



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INTERIM APPLICATION (L) NO. 25700 OF 2025
IN
COMMERCIAL SUIT (L) NO.23360 OF 2025

M/s Divya Enterprise and Others

....Applicants

In the matter between:

Capri Global Capital Limited

....Plaintiff

: *Versus* :

M/s Divya Enterprise (Partnership Firm)
and Others

....Defendants

Mr. Nausher Kohli with Ms. Shikha Ginodia, Mr. Gaurav Suryawanshi
and Ms. Simran K. i/b M/s ANM Global for the Plaintiff.

Mr. Savita Nangare with Mr. Vinod Nagula and Ms. Disha Shah i/b M/s
Law Focus For Defendant Nos. 1 to 4 and for Applicant in IA(L) No.
25700 of 2025.

Mr. Shanay Shah with Ms. Riya Thakkar i/b Mr. Tushar Goradia for
Defendant No.5.

CORAM : SANDEEP V. MARNE, J.

Judg. Resd. On: 30 September 2025.

Judg. Pron. On: 09 October 2025.

JUDGMENT:

1) The Defendants have filed the present Application for
reference of the dispute in the Suit to Arbitration.

2) Plaintiff has filed the present Suit for enforcement of mortgage under Section 8 of the Arbitration and Conciliation Act, 1996 (**the Arbitration Act**). Defendant Nos.1 to 4 have appeared in the Suit and have filed the present Application seeking reference of dispute raised in the Suit to Arbitration under the provisions of Section 8 of the Arbitration Act. Defendant No.1 and his partners are developers appointed for redevelopment of Defendant No.5-Society under Development Agreement dated 28 February 2014 and Supplemental Development Agreement dated 16 March 2021. Plaintiff extended various credit facilities to Defendant No.1 under various loans/facility Agreements as security. Defendant No.1 created mortgage in favour of the Plaintiff in respect of certain rights derived under the Development Agreement. According to Defendant Nos.1 to 4, Clause-34 of the Loan Agreements and Clause-24 of the Indenture of Mortgage contains clause for resolution of disputes through Arbitration. Accordingly, Defendant Nos.1 to 4 have filed the present Application under Section 8 of the Arbitration Act for reference of the dispute to Arbitrator.

3) Ms. Nangare, the learned counsel appearing for Applicants/ Defendant Nos.1 to 4 would submit that the Suit is not maintainable in view of existence of express Agreement between the parties for resolution of disputes through Arbitrator. That the claim of the Plaintiff is not independent but flows entirely out of Development and Supplemental Development Agreements. That the mortgage and credit facilities are also premised on the said Development Agreements. That Plaintiff's alleged rights are inextricably tied to the underlying contracts which contains an Arbitration clause. That Plaintiff itself has relied on Development Agreement and Supplemental Development Agreement executed

between Defendant No.1 and Defendant No 5-Society and the society have founded its Suit on rights derived from Development Agreement, the Plaintiff cannot deny or escape the obligation to have their disputes resolved through Arbitration.

4) Ms. Nangare would rely on judgment of the Apex Court in M.D. Frozen Foods Exports Private Limited and Others Versus. Hero Fincorp Limited¹, in support of her contention that 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. That Plaintiffs alleged right to recover money from Defendant Nos.1 to 4 is a right in *personem* and clearly arbitrable. She would rely upon judgment of the Apex Court in Vidya Drolia and Others Versus. Durga Trading Corporation², in support of her contention that though rights in *rem* are not arbitrable, subordinate rights that arise from right in *rem* are arbitrable. She would submit that Plaintiff is seeking enforcement of subordinate right even if it is momentarily accepted that right of redemption of mortgage is right in *rem*. She would also rely upon judgment of this Court in Aditya Birla Finance Limited Versus. Paul Packaging Private Limited³, in support of her contention that enquiry by a Court under Sections 11 and 7 is identical and beyond conducting enquiry into existence of arbitration clause, the Court cannot decide any further issues which need to be left to be decided by the arbitrator. She would also rely upon judgment of the Apex Court in P.R. Shah Shares and Brokers (P) Ltd. Versus. B.H.H. Securities (P) Ltd. and others⁴. in support of her contention that when claims against multiple parties are

1 (2017) 16 SCC 741

2 (2021) 2 SCC 1

3 2024 SCC ONLINE BOM 3682

4 (2012) 1 SCC 594

interconnected and based on same transactions, there is no bar to consolidate them before a single Arbitral Tribunal.

5) Ms. Nangare, would further submit that Plaintiff has deliberately impleaded Defendant No.5-Society to the present Suit for the purpose of avoiding resolution of disputes through Arbitration. That Defendant No.5 has absolutely no role to play in dispute between Plaintiff and Defendant Nos.1 to 4 which dispute needs to be resolved through Arbitration. She would accordingly pray for making the Interim Application absolute by referring the dispute between the parties to Arbitration.

6) Mr. Kohli, the learned counsel appearing for the Plaintiff would oppose the Interim Application submitting that no Arbitration would lie in respect of a suit for enforcement of a mortgage and that the Suit can be tried only by a Civil Court. In support he would rely upon judgment of the Apex Court in Booz Allen and Hamilton Inc. Versus. SBI Home Finance Limited and Others⁵. and Vidya Drolia (supra) and Emaar MGF Land Limited Versus. Aftab Singh⁶

7) Mr. Kohli would further submit that after amendment to Section 8 of the Arbitration Act, this Court would retain jurisdiction to reject application under Section 8 on the ground that the dispute in question is not arbitrable. He would submit that while deciding application under Section 8 of the Arbitration Act, this Court can also conduct an enquiry into the arbitrability of the dispute. In support, he would rely upon judgment of the Apex Court

5 (2011) 5 SCC 532

6 (2019) 12 SCC 751.

