Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5440 OF 2002

Booz Allen and Hamilton Inc. … Appellant

Vs.

SBI Home Finance Ltd. & Ors. … Respondents

J U D G M E N T

R.V.RAVEENDRAN, J.

The scope of section 8 of the Arbitration and Conciliation Act, 1996 (Act, for short) arises for consideration in this appeal by special leave.

2. Capstone Investment Co. Pvt. Ltd. (second respondent herein, for short "Capstone") and Real Value Appliances Pvt. Ltd. (respondent No.3 herein, for short "RV Appliances") are the owners of flat No.9A and 9B respectively situated at "Brighton", Napien Sea Road, Mumbai. Capstone and RV Appliances had borrowed loans from SBI Home Finance Ltd., (the first respondent herein, for short "SBI") under two loan agreements dated 3.12.1994 by securing the said two flats in favour of SBI.

3. Under two leave and licence agreements dated 5.4.1996, Capstone and RV Appliances permitted the appellant to use their respective flats, for the term 1.9.1996 to 31.8.1999. Each licence agreement was signed, in addition to the licensor and licensee, by the other flat owner (that is RV Appliances in respect of agreement relating to 9A and Capstone in respect of agreement relating to 9B) and SBI as confirming parties 1 and 2.

4. On the same day (5.4.1996) a tripartite deposit agreement was entered among RV Appliances and Capstone as the first party, appellant as the second party and SBI as the third party. Under the said agreement, the appellant paid a refundable security deposit of Rs.6.5 crores to Capstone and RV Appliances (at the rate of Rs.3.25 crores for each flat). Clause (E) of the said agreement confirmed that the appellant made the said deposit and Capstone and RV Appliances received the said deposit on the basis of the terms and conditions recorded in the two leave and licence agreements and the deposit agreement; and that the three agreements together formed a single integral transaction, inseparable, co-extensive and co-terminus in character. Out of the said deposit of Rs.6.5 crores, a sum of Rs.5.5 crores was directly paid to SBI on the instructions of Capstone and RV Appliances towards repayment of the loan taken by Capstone and Real Value and the

balance of Rs.1 crore accounted in the manner indicated therein. As a consequence, the loan due by Capstone to SBI in regard to flat No.9A was cleared, but the loan taken by RV Appliances remained due and outstanding. Capstone however became a guarantor for repayment of the amount due by RV Appliances and flat No.9A was secured in favour of SBI and a charge was created in the shares relating to flat No.9A belonging to Capstone in favour of SBI, as security for repayment of the loan by R V Appliances. We extract below the relevant portion of para 5A of the agreement :

> "However, notwithstanding the repayment of the dues of Capstone Investment Co.Pvt.Ltd., the share Nos.4001 to 4250 of the Society and Flat No.9A shall continue to be available to the Party of the Third Part as security of the remaining dues of Real Value Appliances Ltd., and in this connection it is agreed that upon liquidating the dues of Capstone Investment Co.Pvt.Ltd., and in order to make available the said shares Nos.4001 to 4250 and Flat No.9A as security, Capstone Investment Co.Pvt.Ltd. shall become a Guarantor for repayment of dues of Real Value Appliances Pvt.Ltd. The Parties of the Third Part are confirming that it has no objection to the Party of the Second Part, its employee or officer occupying the Flats and that as long as the balance of the principal amount and interest due thereon is paid by the Parties of the First Part (or as per arrangement hereafter recorded) by the Party of the Second Part to Party of the Third Part, the Parties of the Third Part shall not enforce the mortgage and will permit the Party of the Second Part, its employee or officer to occupy the said Flats."

Clause (3) of the Deposit agreement gave an option to the appellant who opted to continue the licence in respect of the two flats for a further period of two years beyond 31.8.1999, by paying an additional deposit of Rs.2 crores (at the rate of Rs.1 crore for each flat). Clause (11) enabled the appellant to

continue to use and occupy the flats so long as the amounts paid by it as security deposit remained unpaid.

