



C.R.P. (MD) No. 431 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.07.2024

CORAM

THE HON'BLE MR. JUSTICE D.BHARATHA CHAKRAVARTHY

C.R.P. (MD) No. 431 of 2022

M/s.Shriram City Union Finance Limited,

Rep. by its Authorised Signatory,

E.Mariappan

... Petitioner/Claimant

-VS-

1.Thangam

2.Sangarammal

... Respondents/Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to call for records and set aside the fair and executable order dated 01.09.2021 passed in the petition in E.P.No.10 of 2019 in A.C.P.No.3 of 2018 on the file of the Principal Subordinate Court, Tirunelveli.

For Petitioner : Mr.J.Barathan

For Respondents : No appearance

ORDER

The Civil Revision Petition is directed against the order of the Principal Subordinate Court, Tirunelveli, dated 01.09.2021, made in E.P.No.10 of 2019



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in A.C.P.No.3 of 2018. By the said order, the execution petition filed by the petitioner herein is dismissed by the learned Principal Subordinate Judge holding that the subject matter of the execution relates to mortgage and as such, he is not arbitrable and therefore, the arbitration award itself is invalid and not capable of being execution.

2. Assailing the said order, Mr.J.Barathan, the learned counsel appearing on behalf of the petitioner would submit that the said observations made by the execution Court are totally erroneous inasmuch as the arbitration decree in question is not a mortgage decree but a money decree. The claim itself is filed as simpliciter recovery of money. Neither the mortgaged property was directed to be sold nor any preliminary decree was passed. In view thereof, the entire premise on which the order has been passed by the Trial Court is erroneous.

3. Even after service of the notice, the respondents have chosen not to appear before the court.

4. I have considered the arguments made on behalf of the learned counsel for the petitioner and perused the material records of the case.



5. In ***Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd. & Ors.***,

reported in ***[2011 (5) SCC 532]***, it was held by the Hon'ble Supreme Court of India that the mortgage suit is not confined between the parties alone, but has the characteristics of determining rights in rem and therefore, held that it is not arbitrable. The Hon'ble Supreme Court, considered the specific provisions contained in Order XXXIV of the Code of Civil Procedure, 1908 and the provisions of the Transfer of Property Act and held that it may not be appropriate to deal with the mortgage suit and realization of the dues by selling the mortgage property in arbitration. The relevant paragraphs 47 to 48.2 are extracted hereunder for ready reference:-

“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, 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



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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 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 of 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 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.”

6. In that background, if only the mortgage suit is sought to be laid as a claim before the arbitrator, then the same would not be maintainable. The borrowal is based on a loan agreement and a suit for recovery of money is laid. Even though there is a mortgage that is there as a security for repayment of the loan, the lender/creditor has the option in not relying on the security and lay a suit for recovery of money simpliciter provided the same is within the period of limitation.

7. When the agreement was executed on 22.06.2016 agreeing to repay the loan and the award itself was passed on 26.04.2018, when the creditor/mortgagee has not chosen to enforce the security towards the payment



of loan and laid only a claim for recovery of money simpliciter before the arbitrator, then the above said observations of the Hon'ble Supreme Court of India made in **Booz Allen** (supra), will not come to the aid of the judgment debtor to contend that the subject matter is not arbitrable.

8. The right of the mortgagee to pray for a money decree alone is unquestionable. Useful reference in this regard can be made to the judgment of this Court in **Kesavamattam Koda Nayakamma vs. Edara Venkayya** reported in **1939 SCC Online (Mad) 218** and the relevant passage which reads as follows:

*“We are therefore reluctantly forced to come to the conclusion that the mortgage deed has not been duly proved to have been executed by the 1st defendant and a decree on the mortgage cannot be sustained and must be set aside. But Mr. Ramachandra Rao contends that there is a personal covenant in the document and on the strength of that personal covenant it is open to us to pass a money decree in favour of the plaintiff for the amount claimed. This can be done. Vide **PulakaVeetil Muthalakulangara KunhuMoidu v. Thiruthipalli Madhava Menon**. Therefore, while we set aside the mortgage decree as passed by the lower Court, we pass a decree against the defendants for the amount claimed in the plaint with interest at the contract rate up to date of plaint and at 6 per cent from date of plaint.”*