in *M. Hemalatha Devi and Others. Versus. B. Udayasri*⁷, and *Interplay Between Arbitration Agreements under Arbitration and Conciliation Act, 1996 and Stamp Act, 1899, in RE*⁸, .That reliance by the Applicants on judgments in *M.D. Frozen Foods*, (supra) and *Aditya Birla* (supra) is misplaced as both the judgments emanate from proceedings under Section 11 of the Arbitration Act whereas the scope of enquiry under section 8 of the Arbitration Act is entirely different where the Court can look into arbitrability of such dispute. That in any case, the judgment in *M.D. Frozen Foods* has been considered by the Apex Court in later judgment in *Vidya Drolia* where the legal position has been clarified. Lastly, Mr. Kohli, would further submit that Defendant No.5-Society's presence in the Suit is necessary as specific prayers are sought against him. That there is no Arbitration Agreement between the Plaintiff and Defendant No.1-Society. Lastly, he would submit that in the event of this Court coming to the conclusion that part of the Suit is arbitral, there cannot be a part reference to Arbitration as held by the Apex Court in *Sukanya Holdings Pvt. Ltd. Versus. Jayesh H. Pandya and others*⁹.

8) Mr. Shah, the learned counsel appearing for Defendant No.5-Society would also oppose the Application submitting that the subject matter of the Suit and the subject matter of Arbitration Agreement are distinct. That parties to the Arbitration Agreement and parties to the Suit are also not identical. That the reliefs/claims prayed for in the Suit do not emanate solely from the mortgage deed. That there are prayers made against Defendant No.5- Society in clauses (j) and (k) of the Suit which cannot be subject matter of

7 (2024) 4 SCC 255

8 (2024) 6 SCC 1

9 (2003) 5 SCC 531

Arbitration. That it is impermissible to bifurcate the claims for making part reference to Arbitration as held in *Sukanya Holdings* (supra). That Defendant No.5-Society is not a legal stranger to the action. He would accordingly pray for dismissal of the Application.

9) It would be necessary to state the brief factual background in which the Suit has been instituted by the Plaintiff in which the present Application has been filed by Defendant Nos.1 to 4 under Section 8 of the Arbitration Act. The brief facts leading to filing of the suit are stated as under:-

On 28 February 2014, a Development Agreement was executed between Defendant Nos.1 to 4 and Defendant No.5 for redevelopment of property known as Shree Abhishek CHS at Kandivali (West), Mumbai. On 25 October 2017, No Objection Certificate was issued by Defendant No.5-Society to facilitate mortgage of property of the said project in favour of the Plaintiff. On 26 October 2017, Loan Agreement for Rs.15 crores was executed between the Plaintiff and Defendants Nos.1 to 4 for redevelopment of the project. On 26 October 2017, an Indenture of Mortgage was executed by Defendant Nos. 1 to 4 in Plaintiff's favour to secure the loan facility of Rs.15 crores. On the same day, Demand Promissory Note and Letter of Continuity were executed by Defendant Nos.1 to 4 for Rs.15 crores in relation to the above loan facility. An Escrow Agreement was also executed on the same day between Plaintiff, Defendant Nos.1 to 4 and Kotak Mahindra Bank Limited to make a designated Escrow Account in respect of the said loan facility of Rs.15 crores. On 16 March 2021, a Supplementary Development Agreement, was executed modifying the terms of the original Development Agreement between the Defendant No.5-Society and Defendant Nos.1 to 4. On 10 May 2021, additional loan was

sanctioned by the Plaintiff to Defendant Nos.1 to 4 and a Loan Agreement was executed for Rs.25 crores between the Plaintiff and Defendant Nos.1 to 4. On 10 May 2021, Indenture of Mortgage, Demand Promissory Notes, Letter of Continuity, etc were executed to cover additional loan facility of Rs.25 crores by Defendant Nos.1 to 4 in Plaintiff's favour. On 26 March 2022, additional loan of Rs.3.46 crores was sanctioned by the Plaintiff to Defendant Nos.1 to 4 for which again necessary documents such as Loan Agreement, Indenture of Mortgage, Demand Promissory Notes, Letter of Continuity, etc were executed. On 5 March 2025, plaintiff issued recall notices to Defendant Nos.1 to 4 According to the Plaintiff, several cheques issued by Defendant Nos.1 to 4 towards repayment of outstanding dues against the loan facility were dishonoured between 10 March 2025 to 13 March 2025. On 26 April 2025, Plaintiff issued notice to Defendant No.5 calling it upon to issue consent letter or NOC for sale of units in the building without plaintiff's approval. On 1 May 2025, Loan Accounts for Rs.25 crores and for Rs.3.46 crores were identified as Non-Performing Assets (NPA). On 23 May 2025, notices were issued under section 13(2) of the SARFAESI Act by the Plaintiff. An objection was raised by Defendant No.5-Society on 27 May 2025. Plaintiff also issued notices to flats/unit purchasers seeking deposit of receivables in the designated Escrow Accounts. Plaintiff discovered sale of some of the mortgaged flats by Defendants Nos.1 to 4.

10) In the above background, Plaintiff has filed the present Suit seeking recovery of outstanding amount of Rs.17.31 crores from Defendant Nos.1 to 4 under various loan facilities. Plaintiff also seeks enforcement of mortgage rights over unsold flats of the project and a

declaration that the charge created in its favour is valid and subsisting.

