where a mortgagee acquires the share of the mortgagor, two conditions would be necessary for the exception to operate namely, (i) the acquisition must be as a mortgagee i.e., as holder of a mortgage and (ii) what is acquired should be the share of the mortgagor.

12. He would also place reliance on the decision of the Hon'ble Supreme Court in *State of Kerala and Others v. Koliyat Estates*, reported in (1999) 8 SCC 419, where the Hon'ble Supreme Court quoted with approval



the Division Bench judgment in *Eshwar Krishna Iyer* (referred herein supra) and held that the principle underlying the last Clause of Section 60 applies only in cases where the mortgagee, acquires the equity of redemption outstanding in the mortgagor. The learned Senior Counsel would therefore pray that when the mortgage is indivisible, it is not possible for the Revision Petitioner to redeem portions of the mortgage on payment of proportionate part of the debt, since the principle is “one mortgage, one debt and one entire right against all”. The learned Senior Counsel would therefore pray for the dismissal of the Revision Petition.

13. We have paid our anxious and careful consideration to the submissions advanced by the learned counsels on either side.

14. It is an admitted position that the Revision Petitioner approached the DRT in OA.No. 801 of 2014 on the file of the DRT I, Bangalore. In the said OA, the petitioner had impleaded the actual borrower and its partners as defendants 1 to 5 and the purchasers who acquired undivided interest for construction of respective apartments for themselves without obtaining the prior consent or no objection from the petitioner, as defendants 6 to 33.

15. Initially, the Original Application was allowed and thereafter, at



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the instance of three of the defendants viz., some of the purchasers, the DRT thought it fit to give them an opportunity to participate in the OA proceedings and put them on terms. Once these three purchasers were allowed to participate, similar requests were also made by some other purchasers viz., defendants 6, 9, 10, 11, 15, 16, 17, 20, 23, 25, 26, 28, 29 & 32 and in view of the earlier order permitting three of the defendants, the other defendants were also permitted to participate. Thereafter, OA was heard on merits and orders were reserved. At that juncture, An application has been filed in I.A.No. 3180 of 2022 seeking impleadment of 57 persons who are said to be purchasers of other respective undivided shares in the same project.

16. It is the specific case of the Revision Petitioner that insofar as the 57 persons who have not been impleaded, it was a conscious decision made by the Applicant not to array them as Defendants, since the Applicant did not want any relief against the said 57 purchasers for the simple reason that they have already discharged their liability in proportion to the undivided share purchased by them, by making necessary payment to the petitioner. It is only in respect of purchasers who did not come forward to pay any money to the petitioner and proceeded to directly purchase undivided shares for



construction of respective Apartments, without the consent of the petitioner,
the petitioner has impleaded them.

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17. Section 60 of Transfer of Property Act, 1882 has been heavily
relied on by learned Senior Counsel for the respondents, Mr. V.Prakash. For
ease of reference the same is extracted hereunder.

“60. Right of mortgagor to redeem. At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver [to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by [decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.-Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a



mortgagor.”

18. As can be seen from the above provision, there is a rider which dis-entitles a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, a share of a mortgagor. This Section has been put to test by the Hon’ble Division Bench of this Court in decision rendered in *Eshwar Krishna Iyer case* (referred herein supra). No doubt, the Hon’ble Supreme Court concurred with the views expressed by the Division Bench of this Court while confirming the ratio laid down in *Ishwara Krishna Iyer's case* and *State of Kerala's case* (referred herein supra).

19. The DRAT finding that the prayer in the OA is to sell entire ‘A’ Schedule property and the proposed purchasers who are sought to be impleaded have purchased portions of 'A' Schedule property after the mortgage, the question of the petitioner issuing NOC or not would not make any difference as long as the mortgage in respect of the Flats purchased by the proposed parties was released and consequently, the relief in the OA was also suitably amended. In view of the fact that the schedule to the OA was



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not sought to be amended, the DRAT felt that the proposed purchasers would have to be necessarily impleaded for fair adjudication for the reason that they had only purchased Flats as part and parcel of 'A' Schedule property which is still under mortgage.

20. In the said OA, the petitioner has clearly shown the entire mortgage property as Schedule 'A'. That apart, they have included a separate Schedule 'B' property listing out the Flats together with undivided share sold by defendants 1 to 5 in favour of defendants 6 to 33. Therefore, the petitioner has clearly spelt out the purchase made by the defendants 6 to 33 being part of the Schedule 'A' property. In fact, we also find that as against the original loan sanctioned to the tune of Rs.8.5 crores, considering the payments made by the borrowers themselves and also the payments made by the 57 purchasers who obtained NOC, the actual claim made in the OA has boiled down to only Rs. 76,37,741/-. It is therefore not in the interest of the petitioner Bank to proceed against persons or purchasers as against whom they do not seek any relief. As a matter of fact when the petitioner has already received proportionate payments from and out of the sale consideration paid by the 57 purchasers, it is not even open to the petitioner to implead such of those purchasers and seek any relief against them.