(emphasis supplied)



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9. Further in the judgment of this Court in *Meiyappan Servai vs. Meenakshi Achi* reported in [MANU/TN/0389/1969] also it has been categorically held that the mortgagee is entitled under the law to give up the mortgage and to sue upon the personal covenant to pay money. It is relevant to extract paragraph No.8 of the Judgment which reads as follows:

"8. ...In this case the respondent had no doubt a right to sue for the money when the petitioner committed breach of contract by refusing to register the mortgage bond ;but then he is entitled under the law to give up the mortgage and to sue upon the personal covenant to pay the money as in the case of a simple money bond. Two contracts are comprised in the transaction ;one is a mortgage and the other a loan transaction ; and both these contracts are separate and divisible. The causes of action in respect of these two transactions are distinct and separate. In view of the fact that the petitioner had refused to register the mortgage, the mortgage had failed and it was open to the respondent to rescind the mortgage and to file a suit, but then he is not bound to do so and he is entitled under the law to rely upon the personal covenant to repay the money.

(emphasis supplied)

10. Once the mortgagee has a right to sue for money, then the right to invoke arbitration is no longer *res integra* and has been decided by the Hon'ble



Supreme Court of India in ***M.D.Frozen Foods Exports Pvt. Ltd., & Ors. Vs.***

Hero Fincorp Ltd., reported in **(2017) 16 SCC 741** and it is essential to quote

paragraph Nos.30 and 31 of the judgment which reads as follows:

"....30. The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative.¹³ That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.

31. The discussion in the impugned order refers to a judgment of the Full Bench of the Delhi High Court in HDFC Bank Limited vs. Satpal Singh Bakshi¹⁴ opining that an arbitration is an alternative to the RDDB Act. In that context, the learned Single Judge has rightly held that this Full Bench judgment does not, in any manner, help the appellants but, in fact, supports the case of the respondent. The jurisdiction of the Civil Court is barred for matters covered by the RDDB Act, but the parties still have freedom to choose a forum, alternate to, and in place of the regular courts or judicial system for deciding their inter se disputes. All disputes relating to the "right in personam" are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. A claim of money by a bank or a financial institution cannot be treated as a "right in rem", which has an inherent public interest and would thus not be arbitrable.

(emphasis supplied)



11. Though rendered with reference to the bank undertaking SARFAESI Act and arbitration, it can be seen that it has been categorically held that arbitration is an alternative to the civil proceedings and all disputes relating to the 'right in personam' are arbitrable and a claim of money *per se* cannot be treated as a 'right in rem' would thus be arbitrable.

12. When the decision of the arbitrator does not touch upon any right of any third party and when the *lis* is inter parties and when there is a valid arbitration agreement pursuant to which the award is passed, then the executing Court ought to have enforced the arbitral award. The reasoning of the execution Court that the petitioner in the execution petition could not have invoked Arbitration is erroneous in law. Therefore, I am inclined to interfere with the said order.

13. In view thereof, the Civil Revision Petition is allowed on the following terms:-

(i) The order 01.09.2021, made in E.P.No.10 of 2019 in A.C.P.No.3 of 2018 shall stand set aside.

(ii) The execution petition in E.P.No.10 of 2019, which is filed for attachment and sale of the property can be



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proceeded with in accordance with law and the very same property which is given as mortgage, is not sought to be brought for sale straight away, but an order of attachment can be passed and thereafter, in accordance with the provisions contained under Order XXI, property can be brought for sale for realizing the amount due under the arbitral award. No costs.

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Index : Yes/No
NCC : No

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To

1. The Principal Subordinate Court, Tirunelveli.



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D.BHARATHA CHAKRAVARTHY, J.

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