The prayers in the Suit read thus :-

a) That this Hon'ble Court be pleased to order and decree that the Defendant Nos. 1 to 4 pay the Plaintiff a sum of Rs. 17,31,57,434/- (Rupees Seventeen Crores Thirty-One Lakhs Fifty-Seven Thousand Four Hundred and Thirty-Four Only) payable as on 30th June, 2025 as per the Particulars of Claim (Exhibit "DD" hereto) with further Interest at monthly rest payable monthly until payment and/or realisation thereof,

b) That this Hon'ble Court be pleased to declare that all the right, title and interest created in favour of the Plaintiff by the Defendant Nos. 1 to 4 in the said mortgaged properties and/or units of the project Shree Abhishek CHSL, more particularly described in the 1st Loan Agreement, 2nd Loan Agreement, 3^r Loan Agreement, 1st IOM, 2nd IOM and 3rd IOM and the Sanction Letter including but are not limited to the unsold units in Wings A, B, and C of the project 'Shree Abhishek CHSL are legal, valid, Subsisting and binding and that the repayment of Plaintiff's claim under the said Loan is legally and validly secured thereby.

c) That this Hon'ble Court be pleased to declare that payment of the amounts under decree awarded by this Hon'ble Court is secured by legal and valid charge on the mortgage properties, as more particularly described in the 1st Loan Agreement, 2nd Loan Agreement, 3rd Loan Agreement, 1st IOM, 2nd IOM and 3rd IOM and the Sanction Letter and by the personal assets both movable and immovable of the Defendant Nos. 1 to 4;

d) That this Hon'ble Court be pleased to fix time for redemption of mortgage created under the 1st IOM, 2nd IOM and 3rd IOM, directing the Defendant Nos. 1 to 4, to redeem the mortgage created under the 2nd IOM and 3rd IOM inclusive of the units of Wing A, B and C, from the said Project, within the time for redemption as fixed by this Hon'ble Court;

e) That the Defendant Nos. 1 to 4 be called upon to disclose on oath details of all the unsold units of the said Project and all properties /personal assets both movable and immovable as owned by them and upon such disclosure, this Hon'ble Court be pleased to pass an order of attachment before judgment of all their properties;

f) That the Defendant Nos. 1 to 4 be called upon to disclose on oath:

i. all their accounts/earnings/received till date, present and receivable in future from the said Project (Wing A, B & C);

ii. the number of units already sold, including names of purchasers, dates of agreements, amounts received, and balance receivables from the Project,

iii. the copies of all executed agreements for sale, allotment letters, and any pending applications for registration or approval;

iv. All their assets, moveable and immoveable and;

v. Copies of the latest audited balance sheets for partnership firm from the year 2021 to 2025;

vi. Names and details of all the (1) group and affiliate companies/entities and (ii) companies in which majority stake is held by Defendant Nos. 1 to 4 or the Defendant Nos. 1 to 4 directly/indirectly control the board of such companies and entities

g) Pass an order of attachment in respect of the moveable and immoveable assets disclosed on oath by Defendant Nos. 1 to 4 in furtherance of prayer clause (f);

h) That in the event of default being made by the said Defendant No.1 to 4 in the payment of the amounts mentioned (a) hereinabove by a date that will be fixed for redemption by this Hon'ble Court, all the mortgaged properties, inter alia the unsold units of the said Project Shree Abhishek CHSL be ordered and decreed to be sold by an order and under the directions of this Hon'ble Court and the net sale proceeds thereof be ordered to be paid over to the Plaintiff Company towards their claim in the Suit. That in the event of there being any deficiency in the sale proceeds to satisfy the Plaintiff's Company claim fully, the same be recovered by the Plaintiff Company from the Defendant Nos. 1 to 4 jointly and/or severally;

i). That this Hon'ble Court be pleased to direct the Defendant Nos. 1 to 4 to forthwith deposit all amounts received from third-party purchasers of mortgaged flats post the disbursement of the 2nd and 3rd Loan Facilities into the Designated Escrow Account maintained under the Loan Agreements and further direct that any proceeds/receivables from Wing 'C' of the said Project also be deposited in the Designated Escrow Account maintained under the 2nd and 3rd Loan Agreements.;

j) That this Hon'ble Court be pleased to declare that any lien, charge, claim, or right asserted by Defendant No. 5, over the mortgaged unsold units, Project receivables, or development rights under the Loan Agreements and Indentures of Mortgage, is subordinate and subject to the first-ranking rights of the Plaintiff,

k) That this Hon'ble Court be pleased to restrain Defendant No. 5 by an order of temporary/permanent injunction, from in any

manner obstructing the Plaintiff from enforcing its mortgage and security rights over the Project flats/units and receivables from the said Project 'Shree Abhishek CHSL' specifically from Wing A, B, C, and issuing NOCs or consent letters to any flat purchaser or third party with respect to flats mortgaged to the Plaintiff and interfering with the Plaintiff's collection of receivables or exercise of rights over the Designated Escrow-Account, and recognizing or permitting any transfer of the unsold flats mortgaged to the Plaintiff to third parties, unless and until the Plaintiff's charge is satisfied or written consent is granted by the Plaintiff;

l) That this Hon'ble Court be pleased to pass a decree of permanent injunction restraining the Defendant Nos. 1 to 4, their agents, servants, representatives, nominees or any person claiming through or under them from in any manner selling, transferring, leasing, alienating, parting with possession of, or creating any third-party right or encumbrances in the flats/units in the said said Project Shree Abhishek CHSL from receiving any further sale consideration or project receivables in relation to the mortgaged flats/units and issuing any no objection certificates (NOCs), consents, permissions, or confirmations for third-party dealings with the mortgaged flats without the prior written consent of the Plaintiff;

m) Restrain the Defendant No. 1 to 4, their, officers, agents, representatives, or any persons acting under or through them from in any manner marketing, advertising, promoting, or publishing any material (digital or physical) with respect to the sale of any units in the said Project (Wing A, B & C);

n) That pending the hearing and final disposal of the present Suit, this Hon'ble Court be pleased to restrain the Defendant Nos. 1 to 4, their servants, agents and representatives and/or person/s claiming through, by or under them or any one or more of them from and in any manner dealing with and/or disposing of and/or alienating and/or encumbering and/or creating third party rights and/or parting with possession of all their properties including unsold mortgage premises/properties/personal assets both movable and immovable of the Defendant Nos. 1 to 4;

o) Pending the hearing and final disposal of the Suit, this Hon'ble Court be pleased to restrain Defendant Nos. 1 to 4 and Defendant No. 5 from-creating third-party rights in Wing 'C' units of "Shree Abhishek CHSL", or issuing any NOC/consent for the same, without the prior written consent of the Applicant