Clause (8) gave the option to the appellant to pay the amount due to the SBI on behalf of the borrowers to safeguard its interest. Relevant portion of para 8 is extracted below:

> "If any default is made by the Parties of the First Part in paying any sum(s) due from time to time by them to the Parties of the Third Part under the loan facility, the Party of the Second Part shall, to safeguard its interest in retaining the right to use and occupy the said Flats, have an option to pay the Parties of the Third Part the sum(s) so becoming due and remaining unpaid by the Parties of the First Part, on their behalf."

Clauses (9) and (10) provide that at the end of the licence period, Capstone and R V Appliances shall jointly and severally be liable to refund the deposit amount along with interest thereon from the date of expiry of the licence to date of actual payment

Clause (16) of the deposit agreement provided for arbitration and is extracted below:

> "In case of any dispute with respect to creation and enforcement of charge over the said shares and the said Flats and realization of sales proceeds therefrom, application of sales proceeds towards discharge of liability of the Parties of the First Part to the parties of the Second Part and exercise of the right of the Party of the Second Part to continue to occupy the said Flats until entire dues as recorded in Clause 9 and 10 hereinabove are realized by the party of the Second Part, shall be referred to an Arbitrator who shall be retired Judge of Mumbai High Court and if no such Judge is

> ready and willing to enter upon the reference, any Senior Counsel practicing in Mumbai High Court shall be appointed as the Sole Arbitrator. The Arbitrator will be required to cite reasons for giving the award. The arbitration proceedings shall be governed by the Arbitration and Conciliation Ordinance 1996 or the enactment, re-enactment or amendment thereof. The arbitration proceedings shall be held at Mumbai."

5. In or about July 1997 a reference was made by RV Appliances to the Board of Industrial and Financial Reconstruction (BIFR for short) under the Sick Industrial Companies (Special Provisions) Act, 1985 and in pursuance of it, flat 9B was taken over by the official liquidator.

6. By letter dated 4.8.1999, appellant informed Capstone and RV Appliances that it was not interested in exercising the option to renew the licences on expiry of the leave and licence agreements on 31.8.1999 and called upon the licensors to refund the security deposit of Rs.6.5 crores, assuring that it would vacate and deliver up the licensed flats on receipt of the deposit amount. The appellant informed SBI and BIFR about it by endorsing copies of the said letters to them. As there was no confirmation from Capstone and RV Appliances that they would refund the sum of Rs.6.5 crores, the appellant wrote a further letter dated 26.8.1999 stating that it would continue to occupy the flats if the security deposit was not refunded.

7. As the loan amount due by RV Appliances was not repaid, SBI filed a mortgage suit (Suit No.6397/1999) in the High Court of Bombay on 28.10.1999 against Capstone (first defendant), appellant (second defendant), and RV Appliances (defendant No.3) in regard to the mortgaged property (flat No.9A) for the following reliefs:

> (a) for a declaration that the 1st defendant as mortgagor was due in a sum of Rs.8,46,10,731/- with further interest on the principal sum at the rate of Rs.16.5% per annum and additional interest for delayed payment at the rate of 2% per month from 1st September, 1999 till payment or realization;
>
> (b) for a declaration that the amount and interest mentioned in prayer (a) above is secured in favour of the plaintiffs by a valid and subsisting mortgage of flat No.9A and three garages (suit premises);
>
> (c) for a direction to the first defendant to pay to the plaintiff the amount and interest in prayer (a) by such date as may be fixed by the Court for redemption of the mortgage and in the event of the first defendant failing to make payment by that date, the suit premises be sold by and under the orders and directions of the Court in enforcement and realization of the mortgage thereon and the net realization thereof be paid over to the plaintiff in or towards satisfaction of its claim herein;
>
> (d) for a personal decree against the first defendant to the extent of any deficiency in sale realization;
>
> (e) that the second defendant be ordered to vacate the suit premises and hand over possession thereof to the plaintiff to enable the plaintiff effectively to enforce and realize its security thereon."

8. On a notice of motion taken out by SBI seeking interim relief, the High Court issued the following order on 25.11.1999 :

> "The Defendant No.2 shall continue to occupy Flat No.9A and garages Nos. 45 to 47 situate at Brighton, 68D, Napean Sea Road, Mumbai but shall not create any third party right or interest of any nature whatsoever in the said flat nor shall hand over possession of the said flat to defendant No.1 or 3 till further order.
>
> Mr. Dharmadhikari, learned counsel for first defendant makes a statement that till further orders, the first defendant shall not create any third party interest in the said flat No.9A and garages Nos.45 to 47 nor shall alienate, dispose of or transfer the said property till further orders. Statement of Mr. Dharmadhikari is accepted."

