2020 INSC 360

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2373/2020
(Arising out of SLP(C) No. 30392/2019)

M/s. Tripower Enterprises (Private) Limited **...Appellant(s)**

Versus

State Bank of India & Ors. **...Respondent(s)**

J U D G M E N T

A.M. Khanwilkar, J.

1. Leave granted.

2. This appeal takes exception to the judgment and order dated 6.9.2019 passed by the High Court of Judicature at Madras (for short, "the High Court") in Writ Petition No. 11522/2019, whereby the High Court reversed the order dated 29.3.2019 passed by the Debts Recovery Appellate Tribunal (for short, "the DRAT") at Chennai in M.A. No. 90/2018 allowing the application filed by the respondent No. 1 - State Bank of India (for short, "the Bank") before the Debts Recovery Tribunal (for

short, "the DRT") at Madurai being I.A. No. 995/2017 in O.A. No. 11/2008, directing return of original documents – Exhibits A110 to A114 deposited by the Bank before the DRT in O.A. No. 11/2008. In other words, the High Court affirmed the order of the DRT rejecting subject application.

3. Shorn of unnecessary factual matrix, suffice it to observe that the respondent No. 3 – M/s. Rukmini Mills Ltd. (for short, "the borrower") had availed of financial credit from the Bank, for which the respondent No. 2 – Associated Trading Corporation Pvt. Ltd. (for short, "the guarantor") had offered its immovable property by way of mortgage to the Bank. The borrower committed default, as a result of which the Bank declared it as a Non-Performing Asset (for short, "NPA") and then proceeded to file O.A. No. 11/2008 before the DRT at Madurai. The Bank also issued notice for taking symbolic possession of the secured assets, on 13.5.2008 and after considering the reply of the guarantor, took symbolic possession of the secured assets on 15.10.2008. The guarantor filed a petition being SA No. 225/2008 before the DRT at Madurai, challenging the possession notice dated 15.10.2008 issued by the Bank under Section 13(4)

of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the 2002 Act"), which came to be rejected by the DRT on 10.2.2011. The guarantor then filed an appeal being AIR(SA) No. 222/2011 against this decision, which was dismissed on 8.2.2013 on the ground of non-payment of pre-deposit amount. The guarantor did not carry that matter any further.

4. The secured assets offered by the guarantor were eventually put up for public auction by the Bank for recovery of outstanding dues to the extent of Rs.350.12 lakhs. The appellant ultimately turned out to be the highest bidder in the e-auction conducted by the Bank on 28.2.2017. Sale certificate in respect of the secured assets purchased by the appellant in public auction conducted by the Bank, was issued on 29.4.2017. Before the auction was finalised in favour of the appellant, the Bank had already moved an application before the DRT being I.A. No. 995/2017 in O.A. No. 11/2008 for return of the original documents deposited with the DRT, as the Bank would be obliged to hand over the same to the auction purchaser upon issue of sale certificate. That application was rejected by the DRT on 9.11.2018, essentially on

the ground that the issue raised by the guarantor that there was no valid mortgage in respect of the secured assets referred to as 'B' schedule properties and that equitable mortgage in respect of the said properties have been created by incompetent persons, was still to be examined by the DRT in the main proceedings being O.A. No. 11/2008. The DRT rejected the application for the following reasons: -

> "4……. it was decided that the property absolutely belonged to them and that therefore, any mortgage created in respect of their property is illegal and void and that the petitioner bank has itself stated in para-5 & 6 of the counter proof affidavit that D-10 & D-11 have been added as parties to the OA, since they claim over a part of the 'B' schedule property mortgaged by D-4 company and that in order to avoid multiplicity of proceedings, D-8 to D-11 have been added as parties to the Original Application for better adjudication of respective claim over the mortgaged properties. The Ld. Counsel for R-10 further contended that the marked documents cannot be returned unless final order is passed in the main OA and that if the documents are handed over to the auction purchaser, before passing of final order, it will create more problems and multiplicity of proceedings and that therefore, the petition is liable to be dismissed.
>
> 5. Even though, R-2 & R-3 who are said to represent the R-1 mill used to appear before in person before this Tribunal for all hearings, neither filed any counter statement nor did advance any argument. Similarly, the R-5, who is represented by his counsel neither filed any counter statement nor did advance argument.
>
> 6. The petitioner bank has filed the original application OA No. 11/2008 against the Respondents 1 to 11 herein, who are the Defendants-1 to 11, for recovery of sum of Rs.25,49,19,820.41ps/- with future interest thereon. The contention of the petitioner bank with regard to creation of equitable mortgage over the OA 'B' Schedule mentioned properties by R-4 company, in favour of the petitioner