p) Pending the hearing and final disposal of the captioned Interim Application and captioned Suit, this Hon'ble Court be pleased to Issue an order of injunction restraining the Defendant No. 1 to 4 from selling, transferring, alienating, assigning or disposing off or howsoever otherwise dealing with in any manner whatsoever their moveable and immoveable properties particulars whereof would be

disclosed by Defendant Nos. 1 to 4 pursuant to the orders passed by this Hon'ble Court:

q) Pending the hearing and final disposal of Suit, this Hon'ble Court be pleased to direct Defendant No. 1 to 4 to transfer/deposit all the monies from the unauthorized sold units of the Wing A & B of the Project in the designated escrow account and to deposit all further sale proceeds from any units sold of Project post the filing of this Application, into such account, to be operated only with prior permission of this Hon'ble Court;

r) That Pending the hearing and final disposal of the present suit proceedings, this Hon'ble Court be pleased to direct the Defendant Nos. 1 to 4 to furnish security by way of a Bank Guarantee in the sum of Rs. 17,31,57,434/- (Rupees Seventeen Crores Thirty-One Lakhs Fifty-Seven Thousand Four Hundred and Thirty-Four Only) together with interest thereon as per Particulars of Claim being Exhibit "EE" hereto with the office of the Prothonotary and Senior Master of this Hon'ble Court, within such time as this Hon'ble Court may deem fit and proper.

s) That the Defendants be directed to disclose on oath all their accounts /earnings/received till date, present and receivable in future from the said Project and upon same being disclosed, necessary order of injunction be passed restraining Defendant Nos. 1 to 4 from withdrawing, transferring and/or dealing with same in any manner and upon such disclosure being made the Defendant Nos. 1 to 4 be directed that such amounts be deposited before this Hon'ble Court same be directed to be deposit before this Hon'ble Court.

t) That the pending the hearing and final disposal of the captioned Suit, this Hon'ble Court be pleased to appoint a Court Receiver, High Court, Bombay as receiver to take possession and charge of the moveable and immoveable properties belonging to Defendant Nos. 1 to 4 and the development rights of Wing C of Project, Unsold units of the Wing A & B of Project along with balance receivables from the sold units of Wing A & B of the Project, for sale thereof and for payment to the Applicant of the amount due to the Plaintiff, till full satisfaction, payment/realisation;

u) That in the event of there being any deficiency in the sale proceeds to satisfy the Applicant's claim fully, the same be recovered by the Applicant Company from the Defendant Nos. 1 to 4 jointly and/or severally

v) That pending the hearing and final disposal of the present Suit, this Hon'ble Court be pleased to restrain the Defendant Nos. 1 to 4 from receiving any amounts under the said Project in any account and upon receipt of any such amounts, the Defendant Nos. I to 4 be directed to deposit the same before this Hon'ble Court as

security towards the decree which may be passed in favour of the Plaintiff;

w) That pending the hearing and final disposal of the suit, Hon'ble Court be pleased to direct the Defendant No.1 to 4 to surrender/deposit their passport before the the Ld. Prothonotary and Senior Master of the Hon'ble High Court.

x) That pending the hearing and final disposal of the suit, the Defendants be restraining from making payments to or repaying/prepaying loans, if any, availed or borrowed from any other party/institution;

y) For ad-interim reliefs in terms of prayer clauses (a) to (x) hereinabove

z) That costs incidental to this Suit be provided for.

aa) For such other and further reliefs as the nature and circumstances of the case may require.

11) Rival contentions of the parties now fall for my consideration.

12) The short issue that needs to be decided in the present Application is whether the dispute involved between the parties in the present suit needs to be referred to arbitration in exercise of power under Section 8 of the Arbitration Act.

13) Plaintiff has filed the present suit essentially for recovery of amount of Rs.17.31 crores from Defendant Nos.1 to 4. It has also sought a declaration that the right, title and interest created in its favour by Defendant Nos.1 to 4 in the mortgaged properties are legal, valid, subsisting and binding. It also sought a declaration that its claim is secured by legal and valid charge on mortgaged properties. It has also sought redemption or mortgage created by Defendant Nos.1 to 4 in respect of the units of Wings, A, B and C of the project. Plaintiff also sought certain prayers against Defendant No. 5-Society

for the purpose of restraining it from facilitating any further sale of units in the project.

14) According to Defendant Nos.1 to 4, the Indenture of Mortgage contained arbitration clause as under :-

24.1 Any dispute in connection with the interpretation, performance, termination of this Indenture, or otherwise in connection with this Indenture, considered to be arbitrable under prevailing Indian law, shall be referred to arbitration under the Arbitration and Conciliation Act, 1996, as may be amended from time to time, or any reenactment thereof, of a sole arbitrator to be mutually appointed by the Mortgagor(s) and the Mortgagee.

15) On account of existence of Arbitration clause in the Indenture of Mortgage as well as loan Agreements, Defendant Nos.1 to 4 have filed the present Application for reference of dispute to Arbitration. Plaintiff does not dispute existence of Arbitration Clause-24.1 in Indenture of Mortgage, as well as Clause-34 in the Loan Agreement. The defence of the Plaintiff in the present Application is however that dispute involved in suit for redemption of mortgage is not arbitrable and that therefore reference under Section 8 of the Act cannot be made.

16) Under section 8 of the Arbitration Act, an action brought before the Court in a matter which is subject matter of an Arbitration Agreement needs to be referred to arbitration. Section 8 of the Arbitration Act provides thus :-

8. Power to refer parties to arbitration where there is an arbitration agreement:

(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his

first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

[PROVIDED that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.]

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made.

17) Thus a reference under Section 8 of the Arbitration Act can be made only if the matter in an action is also subject of Arbitration Agreement. Therefore, this Court is required to ascertain whether the action in the present Suit is also subject matter of Arbitration.