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21. The concept of *dominus litis* is well settled by a catena of decisions by the Hon'ble Supreme Court as well as this Court. It is always the prerogative of the person approaching the Court seeking relief to file the case only against the persons in respect of whom he wants relief and such person cannot be compelled to fight against persons who are neither related to the *lis* nor against whom the party approaching the Court does not seek any relief.

22. The learned counsel Mr. V.Prakash would further submit that it would not be possible to execute any order passed by the Tribunal even in the event of the petitioner ultimately succeeding in the OA. This is a matter which the petitioner should be concerned with and when the petitioner is willing to go ahead and proceed only against some of the purchasers for whom No Objection Certificate has not been issued, it is not for the defendants who are contesting the proceedings to espouse the cause of the petitioner.

23. We do not have any quarrel with regard to the principle that mortgage is indivisible and it has to be redeemed entirely or not at all. This is in line with the statutory provision namely Section 60 of Transfer of



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Property Act, 1882. However, when the petitioner, who is the person who has lent money, has thought it fit not to proceed against some of the purchasers, viz., 57 purchasers in the present case, by taking proportionate sums of money from them towards partial discharge of the mortgage, the petitioner is taking the responsibility of such a consequence. There is no violation of Section 60 of the Transfer of Property Act. Admittedly the petitioner has only issued NOC on receipt of portions of the sale consideration towards part discharge of the loan and even according to the petitioner, the original mortgage against defendants 1 to 5 subsists. Therefore, we cannot term the conduct of the petitioner and the 57 purchasers as contrary to Section 60 or being illegal for such reason.

24. It should also be borne in mind that Section 60 itself is only a right made available to a mortgagor to redeem his property and in such context, it has been held that the mortgagor cannot seek to redeem portions of the mortgage property on payment of proportionate part of the amount. Nothing prevents the mortgagee to accept proportionate payment and agree to not proceed against a particular share or portion of the mortgage property. Even in the decision of *Eshwara Krishna Iyer* discussed herein supra, the Hon'ble Division Bench held at para 12 as follows:-



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“12. It was conceded at the Bar that it is open to a mortgagee to release his right in respect of an item or part of the property and some time later become a purchaser of that Item or part in which case no question of pro tanto extinguishment of the debt would arise at all. The principle is that once the right of the mortgagee is released, the property ceases to be the subject of the mortgage and the acquisition by the mortgagee would therefore be just like an acquisition by any other stranger acquiring the property.”

25. Both the decisions relied on by the learned Senior Counsel were rendered on peculiar and different facts before the respective Courts viz., the Division Bench of this Court as well as the Hon'ble Supreme Court. Both cases were not cases where the mortgagee willingly agreed to release his right in respect of a part of the mortgage property. Therefore, Section 60 of Transfer of Property Act, 1882 which is only a right conferred on mortgagor cannot be pressed into service, in the instant case. As already discussed herein above, the petitioner is the mortgagee and it is for him to select particular persons and proceed against them. It is not open to the contesting defendants who are either mortgagors or persons who have purchased various undivided interest from the mortgagors to place reliance on Section 60 of the Act and question the actions of the petitioner in issuing No Objection Certificates to 57 of the purchasers and not proceed against them.

26. However, since we have already made it clear, the Applicant being



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the *dominus litis* has taken a conscious decision not to proceed against some of the purchasers at his risk and peril. The Court cannot find fault with such decision taken by the mortgagee. Further, after making elaborate submissions and orders were reserved by the Tribunal the present Application has been taken out to implead 57 other purchasers. We can only see this as an attempt to protract the proceedings and by compelling the Applicant to implead 57 purchasers as new parties to the *lis*, it would only protract the proceedings further and we are unable to see any bonafides in the Application taken out by the defendants/purchasers under the guise of espousing the cause of mortgagee.

27. For all the above reasons we are constrained to interfere with the impugned order passed by the DRAT, Chennai, directing impleadment of 57 purchasers in the original OA 801 of 2014 and accordingly, the order dated 09.07.2024 in MA No.35 of 2023 on the file of Debt Recovery Appellate Tribunal, Chennai is set aside confirming the order dated 25.07.2023 in IA. No.3180 of 2022 in OA. No.801 of 2014 on the file of the Debt Recovery Tribunal -I, Karnataka at Bengaluru.

28. In fine, CRP is allowed with no orders as to cost. Consequently,



connected Miscellaneous Petition is closed.

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(D.K.K.J.,) (P.B.B.J.,)

19.10.2024

Internet: Yes/No

Index : Yes/No

Speaking Order/Non Speaking Order

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To

1. The Debt Recovery Appellate Tribunal, Chennai.

2. The Debt Recovery Tribunal -I, Karnataka at Bengaluru.

3. Housing and Urban Development Corporation

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D. KRISHNAKUMAR. J.,
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Pre-delivery Order in
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19.10.2024