On 15.12.1999 the appellant filed a detailed reply to the said notice of motion. It inter alia contended that SBI had a contractual obligation towards the appellant as it had agreed for the continuance of appellants' occupation till refund of the deposit. Capstone also contested the application, denying the existence of any mortgage or charge over flat No.9A.

9. The appellant however did not file its written statement in the suit. The appellant claims that settlement talks were being held for some time but did not fructify into any settlement. Therefore, on 10.10.2001, the appellant took out a notice of motion praying that the parties to the suit be referred to arbitration as provided in clause 16 of the deposit agreement dated 5.4.1996

and consequently the suit be dismissed. The said application was resisted by the SBI.

10. A learned single Judge of the High Court by impugned order dated 7.3.2002 dismissed the application holding as follows:

(a) Clause 16 of the deposit agreement (arbitration agreement) did not cover the dispute which is the subject matter of the claim by SBI against its borrowers (Capstone and RV Appliances) and therefore, it was not open to the appellant to request the court to refer the parties to arbitration.

(b) The detailed counter affidavit dated 15.12.1999 filed by the appellant, in regard to the notice of motion for temporary injunction, amounted to submission of the first statement on the substance of the dispute, before filing the application under section 8 of the Act and therefore the appellant lost the right to seek reference to arbitration.

(c) The suit was filed on 28.10.1999. The appellant filed the counter affidavit opposing the application for temporary injunction on 15.12.1999. The application under section 8 of the Act was filed on 10.10.2001 nearly 20 months thereafter, during which period the appellant had subjected itself to the jurisdiction of the High Court. In view of the inordinate delay, the appellant was not entitled to the relief under section 8 of the Act.

The said order is challenged in this appeal by special leave. This court while granting leave on 28.8.2002 stayed the further proceedings in the suit.

11. The appellant contends that the parties to the suit were all parties to the deposit agreement containing the arbitration agreement. The claim of the SBI was for enforcement of the charge/mortgage over flat No.9A and realization of the sale proceeds therefrom, which was specifically mentioned as a dispute which was arbitrable. Having regard to the clear mandate under section 8 of the Act, the court ought to have referred the parties to arbitration. SBI supported the order

12. In *S.B.P & Co. vs. Patel Engineering Ltd* – 2005 (8) SCC 618, this Court held thus :

> "When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief disputes the same, *the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it is covered by the arbitration clause.* It is difficult to contemplate that the judicial authority has also to act mechanically or has merely to see the original arbitration agreement produced before it and mechanically refer the parties to an arbitration."
>
> *(emphasis supplied)*

Where a suit is filed by one of the parties to an arbitration agreement against the other parties to the arbitration agreement, and if the defendants file an application under section 8 stating that the parties should be referred to arbitration, the court (judicial authority) will have to decide (i) whether there is an arbitration agreement among the parties; (ii) whether all parties to the suit are parties to the arbitration agreement; (ii) whether the disputes which are the subject matter of the suit fall within the scope of arbitration agreement; (iv) whether the defendant had applied under section 8 of the Act before submitting his first statement on the substance of the dispute; and (v) whether the reliefs sought in the suit are those that can be adjudicated and granted in an arbitration.

13. On the contentions urged the following questions arise for our consideration :

(i) Whether the subject matter of the suit fell within the scope of the arbitration agreement contained in clause 16 of the deposit agreement?

(ii) Whether the appellant had submitted his first statement on the substance of the dispute before filing the application under section 8 of the Act?

(iii) Whether the application under section 8 was liable to be rejected as it was filed nearly 20 months after entering appearance in the suit?

(iv) Whether the subject matter of the suit is 'arbitrable', that is capable of being adjudicated by a private forum (arbitral tribunal); and whether the High Court ought to have referred the parties to the suit to arbitration under section 8 of the Act?