18) So far as Plaintiff's prayer in the Suit for recovery of amount of Rs.17.31 crores is concerned there appears to be no serious dispute between the parties that the said action brought in by the plaintiff would be arbitrable. However, Plaintiff has also sought redemption of mortgages executed in its favour and this is where the Plaintiff claims that the said claim is not arbitrable.

19) In *Booz Allen and Hamilton* (supra) the Apex Court was concerned with almost similar facts where the loan amount was not

repaid and the bank had filed a mortgage suit in this Court for seeking recovery of outstanding loan amount and a declaration that the claim amount is secured by a valid and subsisting mortgage of flat. The facts of the case and prayers in the suit are captured in para-12 of the judgment which reads thus :-

12) 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 favor 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.

20) Thus, the prayers in the suit involved in *Booz Allen and Hamilton* were more or less similar. The defendant in the suit took out Notice of Motion under Section 8 of the Arbitration Act for reference

of dispute to Arbitration in the light of existence of Arbitration clause. The High Court dismissed the application of the Defendant and decision of the High Court was questioned before the Apex Court. After referring to the judgment in *SBP Co. Versus. Patel Engineering*¹⁰, the Apex Court held in paras-19, 22, 32, 33, 46, 48, 48.1, 48.2, 48.3 and 51 as under :-

19. 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;
- (iii) 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

22. 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, realization of sale proceeds there from 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 (iv)

32. 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

10 (2005) 8 SCC 618

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.

33. 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.

46. 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.

48. 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.

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, 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.

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.

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

51. 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--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.

21) Thus, in *Booz Allen and Hamilton* the Apex Court held that while conducting enquiry under Section 8 of the Arbitration Act, the Court can decide the issue of arbitrability. The Court distinguished the scope of enquiry under Section 11 and Section 8 holding that the enquiry under Section 11 is far narrower than the one

under Section 8 of the Arbitration Act. So far as the issue of arbitrability of dispute relating to mortgage is a transfer of right in *rem* and that a suit for enforcement of mortgage will have to be decided by Courts of law and not by Arbitral Tribunal.

22) According to Ms. Nangare, the ratio of the judgment in *Booz Allen and Hamilton* has been explained in subsequent judgment in *Vidya Drolia* in which it is held that though a right in *rem* is not arbitrable, the subordinate rights flowing in right in *rem* would be arbitrable. The proposition canvassed by Ms. Nangare has been discussed by the Apex Court in *Vidya Drolia* in para-48 of the judgment which reads thus :-

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 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.⁶ By contrast, a judgment in *personam*, "although it may concern a res, merely determines the rights of the litigants inter se to the res".⁷ Distinction between judgments in *rem* and judgments in *personam* turns on their power as *res judicata*,⁸ 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*" and "rights in *personam*" may not be correct for determining non-arbitrability because of the inter-play 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.* 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*.

23) The Apex Court thereafter in *Vidya Drolia* propounded fourfold test for determining when subject matter of dispute in Arbitration Agreement is not arbitrable in paras-76, 76.1 to 76.4 which reads thus :-

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.

76.2. (2)When cause of action and subject matter of the dispute affects third party rights; have erga omnes effect; require centralized 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; and

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

24) However, in my view, after discussing the ratio of the judgment in *Booz Allen and Hamilton* the Apex Court has not made a departure from the view expressed in *Booz Allen and Hamilton* while delivering the judgment in *Vidya Drolia*. So far as the issue of non-arbitrable dispute involving redemption of mortgage is concerned, the Apex Court has reiterated the view expressed in *Booz Allen and Hamilton*. Thus it is clear from paragraph 39 of the judgment in *Vidya Drolia*, the Apex court has held that a suit for foreclosure or redemption of mortgage property can be dealt with by public forum and not by a private forum. The Apex Court has held in para-39 as under :-

39. Analysing provisions of Order XXXIV of the Code of Civil Procedure, 1908, Booz Allen & Hamilton Inc. 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 Transfer of Property Act read with the Code relating to 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

25) Ms. Nangare has also relied on judgment of the Apex Court in *M.D. Frozen Foods Exports Pvt. Ltd.* in support of her contention that claim of money by a bank or financial institution cannot be treated as right in *rem* and is arbitrable. The Apex Court has held in para-31 as under :-

31. The discussion in the impugned order refers to a judgment of the Full Bench of the Delhi High Court in *HDFC Bank Limited v. Satpal Singh Bakshi* 2013(134)DRJ 566 (FB) 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.

26) However, the judgment in *M.D. Frozen Foods Exports Pvt. Ltd.* has been considered and explained by the Apex Court in *Vidya Drolia* by holding in paras-56 and 58 as under :-

56. In *M.D. Frozen Foods Exports Private Limited and Ors. v. Hero Fincorp Limited* MANU/SC/1244/2017 : (2017) 16 SCC 741 and following this judgment in *Indiabulls Housing Finance Limited v. Deccan Chronicle Holdings Limited and Ors.* MANU/SC/0163/2018 : (2018) 14 SCC 783 it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

58. Consistent with the above, observations in *Transcore* on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in *HDFC Bank Ltd. v. Satpal Singh Bakshi* MANU/DE/5308/2012 : 2013 (134) DRJ 566 (FB), which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in *HDFC Bank Ltd.* has been referred to in *M.D. Frozen Foods Exports Private Limited*, but not examined in light of the legal principles relating to non-arbitrability. Decision in *HDFC Bank Ltd.* holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration.

27) In *M.D. Frozen Foods* the Apex Court has considered the ratio of Full Bench judgment of Delhi High Court in *HDFC Bank Versus Satpal Singh Bakshi*¹¹, which has been overruled in *Vidya Drolia*. The Apex Court in *Vidya Drolia* has held that claims of banks and financial institutions are covered under the DRT and cannot be held to be arbitrable. Thus, the interpretation of the ratio of the

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judgment in *M.D. Frozen Foods* by the Apex Court in *Vidya Drolia* would be binding on this Court.