bank for the above said loan facilities availed by R-1 company has been stoutly denied by R-4 company, in its written statement, filed in the OA. There is no dispute with regard to sale of some of the OA 'B' Schedule mentioned properties in the e-auction held on 28.02.17 under the SARFAESI proceedings initiated by the petitioner bank herein, to M/s. Tripower Enterprise Pvt. Ltd., Chennai-115.

7. R-4 company has filed its written statement in the OA, wherein it has been alleged that no valid mortgage over OA 'B' schedule properties had been created by R-4 company and that equitable mortgage over the above said properties had been created by incompetent persons on behalf of R-4 company by fabricating false records. But the rival contention of the petitioner bank is that valid equitable mortgage has been created over the above said properties by R-4 company. This vital issue has to be decided only after conclusion of the inquiry in the original application pending before this Tribunal. In the meanwhile, this petition has been filed for return of the original documents, which have been marked as Exh. A-110 to A-114.

8. The mere reason that R-4 company and R-10 have not raised the above said issue during the SARFAESI proceedings, cannot be a valid reason to strengthen the contention of the petitioner bank that R-4 company & R-10 cannot raise this objection in the original application, since the SARFAESI proceedings are of summary proceedings in nature. In the original application, all the contesting defendants have filed their written statement and that OA has reached the stage for inquiry. Therefore, this Tribunal is of the considered view that the issue as to whether there is valid creation of equitable mortgage over the OA 'B' schedule mentioned properties, has to be decided only in the original application, along with the issue as to whether the petitioner bank is entitled for recovery of sum of Rs.25,49,19,820.41ps/- and with future interest thereon. Further the documents, which are sought for by the petitioner bank, have already been marked as Exh.A-110 to A-114. Therefore, passing an order in this petition for return of the above mentioned documents to the petitioner bank would cause prejudice, at this stage, to decide the vital issue as to whether valid mortgage has been created over some of the OA 'B' schedule properties by R-4 company.

> In view of the foregoing reasons, this petition stand dismissed."

The Bank carried the matter in appeal before the DRAT at Chennai by way of M.A. No. 90/2018. The DRAT, however, reversed the decision of the DRT and observed thus: -

> "7. On careful perusal of pleadings of parties and submission of counsel of parties and record, it becomes clear that R4 has preferred an appeal against order passed in SA 225/2008. But it was dismissed for want of compliance OD pre-deposit. On 09.06.2015, in OA 11/2008 by way of IA 357, 3544448, 359, Mr. Balasubramanian and Mr. Thiagarajan brought some facts on record regarding objections pertains to signature of memorandum of deposit of titles deeds by unauthorised persons. The record reveals that borrowers/guarantors availed loan from appellant bank decaded ago (i.e.) in the years 1990, relationship between bank and guarantor had taken and for loan of R1 company R4 company stood as guarantor and behind both companies the same person was the instrument. It can safely be presumed and inferred that loan was availed by common predecessor of respondents/defendants who floated various Companies according to need and convenience in such a background if OA filed in the year 2008 was kept pending even after 10 years, then bank had a right for recovery of money. In this background, bank had proceeded for sale of property in the year 2017 and bonfire auction purchaser has spent more than Rs.60 crores on it. In such a situation, the memo of part satisfaction of IA should have been taken on record in that spirit only.
>
> 8. In so far as disputes regarding ownership of the company between brothers and extended relatives should not adversely affect the right of recovery. Such disputes are endless. Bonafides of defaulters can be perceived and presumed if they were willing to repay the dues. During the course of arguments also it was transpired that R4 is not feeling himself liable for any repayment whatsoever. The SARFASEI appeal filed by R4 in the year 2008 itself had attained finality. In such a situation recovery made by bank under SARFAESI Act should be acknowledged