Re : Question No.(i)

14. In this case, there is no dispute that all the parties to the suit are parties to an agreement which contains the provision for settlement of disputes by arbitration. Clause (16) which provides for arbitration provides for settlement of the following disputes by arbitration : (a) disputes with respect to creation of charge over the shares and flats; (b) disputes with respect to enforcement of the charge over the shares and flats and realization of sale proceeds therefrom; (c) application of the sale proceeds towards discharge of liability of Capstone and RV Appliances to the appellant; and (e) disputes relating to exercise of right of the appellant to continue to occupy the flats until the entire dues as stated in clauses 9 and 10 of the deposit agreement are realised by the appellant.

15. The suit has been filed by SBI to enforce the mortgage to recover the amounts due to it. In that context, SBI has also sought delivery of vacant possession. The enforcement of the charge/mortgage over the flat, realisation of sale proceeds therefrom and the right of the appellant to stay in possession

till the entire deposit is repaid, are all matters which are specifically mentioned in clause 16 as matters to be settled by arbitration. Therefore, the subject matter of the suit falls within the scope of the arbitration agreement.

Re : Question No.(ii)

16. The appellant filed a detailed affidavit opposing the application for interim injunction on 15.12.1999. Thereafter the appellant filed the application under section 8 of the Act on 12.10.2001. On the date of filing of the application under section 8, the appellant had not filed the written statement. Section 8 of the Act provides that a judicial authority before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration. The High Court has held that filing a detailed counter affidavit by a defendant setting out its case, in reply to an application for temporary injunction, should be considered to be the submission of the first statement on the substance of the dispute; and that the application under section 8 of the Act having been filed subsequent to filing of such first statement on the substance of the dispute, the appellant's prayer for referring the parties to arbitration cannot be accepted. The question therefore is whether filing a

counter to an application for temporary injunction can be considered as submitting the first statement on the substance of the dispute.

17. Not only filing of the written statement in a suit, but filing of any statement, application, affidavit filed by a defendant prior to the filing of the written statement will be construed as 'submission of a statement on the substance of the dispute', if by filing such statement/application/affidavit, the defendant shows his intention to submit himself to the jurisdiction of the court and waive his right to seek reference to arbitration. But filing of a reply by a defendant, to an application for temporary injunction/attachment before judgment/appointment of Receiver, cannot be considered as submission of a statement on the substance of the dispute, as that is done to avoid an interim order being made against him. In *Rashtriya Ispat Nigam Ltd vs. Verma Transport Company* – 2006 (7) SCC 275, this Court held that the expression 'first statement on the substance of the dispute' contained in Section 8(1) of the Act is different from the expression 'written statement', and refers to a submission of the party making the application under section 8 of the Act, to the jurisdiction of the judicial authority; and what should be decided by the court is whether the party seeking reference to arbitration has waived his right to invoke the arbitration clause. This Court then proceeded to consider

whether contesting an application for temporary injunction by filing a counter, would amount to subjecting oneself to the jurisdiction of the court. This Court observed :

> "By opposing the prayer for interim injunction, the restriction contained in Sub-section (1) of Section 8 was not attracted. Disclosure of a defence for the purpose of opposing a prayer for injunction would not necessarily mean that substance of the dispute has already been disclosed in the main proceeding. Supplemental and incidental proceeding are not part of the main proceeding. They are dealt with separately in the Code of Civil Procedure itself. Section 94 of the Code of Civil Procedure deals with supplemental proceedings. Incidental proceedings are those which arise out of the main proceeding. In view of the decision of this Court in *Food Corporation of India* vs. *Yadav Engineer & Contractor* – 1982 (2) SCC 499, the distinction between the main proceeding and supplemental proceeding must be borne in mind. …….. Waiver of a right on the part of a defendant to the lis must be gathered from the fact situation obtaining in each case. In the instant case, the court had already passed an ad interim ex pare injunction. The Appellants were bound to respond to the notice issued by the Court."

18. In this case, the counter affidavit dated 15.12.1999, filed by the appellant in reply to the notice of motion (seeking appointment of a receiver and grant of a temporary injunction) clearly stated that the reply affidavit was being filed for the limited purpose of opposing the interim relief. Even in the absence of such a disclaimer, filing a detailed objection to an application for interim relief cannot be considered to be submission of a statement on the substance of the dispute resulting in submitting oneself to the jurisdiction of the court.