28) I am also unable to accept the contention of Ms. Nangare that this Court cannot make an enquiry into the issue of arbitrability of subject matter of dispute while deciding Application under Section 8 of the Arbitration Act. This contention has been raised by Ms. Nangare by relying on judgment of this Court in *Aditya Biral Finance Ltd.* (supra) in which this Court has dealt with application filed under Section 11(6) of the Arbitration Act for appointment of Arbitrator. The Application was opposed by the Respondent therein on the ground of pendency of proceedings before the DRT and reliance was placed on judgment of the Apex Court in *M.D. Frozen Foods* by referring to the judgment in *M.D. Frozen Foods*, this Court held that SARFAESI proceedings are in the nature of enforcement proceedings whereas Arbitration is in the context of adjudicatory proceedings and that both can proceed parallelly. This Court also referred to the judgment in *Tata Capitals Ltd Versus. Priyanka Communications (India) Pvt. Ltd.*¹² and held in para-27 as under :-

Having considered the above decisions, it becomes clear that in the context of examining an application under Section 11, the Court ought to prima-facie decide on the existence of arbitration agreement under the framework of Section 7 of the Arbitration Act, and no further. Applying it to the present facts, evidently there is an arbitration agreement which manifests itself in the arbitration clause contained in para 23.16 of the loan agreement. Thus, the statutory requirement under Section 7 of the Arbitration Act is fulfilled. The Applicant had by its advocate's letter dated 10 February 2023 invoked the said clause to refer the disputes or differences arising out of loan agreement to arbitration. Thus, the objection taken by the respondent on the invocation of the arbitration clause, is sans merit in the given facts and circumstances.

29) By relying on judgment of this Court in *Aditya Birla Finance Ltd.* Ms. Nangare contends that the scope of enquiry under Sections 11 and 8 being same, this Court is required to make a reference for Arbitration by leaving open the issue of arbitrability to be decided by the arbitrator. However, this issue is again no more *res-integra*. In *Interplay Between Arbitration Agreements* (supra) the Apex Court has considered the effect of 2015 Amendment to Sections 8 and 11 and has held in para-164 that Section 8 requires the referral court to look into *prima-facie* existence of valid Arbitration Agreement, whereas, Section 11 confines the Court's jurisdiction to the examination of existence of Arbitration Agreement. It has further held that although the object and purpose behind Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of referral courts on the said provisions is intended to be different. The Court held that the 2015 Amendment Act has legislatively overruled the dictum of the judgment in *SBP & Company. Versus. Patel Engg. Ltd.*¹³ wherein it was held that Sections 8 and 11 are complimentary in nature. The Court accordingly held that the two provisions cannot be held as laying down a similar standard. The Apex Court held in para-164 as under :-

164. The 2015 Amendment Act has laid down different parameters for judicial review Under Section 8 and Section 11. Where Section 8 requires the referral court to look into the prima facie existence of a valid arbitration agreement, Section 11 confines the court's jurisdiction to the examination of the existence of an arbitration agreement. Although the object and purpose behind both Sections 8 and 11 is to compel parties to abide by their contractual understanding, the scope of power of the referral courts under the said provisions is intended to be different. The same is also evident from the fact that Section 37 of the Arbitration Act allows an appeal from the order of an arbitral tribunal refusing to refer the parties to arbitration Under Section 8, but not from Section 11.

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Thus, the 2015 Amendment Act has legislatively overruled the dictum of Patel Engineering (supra) where it was held that Section 8 and Section 11 are complementary in nature. Accordingly, the two provisions cannot be read as laying down a similar standard.

30) In *Emmar MGF Land Limited* (supra), the effect of 215 Amendment has been discussed by the Apex Court and it has again reiterated that enforcement of a mortgage as a right in *rem* for which proceedings in arbitration would not be maintainable. The Apex Court held in paras-34 to 39 as under:-

33. Now, the issue to be addressed is effect and consequences of the above stated position of law consequent to the Arbitration and Conciliation (Amendment) Act, 2015 amending Section 8.

34. Section 8(1) and 8(2) of Act, 1996 (as existed prior to amendment of the Act, 1996) are as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement.-

(1) 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.

(2) The application referred to in Sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof.

35. Section 8(1) and 8(2) after Amendment by Act, 2015 are as follows:

8. Power to refer parties to arbitration where there is an arbitration agreement.-

Section 8(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that *prima facie* no valid arbitration agreement exists.

In sub-section (2) the following proviso shall be inserted, namely:

"Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration Under Sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

36. Two more provisions of the 1996 Act need to be noted before we proceed further to consider the issues. The 1996 Act contains two Parts - Part I and Part II. Part I contains heading "Arbitration" and Part II contains heading "Enforcement of certain Foreign Awards". Chapter I of Part I is "General Provisions", in which Section 2 deals with definitions. Section 2(1) begins with the words "In this Part, unless the context otherwise requires". Section 2(1) contains definitions. Section 2(3) provides:

Section 2(3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

37. There are two aspects to be noticed in the Scheme of Section 2, firstly, Section 2 contains a heading "Definitions" but it is covered by general heading of Chapter I "General Provisions". Section 2(3) does not contain any definition but contain a general provision which clarifies that "This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration". Section 2(3) gives predominance of any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

38. We have already noted several categories of cases, which are not arbitrable. While referring to judgment of this Court in *Booz Allen and Hamilton Inc. (supra)*, those principles have again been reiterated by this Court in *A. Ayyasamy (supra)*, *Dr. A.K. Sikri, J.* delivering the judgment in that case has noticed certain cases, which are not arbitrable in paragraph No. 14, which is as follows:

14. In the instant case, there is no dispute about the arbitration agreement inasmuch as there is a specific arbitration Clause in the partnership deed. However, the question is as to whether the dispute raised by the Respondent in the suit is incapable of settlement through arbitration. As pointed out above, the Act does not make any provision excluding any category of disputes treating them as non-arbitrable. Notwithstanding the above, the courts have held that certain kinds of disputes may not be capable of adjudication through the means of arbitration. The courts have held that certain disputes like criminal offences of a public nature, disputes arising out of illegal

agreements and disputes relating to status, such as divorce, cannot be referred to arbitration. The following categories of disputes are generally treated as non-arbitrable:

- (i) patent, trade marks and copyright;
- (ii) anti-trust/competition laws;
- (iii) insolvency/winding up;
- (iv) bribery/corruption;
- (v) fraud;
- (vi) criminal matters.