> and respected for all purposes. The dispute/battle between family members of defaulters should not create or cause or prejudice against bank or bonfire purchaser. When seeing the gestures of repayments to be made by respondents, their objection cannot be created as a sign of honesty and bonfires. Rather they can be presumed as a culprit and deferring the recovery proceedings.
>
> 9. In this back drop, IA filed by bank deserves to be allowed and it should have been allowed by presiding officer. The bank has to receive the relevant five documents after keeping the photocopy of documents on record because bank has also a responsibility towards auction purchaser who had spent [*sic*] a sum of more than Rs.60 crores about two years ago.
>
> 10. Hence, Appeal stands allowed and impugned order is set aside. It is made clear that this tribunal has not expressed any opinion about legality of mortgage. The presiding officer will decide this issue on merits after hearing of parties according to law without being influenced by this order at all. Simply in view of the fact that bank had a recovery of a sum of Rs.60 crores and defaulters are not willing and has no capacity of sum of Rs.60 crores and defaulters are not willing and has no capacity of such payment, impugned order is set aside. DRT will return the documents to the bank for further proceedings and presiding Officer will adjudicate the OA after hearing both parties according to law.
>
> 11. Impugned order is set aside."

Accordingly, the DRAT allowed the application preferred by the Bank and directed return of the original documents - Exhibits A110 to A114 to the Bank.

5. Feeling aggrieved, the guarantor filed a writ petition before the High Court, being Writ Petition No. 11522/2019. The High Court, after considering the factual matrix, was pleased to restore

the order passed by the DRT, rejecting the application preferred by the Bank. For doing so, the High Court observed as follows: -

> "10. On a careful consideration of the materials available on record, the judgment relied upon by the learned counsel appearing for the 1st respondent and the submissions made by the learned counsel on either side, it could be seen that O.A. No. 11 of 2008 was filed by the 1st respondent-Bank for recovery of a sum of Rs.25,49,19,820.41 together with future interest. Schedule 'B' in the Schedule of properties mentioned in O.A. No. 11 of 2008 was sold in e-auction on 28.02.2017 for a sale consideration of Rs.60,25,00,000/- under the SARFAESI proceedings to the auction purchaser, viz., M/s. Tripower Enterprises Private Limited and the sale certificate was also issued in their favour. However, the auction purchaser, is not a party either in the Original Application or in this Writ Petition. The 1st respondent also filed a memo for recording part satisfaction.
>
> 11. It is also not in dispute that the sale made in favour of M/s. Tripower Enterprises Private Limited by the 1st respondent-Bank has not been challenged by the petitioner Company, who claimed title to the property. The petitioner has challenged the possession notice dated 10.02.2011 in S.A. No. 225 of 2008 and the same was dismissed by the Debts Recovery Tribunal. However, the Tribunal did not go into the other issues relating to the subsequent extension of the mortgage done by the persons, since the proceedings under Section 17 of the SARFAESI Act is summary proceedings.
>
> 12. The petitioner contended that there is no valid creation of mortgage or extension of mortgage over the Schedule 'B' property. The respondents 10 and 11 claimed that the property originally belonged to their father and by virtue of the decree granted by a competent Civil Court, declaring them as absolute owners of an extent of 1.80 acres, they became the absolute owners. Further, the 10th respondent has stated that out of the extent of 1.80 acres, an extent of 1.40 acres was acquired by the Government for Thillai Ganga Nagar Subway and in the remaining 40 cents, some extent of properties were sold to third parties and therefore, the petitioner could not have mortgaged an extent of 1.80 acres with the 1st respondent-Bank. The petitioner also

contended that there was no valid mortgage in respect of Schedule 'B' property mentioned in O.A.No.11 of 2008 and the mortgage was created by an incompetent person on behalf of the petitioner Company by fabricating false records.