Re : Question No.(iii)

19. Though section 8 does not prescribe any time limit for filing an application under that section, and only states that the application under section 8 of the Act should be filed before submission of the first statement on the substance of the dispute, the scheme of the Act and the provisions of the section clearly indicate that the application thereunder should be made at the earliest. Obviously, a party who willingly participates in the proceedings in the suit and subjects himself to the jurisdiction of the court cannot subsequently turn round and say that the parties should be referred to arbitration in view of the existence of an arbitration agreement. Whether a party has waived his right to seek arbitration and subjected himself to the jurisdiction of the court, depends upon the conduct of such party in the suit. When plaintiffs file applications for interim relief like appointment of a receiver or grant of a temporary injunction, the defendants have to contest the application. Such contest may even lead to appeals and revisions where there may be even stay of further proceedings in the suit. If supplemental proceedings like applications for temporary injunction on appointment of Receiver, have been pending for a considerable time and a defendant has been contesting such supplemental proceedings, it cannot be said that the defendant has lost the right to seek reference to arbitration. At the relevant

time, the unamended Rule 1 of Order VIII of the Code was governing the filing of written statements and the said rule did not prescribe any time limit for filing written statement. In such a situation, mere passage of time between the date of entering appearance and date of filing the application under section 8 of the Act, can not lead to an inference that a defendant subjected himself to the jurisdiction of the court for adjudication of the main dispute. The facts in this case show that the plaintiff in the suit had filed an application for temporary injunction and appointment of Receiver and that was pending for some time. Thereafter, talks were in progress for arriving at a settlement out of court. When such talks failed, the appellant filed an application under section 8 of the Act before filing the written statement or filing any other statement which could be considered to be a submission of a statement on the substance of the dispute. The High Court was not therefore justified in rejecting the application on the ground of delay.

Re : Question (iv)

20. The nature and scope of issues arising for consideration in an application under section 11 of the Act for appointment of arbitrators, are far narrower than those arising in an application under section 8 of the Act, seeking reference of the parties to a suit to arbitration. While considering an

application under section 11 of the Act, the Chief Justice or his designate would not embark upon an examination of the issue of 'arbitrability' or appropriateness of adjudication by a private forum, once he finds that there was an arbitration agreement between or among the parties, and would leave the issue of arbitrability for the decision of the arbitral Tribunal. If the arbitrator wrongly holds that the dispute is arbitrable, the aggrieved party will have to challenge the award by filing an application under section 34 of the Act, relying upon sub-section 2(b)(i) of that section. But where the issue of 'arbitrability' arises in the context of an application under section 8 of the Act in a pending suit, all aspects of arbitrability have to be decided by the court seized of the suit, and cannot be left to the decision of the Arbitrator. Even if there is an arbitration agreement between the parties, and even if the dispute is covered by the arbitration agreement, the court where the civil suit is pending, will refuse an application under Section 8 of the Act, to refer the parties to arbitration, if the subject matter of the suit is capable of adjudication only by a public forum or the relief claimed can only be granted by a special court or Tribunal.

21. 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) w*hether the disputes are capable of adjudication and settlement by arbitration?* That is, whether the disputes, having 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 counter claim 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 tribunal.

22. 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 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 a 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. The well recognized 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.

23. 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, *judgment in personam* refers to a judgment against a person as distinguished from a judgment against a thing, right or status and *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). 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 sub-ordinate rights *in personam* arising from rights *in rem* have always been considered to be arbitrable.

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

25. Russell on Arbitration [22nd Edition] observed thus [page 28, para 2.007] :

> "Not all matter 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 Edition, page 470, para 8.043]] merely observes that English law does recognize that there are matters which cannot be decided by means of arbitration. *Mustill* and *Boyd* in their Law and Practice of Commercial Arbitration in England [2nd – 1989 Edition], 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 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…."
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> *[emphasis supplied]*

Mustill and *Boyd* in their 2001 Companion Volume to the 2nd Edition of *commercial Arbitration,* observe thus (page 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 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."
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> *(Emphasis supplied)*

26. 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.