Fraud is one such category spelled out by the decisions of this Court where disputes would be considered as non-arbitrable.

39. Dr. Justice D.Y. Chandrachud, J. in his concurring opinion has referred to Booz Allen and Hamilton Inc. (supra) and noticed the categories of cases, which are not arbitrable. Paragraph No. 35 of the judgment is quoted as below:

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., 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)

- (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 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*, MANU/SC/0913/2016 : (2016) 8 SCC 788 this Court added a seventh category of cases to the six non-arbitrable categories set out in *Booz Allen*, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act

31) In *Emmar MGF Land Limited* the Apex Court also took into consideration the Report of the Commission on amendment to Section 8, as well as the Note thereon which is reproduced in para-44 of the judgment. The Note reads thus :-

NOTE: The words "such of the parties... to the arbitration agreement" and proviso (i) of the amendment have been proposed in the context of the decision of the Supreme Court in *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya and Anr.*, MANU/SC/0310/2003 : (2003) 5 SCC 531, - in cases where all the parties to the dispute are not parties to the arbitration agreement, the reference is to be rejected only where such parties are necessary parties to the action - and not if they are only proper parties, or are otherwise legal strangers to the action and have been added only to circumvent the arbitration agreement. Proviso (ii) of the amendment contemplates a two-step process to be adopted by a judicial authority when considering an application seeking the reference of a pending action to arbitration. The amendment envisages that the judicial authority shall not refer the parties to arbitration only if it finds that there does not exist an arbitration agreement or that it is null and void. If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the arbitral tribunal. However, if the judicial authority concludes that the agreement does not exist, then the conclusion will be final and not prima facie. The amendment also envisages that there shall be a conclusive determination as to whether the arbitration agreement is null and void.]

NOTE: In many transactions involving Government bodies and smaller market players, the original/duly certified copy of the arbitration agreement is only retained by the former. This amendment would ensure that the latter class is not prejudiced in any manner by virtue of the same

32) The Apex Court further proceeded to hold in paras-57 and 58 as under :-

57. The Legislative intent and object were confined to only above aspects and was not on those aspects, where certain disputes were not required to be referred to arbitration. Can it be said that after amendment Under Section 8(1), the law laid down by this Court in reference to Section 2(3), where large number of categories have been held to be non-arbitrable has been reversed or set at naught. Neither any such Legislature intendment was there nor any such consequence was contemplated that law laid down by this Court in context of Section 2(3) has to be ignored or reversed.

58. While carrying out amendment Under Section 8(1) of Act, 1996, the statutes providing additional remedies/special remedies were not in contemplation. The legislative intent is clear that judicial authority's discretion to refuse arbitration was minimise in respect of jurisdiction exercise by judicial authority in reference to Section 8. The amendment was also aimed to do away with special or additional remedies is not decipherable from any material. The Law Commission 246th Report, the Statement and Objects of Bill and the notes on clauses do not indicate that amendments were made for overriding special/additional remedies provided under different statutes. In the event, the interpretation as put by the learned Counsel for the Petitioner is accepted, Section 8 has to be read to override the law laid down by this Court in reference to various special/additional jurisdictions as has been adverted to and noted in judgment of this Court in *Booz Allen and Hamilton Inc.* (supra) which was never the intent of amendment in Section 8.

33) The Apex Court thus overruled in *Emmar MGF Land Limited* that the ratio of the judgment in *Booz Allen and Hamilton* would continue to apply even after amendment of Section 8.

34) In *Hemalatha Devi*, (supra) the Apex Court once again considered the issue as to whether the ratio of the judgment in *Booz Allen and Hamilton* would continue to operate after the 2015 Amendments and held in paras-40 and 47 as under :-

40. In *Booz Allen and Hamilton Inc.* (supra), what would be a non-arbitrable dispute was elaborated by this Court in detail. *Emaar III* (supra) then analysed whether this position has changed after the 2016 amendment in the Arbitration Act, 1996. The provisions

amended in the Arbitration Act, 1996 particularly with which we are concerned here i.e., Sections 8 and 11 have already been referred to in the preceding paragraphs. This Court in Emaar III (supra), after a change in the provisions post amendment, referred to Section 2(3) of the Arbitration Act, 1996, which reads as under:

2. (3) This Part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

47. This Court ultimately held that the main purpose of bringing an amendment inter alia in Sections 8 and 11 of the Arbitration Act, 1996 was to minimise the scope of judicial authority, which was to refuse reference to arbitration only on the ground when it prima facie finds that there was no valid arbitration agreement. The legislative intent for the amendment was confined to limiting judicial intervention, and once the Court finds that there is a valid arbitration agreement, it has no option but to refer the matter for arbitration. But this would not mean that where the matter itself is non-arbitrable, or is covered by a special legislation such as the Consumer Protection Act, it still has to be referred for arbitration. In Para 59 of Emaar III (supra), it was stated as under:

59. The amendment in Section 8 cannot be given such expansive meaning and intent so as to inundate entire regime of special legislations where such disputes were held to be not arbitrable. Something which legislation never intended cannot be accepted as side wind to override the settled law. The submission of the Petitioner that after the amendment the law as laid down by this Court in National Seeds Corpn. Ltd. [National Seeds Corpn. Ltd. v. M. Madhusudhan Reddy, MANU/SC/0038/2012 : (2012) 2 SCC 506 : (2012) 1 SCC (Civ) 908] is no more a good law cannot be accepted. The words "notwithstanding any judgment, decree or order of the Supreme Court or any court" were meant only to those precedents where it was laid down that the judicial authority while making reference Under Section 8 shall be entitled to look into various facets of the arbitration agreement, subject-matter of the arbitration whether the claim is alive or dead, whether the arbitration agreement is null and void. The words added in Section 8 cannot be meant for any other meaning.