13. The case put up by the respective parties is a matter for evidence and the same can be decided only after the conclusion of the trial in the Original Application pending before the Debts Recovery Tribunal. The original documents were marked as Exs.A110 to A114 in O.A.No.11 of 2008. The Debts Recovery Tribunal, while disposing of the application, observed that the Original Application has reached the stage of inquiry and therefore, the Tribunal was of the view that the issue as to whether there was valid creation of equitable mortgage over the Schedule 'B' property mentioned in the O.A. No.11 of 2008 has to be decided only in the Original Application, along with the issue as to whether the 1st respondent-Bank is entitled for recovery of the amount with future interest.

14. That apart, when the documents were marked as Exs.A110 to A114 before the Debts Recovery Tribunal the documents cannot be allowed to be returned even before the disposal of the Original Application. The Debt Recovery Appellate Tribunal without considering the case of the parties had set aside the order of the Debts Recovery Tribunal finding that the sale made in favour of the auction purchaser has become final. When the core issue is with regard to creation of mortgage, the same can be decided only in the Original Application, the order passed by the Debt Recovery Appellate Tribunal without considering the same cannot stand. If the Debts Recovery Tribunal, after trial, ultimately comes to the conclusion that there was no valid mortgage in respect of the Schedule 'B' property mentioned in O.A. No.11 of 2008, in that case, it would further complicate the dispute. The Appellate Tribunal, instead of setting aside the order passed by the Debts Recovery Tribunal, should have directed the Debts Recovery Tribunal to dispose of the appeal, within a time frame and further directed the Debts Recovery Tribunal to consider the application in I.A. No.995 of 2017 along with the Original Application.

15. In these circumstances, we are of the considered view that in the interest of justice, the Debts Recovery Tribunal should retain the documents marked as Exs.A110 to A114 till the disposal of O.A.No.11 of 2008

> and a direction can be given to the Debts Recovery Tribunal to dispose of the Original Application within a time frame."

The High Court, however, after setting aside the order of DRAT at Chennai, directed remand of I.A. No. 995/2017 in O.A. No. 11/2008 to the DRT at Madurai for deciding the same afresh and to dispose of the main matter bearing O.A. No. 11/2008 together, on merits and in accordance with law within four months from the date of receipt of the said order.

6. Feeling aggrieved, the appellant being the auction purchaser, has assailed the aforesaid decision of the High Court in the present appeal by way of special leave. The Bank has supported the stand of the appellant. The thrust of the argument of the appellant is that it having purchased the property in a public auction conducted by the Bank and upon complying with necessary formalities and further, having received the sale certificate in that regard, in law, was entitled to get the original title documents in respect of the stated properties, which were lying with the DRT in O.A. No. 11/2008. According to the appellant, the guarantor had filed writ petition before the High Court challenging the direction issued by the DRAT vide order dated 29.3.2019 for return of original documents despite in the

past it had unsuccessfully challenged the notice for taking possession of the stated properties. Another petition filed by the guarantor for issue of restraint order against the Bank to desist from proceeding with the public auction, was also rejected. Similarly, the guarantor had unsuccessfully challenged the auction concluded in favour of the appellant. In all these proceedings, the very contention about the mortgage in question being invalid and created by incompetent persons was raised and negatived. According to the appellant, the guarantor on affidavit had admitted the factum of mortgage in question created in favour of the Bank, and one of its Directors had also offered to pay the outstanding dues of Rs.350.12 lakhs, if some more time for payment was granted. Considering all these aspects, contends the appellant, the High Court should not have shown any indulgence to the guarantor and the writ petition filed by it ought to have been rejected. Further, the High Court misdirected itself by taking into account matters disregarding the consistent opinion recorded against the guarantor by the DRT and the DRAT and in certain proceedings, by the High Court and even this Court.

7. The guarantor, on the other hand, would urge that it had not taken any loan from the Bank. The borrower had been borrowing money from the bank against the security by deposit of title deeds and equitable mortgage created on 12.4.1984. However, the Bank extended further loans to the borrower in 1990 and 1992, to which the guarantor was not a party. As a matter of fact, the equitable mortgage was not created by the authorised person of the guarantor nor it was party to the extensions of mortgage. In the proceedings before the DRT, it has been observed in order dated 9.6.2015 that the documents for extension of the alleged mortgage dated 12.4.1984, were signed by Mr. S. Balasubramaniam (personal guarantor/respondent No. 4). It is asserted that he was never a Director of the respondent No. 2 company/guarantor and was a stranger to it. It is urged that the jurisdiction of DRT under the 2002 Act is only supervisory over the actions initiated by the Bank under Section 13 of that Act. It cannot decide the substantial issues and disputes regarding the genuineness or validity of the mortgage itself. Reliance is placed on ***Transcore vs. Union of India & Anr.***[1], ***Authorised Officer, Indian***