26.1) In *Haryana Telecom Limited vs. Sterlite Industries India Ltd* – 1999 (5) SCC 688, this Court held :

> "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 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.
>
> 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 petition 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."
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> *(Emphasis supplied)*

26.2) A different perspective on the issue is found in *Olympus Superstructures Pvt Ltd vs. Meena Vijay Khetan and others* – 1999 (5) SCC 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 :

> "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 immoveable property."

Approving the decision of the Calcutta High Court in *Keventer Agro Ltd vs. Seegram Comp. Ltd* – (Apo 498 of 1997 etc. dated 27.1.1998), 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 :

> "Further, as pointed in the Calcutta case, 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 means 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 should be precluded from referring the dispute to arbitration."

This Court further clarified that while matters like criminal offences and matrimonial disputes may not be subject matter of resolution by arbitration, matters incidental thereto may be referred to arbitration :

> "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 Q.B, 371. Similarly, it has been held that a husband and wife may, refer to arbitration the terms on which they shall separate, because they can make a valid agreement between themselves on that matter …… …."

26.3) In *Chiranjilal Shrilal Goenka vs. Jasjit Singh and Ors.*- 1993 (2) SCC 507 this court held that grant of probate is a judgment *in rem* and is conclusive and binding not only the parties but also the entire world; and therefore, courts alone will have exclusive jurisdiction to grant probate and an arbitral tribunal will not have jurisdiction even if consented concluded to by the parties to adjudicate upon the proof or validity of the will.

27. An agreement to sell or an agreement to mortgage does not involve any transfer of right *in rem* but create 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 courts of law and not by arbitral tribunals. 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 Transfer of Property Act, 1882 relating to suits on mortgages (section 85 to 90, 97 and 99) and also provides for implementation of some

of the other provisions of that Act (section 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. The provisions of 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.

(i) 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 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, can not 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 likelihood of divergent results.

(ii) 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.

(iii) 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 mortgagor/defendant or other persons entitled to receive the same. An arbitral tribunal will not be able to do so.

(iv) 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 Form Nos. 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.

(v) 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 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, changes, expenses and interest, upon such terms as it deems fit. The Arbitral Tribunal will have no such power.

28. 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.

29. The appellant contended that the suit ultimately raises the following core issues, which can be decided by a private forum: (i) Whether there is a valid mortgage or charge in favour of SBI? (ii) What is the amount due to SBI? and (iii) Whether SBI could seek eviction of appellant from the flat, even if it is entitled to enforce the mortgage/charge? It was submitted that merely because mortgage suits involve passing of preliminary decrees and final decrees, they do not get excluded from arbitrable disputes. It is pointed out that the arbitral tribunals can also make interim awards deciding certain aspects of the disputes finally which can be equated to preliminary decrees granted by courts, and the final award made by the arbitrator, after detailed accounting etc. could be compared to the final decree by courts. It is therefore contended that there is no impediment for the parties to mortgage suits being referred to arbitration under section 8 of the Act. If the three issues referred by the appellant are the only disputes, it may be possible to refer them to arbitration. But a mortgage suit is not only about determination

of the existence of the mortgage or determination of the amount due. It is about enforcement of the mortgage with reference to an immovable property and adjudicating upon the rights and obligations of several classes of persons (referred to in para 27 (ii) above), who have the right to participate in the proceedings relating to the enforcement of the mortgage, vis-à-vis the mortgagor and mortgagee. Even if some of the issues or questions in a mortgage suit (as pointed out by the appellant) are arbitrable or could be decided by a private forum, the issues in a mortgage suit cannot be divided. The following observations of this court in a somewhat different context, in *Sukanya Holdings (P) Ltd. v. Jayesh H.Pandya* – 2003 (5) SCC 531 are relevant:

> "The next question which requires consideration is--even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed."

Conclusion

30. Having regard to our finding on question (iv) it has to be held that the suit being one for enforcement of a mortgage by sale, it should be tried by the court and not by an arbitral tribunal. Therefore we uphold the dismissal of the application under section 8 of the Act, though for different reasons. The appeal is accordingly dismissed. We however make it clear that we have not recorded any finding, nor expressed any opinion, on the merits of the claims and disputes in the suit.

……..J.
(R V Raveendran)

New Delhi;
April 15, 2011.

……J.
(J M Panchal)