Emaar III (supra) though ends with a caveat, where it leaves the option with the party who may have an option to choose between a public or private forum, may consciously choose to go for private fora. This is what it says:

63. We may, however, hasten to add that in the event a person entitled to seek an additional special remedy provided under the statutes does not opt for the

additional/special remedy and he is a party to an arbitration agreement, there is no inhibition in disputes being proceeded in arbitration. It is only the case where specific/special remedies are provided for and which are opted by an aggrieved person that judicial authority can refuse to relegate the parties to the arbitration.

35) In *Hemalatha Devi* the Apex Court also considered the ratio of the judgment in *A Ayyaswmy Versus A. Paramasivam and Others*¹⁴ in which it has held that enforcement of mortgage has a right in *rem* for which proceedings in arbitration would not be maintainable.

36) The conspectus of the above discussion is that enforcement of mortgage being a right in *rem*, the same is not arbitrary since the Plaintiff is seeking enforcement of mortgage, the dispute involved in the suit cannot be referred to arbitration.

37) The other issue is about presence of Defendant No.5-Society in the Suit with whom there is no Arbitration Agreement. In para-76.2 of *Vidya Drolan* the Apex Court has held that when cause of action in subject matter of the dispute affects third party rights and requires centralized adjudication, such dispute would be non-arbitrable. To get over this situation, Ms. Nangare has contended that presence of Defendant No.5-Society is not necessary in the Suit and Defendant No.5-Society is impleaded in the suit only with a view to get over the objection of Arbitration.

38) I am unable to agree with this contention as there are specific prayers sought against Defendant No.5-Society in the Plaint. Plaintiff is seeking a restraint order against the Society from issuing

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any NOCs/consent letters in respect of the flats/ units in the building. This relief cannot be sought in arbitration proceedings between the Plaintiffs and Defendant Nos.1 to 4. Ms.Nangare has therefore pressed into service of alternate plea of conducting arbitration proceedings between Plaintiff and Defendant Nos.1 to 4 and Plaintiff and Defendant No.5-Society. She has placed reliance on judgment of Apex Court in *P.R. Shah Shares* (supra) in support of the contention that claims against interconnected claims against multiple parties based on same transaction can be consolidated before a single arbitral tribunal. Reliance is placed on judgment of the Apex Court in *Cloro Controls India Pvt. Ltd Versus. Severn Waters Purification Inc and Others*¹⁵ in support of the same contention. I am unable to accept even this contention. Plaintiffs claim against Defendant Nos.1 to 4 is in respect of the credit facilities advanced to Defendant Nos.1 to 4 and mortgages created by them. As of now, it is not known as to the exact dispute between the Defendant No.5-Society and Defendant Nos.1 to 4. It is difficult to hold that there is any interconnection between the Plaintiff and Defendant No.5 and dispute between Defendant No.5-Society and Defendant Nos.1 to 4. From page-9 of the application, it appears that the Society had filed application under Section 9 of the Arbitration Act seeking interim measures during pendency of arbitral proceedings. Another Arbitration Petition was filed seeking appointment of Arbitral Tribunal. It appears that consent terms dated 18 February 2022 were tendered before the Court evidencing settlement of dispute between the parties. Accordingly, both the Arbitration Petitions were disposed off recording consent of the rival parties vide order dated 21 February 2022. Defendant Nos.1 to 4 while referring to invocation of arbitration clause by Defendant

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No.5-Society have not disclosed order dated 21 February 2022 passed by this Court which reads thus :-

1. Commercial Arbitration Petition (L) No. 528 of 2022 is filed under section 9 of the Arbitration and Conciliation Act (for short "the Act") praying for interim relief pending the arbitral proceeding. Commercial Arbitration Application (L) No. 901 of 2022 is filed under section 11 of the Act praying for appointment of an arbitral tribunal to adjudicate the disputes and differences which have arisen under the Development Agreement dated 28 February, 2014 and Supplementary Agreement dated 16 March, 2021.

2. After the proceedings were heard on the earlier occasion, learned counsel for the parties today have tendered consent terms dated 18 February, 2022 entered between the parties under which the parties have settled the disputes and differences arisen between them in the manner as set out in various paragraphs of the consent terms. The consent terms are signed by Mr. Sanjay Pandey, Secretary, who is authorized to sign the consent terms in view of the resolution passed by the Managing Committee of the petitioner-society. Respondent nos. 2 to 4, partners of respondent no. 1 have executed these consent terms and accordingly have made their signatures. The advocates for the parties have also signed the consent terms as also they have identified the signatures of the signatories to the consent terms. There is no dispute in regard to the signatures. The Secretary of the petitioner and respondent no. 2 is present in the Court. The consent terms are accordingly taken on record and marked 'X' for identification. The undertaking as set out in the consent terms stands accepted as undertaking to the Court.

3. The proceedings are disposed of in terms of the consent terms. No costs.

39) Thus, as of now there is no arbitration between Defendant No.5-Society and Defendant Nos.1 to 4. Therefore the contention of inter connectivity between the two disputes and conciliation of arbitration proceedings deserves rejection.

40) The conspectus of the above discussion is that the disputes involved in the Suit cannot be referred to Arbitration on account of disputes relating to redemption of mortgage being incapable of resolving through arbitration on account of absence of

arbitration clause. I therefore do not find any merits in the Application preferred by Defendants No.1 to 4. The Interim Application is accordingly rejected.

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
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