1 (2008) 1 SCC 125 (paragraph 30)

Overseas Bank & Anr. Vs. Ashok Saw Mill[2], ***Standard Chartered Bank vs. Dharminder Bhohi & Ors.***[3], ***Axis Bank vs. SBS Organics Private Limited & Anr.***[4], ***M.D. Frozen Foods Exports Private Limited & Ors. vs. Hero Fincorp Limited***[5] and ***Shakeena & Anr. vs. Bank of India & Ors.***[6]. It is then urged that the principle of *res judicata* will have no application to the opinion already recorded by the DRT or DRAT and at the same time, the guarantor cannot be denuded from pursuing the objection regarding validity of the mortgage in appropriate proceedings including in pending O.A. The guarantor has pointed out the similarities and dissimilarities in the 2002 Act, the Transfer of Property Act, 1882 and the Code of Civil Procedure, 1908 to contend that the remedy under Section 13(4) of the 2002 Act is only an enabling provision, pending final adjudication of liability. It is urged that at least the cases wherein the validity of mortgage is put in issue or the factum of existence of mortgage itself is in dispute, will have to be dealt with in a different manner than a case where the factum of

---

2 (2009) 8 SCC 366 (paragraph 37)
3 (2013) 15 SCC 341 (paragraph 36)
4 (2016) 12 SCC 18 (paragraph 12)
5 (2017) 16 SCC 741 (paragraphs 27 and 33)
6 2019 SCC OnLine SC 1059 (paragraph 21)

existence of mortgage is admitted. The DRT can only examine the issues regarding procedural irregularities committed by the Bank and not decide the disputed question about the existence or validity of the mortgage itself, unlike in proceedings under the Recovery of Debts and Bankruptcy Act, 1993 (for short, "the 1993 Act"). Reliance is placed on ***E. Subbulakshmi vs. State of Tamil Nadu through Secretary to Government & Ors.***[7] ***and M.D. Frozen Foods Exports Private Limited*** (supra). It is then urged that there is no warranty of title in a Court auction, much less in a public auction, wherein the doctrine of *caveat emptor* applies. Reliance is placed on ***The Ahmedabad Municipal Corporation of the City of Ahmedabad vs. Haji Abdulgafur Haji Hussenbhai***[8] to buttress the argument that it is imperative for the purchaser to ascertain and satisfy himself about the title of the property. It is then urged that the order passed by the DRT which was subject matter of challenge before the High Court was only an interlocutory order, for which reason this Court should be loath to interfere, especially when the High Court has only remanded the matter with direction to expeditiously dispose

7 (2017) 1 SCC 757
8 (1971) 1 SCC 757 (paragraph 3)

of the main proceedings pending before the DRT since 2008. No prejudice would be caused to the appellant, especially when the question regarding the validity of the mortgage of title in respect of the stated properties itself would be decided in the original proceedings, namely, O.A. No. 11/2008.

8. The respondent No. 11 (A.R. Sridharan) has more or less raised the same objection, but additionally urged that the material facts were not brought to the notice of the DRT, namely, that the ancestors of respondent Nos. 11 (A.R. Sridharan) and 12 (A.R. Kannan) were the owners and in possession of land to the extent of 1.80 acres at Adampakkam Village at old Survey, which was known as Paimash No. 722/4. The factum of ownership of the respondent Nos. 11 and 12 has been decided in O.A. Suit No. 186/1976, filed by their father and after his demise, the same was pursued by them. The suit was decreed in their favour in respect of 1.80 acres land at Paimash No. 722/4 and which decree had attained finality by dismissal of special leave petition by this Court on 11.5.1992 in view of the concurrent decisions of the trial Court dated 16.2.1990, of the first appellate Court dated 3.1.1992 and of the High Court in Second Appeal dated 6.4.1992.

Besides the civil proceedings which have attained finality, reliance is also placed on criminal proceedings making reference to the stated property (Paimash No. 722/4). Notwithstanding this position, it is urged by the respondent No. 11 (A.R. Sridharan) that the sale certificate issued by the Bank refers to land admeasuring 1.80 acres bearing Paimash No. 722/4, which cannot be countenanced. He stoutly urged that land bearing Paimash No. 722/4 admeasuring 1.80 acres was not and could not have been made the subject matter of mortgage in favour of the Bank, as the guarantor had no title whatsoever qua that property when mortgage was created by it. Thus, besides praying for dismissal of the appeal, he has prayed that it be clarified that the mortgage and the sale certificate could not have and had not included the property bearing Paimash No. 722/4 admeasuring 1.80 acres, and for directing that all proceedings conducted in whichever Court/forum must proceed on the basis that sale certificate issued by the Bank is subject to the decree in favour of the respondent No. 11 dated 16.2.1990 in O.S. No. 186/1976.

9. We have heard Mr. Vinay Prabhakar Navare, learned senior counsel for the appellant, Mr. Tushar Mehta, learned Solicitor

General for the respondent No. 1 (the Bank), Mr. V. Giri, learned senior counsel for the respondent No. 2 (the guarantor) and Mr. Gopal Sankaranarayanan, learned senior counsel for the respondent No. 11.

10. Considering the fact that the guarantor had filed writ petition before the High Court assailing the order passed by the DRAT, dated 29.3.2019, allowing the application filed by the Bank for return of original documents, we must first address the argument of the appellant (auction purchaser) that the guarantor cannot be allowed to approbate and reprobate and moreso, in view of the unambiguous affidavit admitting the mortgage and offer given by its Director to pay the outstanding dues of the Bank in the earlier proceedings including the findings recorded by the DRT/DRAT against it in relation to the plea of validity of the mortgage in question.

11. For that, we may first refer to the decision of the DRT, in earliest point of time, on the petition moved by the guarantor being S.A. No. 225/2008 challenging the possession notice dated 15.10.2008 issued by the Bank under Section 13(4) of the 2002 Act. In these proceedings, the guarantor had specifically urged

that the person who created equitable mortgage in respect of subject property, was not an authorised person of the guarantor. This issue was considered by the DRT in its final order dated 10.2.2011 in the following manner: -

> "(i) The Applicant is a Private Limited Company registered under the Company Act under the name and style of Associated Trading Corporation Pvt. Ltd. having the identification (SIN) No. U51909IN194) PTC000011. The Respondent 2 is the borrower company, who has availed various credit facilities from the 1st Respondent (Respondent Bank) to meet the business requirements since 1954. Therefore, it is clear that the Applicant is a Private Ltd. Company, a legal person in the eye of law, has filed the present Application challenging the Possession Notice dated 15.10.2008 issued u/s 13(4) of the SARFAESI Act, 2002 and prayed for other reliefs as aggrieved person through the Authorised Signatory Mr. Tamilselvam.....
>
> (ii) While negotiating the aspect of creating of financial asset, it is seen from the records submitted by the Respondent Bank that the Applicant Company has joined the loan transaction with respondent 1 and 2 as guarantor and offered the schedule mentioned property as collateral security to the advance granted to M/s. Rukmani Mills Limited on 12.4.1984. **Mr. M. Shanmugam, the then Director of the Applicant Company has created unregistered equitable mortgage in favour of the Respondent Bank, by deposit of title deeds relating to the Applicant Company for the due repayment and discharge of liability and indebtedness of M/s. Rukmani Mills Ltd. to the Respondent Bank** in respect of credit facilities extended by the bank to the M/s. Rukmani Mills Ltd. for 350.12 lakhs inclusive of all interest discount, commission, charges and cost and expenses payable to and incurred by the bank in relation to and for all other indebtedness and liabilities of the Company, viz M/s. Rukmani Mills Ltd. **The executants of the mortgage also acknowledged the maximum indebtedness to be secured by the said mortgage created as aforesaid on 12.04.1984 was for, the**

purpose of Section 79 of the TE Act, 1882, but for no other purpose and without prejudice to fill liability to the Bank under the said mortgage fixed at 350.12 lakhs and the said charges created in favour of the Respondent Bank on 12.04.1984 still continues and not satisfied so far. Therefore, taking into consideration of the documents submitted by the Respondent Bank, I am of the considered view that the aforesaid financial asset has been created in favour of the Respondent Bank. The Respondent Bank in the course of proving their claim on the mortgage has produced additional documents, Form-8 dated 26.04.1984 and other documents dated 07.03.1985, 04.03.1985, 29.04.1988 and 27.09.1988 along with random of Balance Sheets, with Director's Report and Auditors. Report periodically filed before ROC from the year 1985 to 1996. But it is pertinent to note that Mr. Balasubramanian and Mr. Kumarappan, who have signed these documents as Directors, no proof is submitted that they are the Directors as per the records of ROC. **However, the Ld. Counsel for the Respondent Bank would argue that the Balance sheets have been periodically filed by the company with ROC have been signed by Mr. Balasubramanian and Mr. Kumarappan and the same have been accepted by the ROC and kept in the records. (Relevant documents produced by the Respondent Bank**. Therefore, it is claimed by the Ld. Counsel for the Respondent Bank that the periodical balance sheets filed by the Company up to 1996 prove that they are the people who are in charge, of the affairs of the Company and secured loans and the financial facilities, availed from the respondent Bank since the same are reflected in the Balance Sheets and the same would amount to acknowledgment of debts. **Therefore, the Bank is entitled to enforce the securities, of mortgaged properties for the recovery of the outstanding dues**. Hence, I am of the considered view that the Respondent Bank has the right to initiate action/measures under the SARFAESI Act, 2002. Accordingly, the demand notice dated 13.05.2008 u/s 13(2) of the Act has been issued to the borrower/guarantors. Hence, the Question No. 2 is answered in favour of the Respondent Bank."

(emphasis supplied)

The DRT clearly opined that the Bank had initiated measures under the 2002 Act by issuing a demand notice dated 13.5.2008 under Section 13(2) followed by possession notice dated 15.10.2008 under Section 13(4) of that Act. It also opined that all parties involved in the mortgage transactions were trying to supress or avoid giving material facts and information and have not approached the DRT with clean hands. What is significant to notice is the fact recorded by the DRT in this very order in the following words: -

> "(iii).....
>
> **On behalf of the Applicant Company, Mr. S. Thiagarajan one of the Directors of the Applicant company has filed an Affidavit on 27.01.2011 stating that the Applicant company is willing to pay a sum of Rs.350.12 lacs within the time frame fixed by the Tribunal (Minimum 6 months is required) subject to the Respondent Bank releasing the charge on the property of the Applicant Company in order to give quietus to the matter**. In my considered view this aspect is to be settled among the parties and the designated court DRT under the Act does not have scope to enter into the question of settlement as the SARFAESI Act, 2002 specifies that the DRT has to come to the conclusion as to whether any violation has been committed by the respondent Bank while negotiating the measures taken by them under the SARFAESI Act, 2002. However, it is left open to the Applicant to take up the matter with Respondent Bank as still the Applicant has the scope to redeem the property by invoking the Section 13(8) of the SARFAESI Act, 2002. Hence, the Applicant is advised accordingly."
>
> (emphasis supplied)

The guarantor (the applicant therein) had not disputed the correctness of the aforementioned finding of fact recorded by the DRT. Mr. M. Shanmugham (respondent No. 7's deceased father), Mr. S. Balasubramaniam (respondent No. 4), Mr. S. Kumarappan (respondent No. 5) and Mr. S. Thiagarajan (respondent No. 8) were the Directors of the guarantor company. One of them – Mr. S. Thiagarajan (respondent No. 8) had even filed affidavit before the DRT on 27.1.2011 stating that the guarantor company was willing to pay the sum of Rs.350.12 lakhs within the time frame fixed by the DRT to be minimum six months. These facts clearly belie the claim of the guarantor. The guarantor cannot be permitted to resile from the admission of its liability. Similarly, the guarantor had filed a detailed counter affidavit in Writ Petition No. 710/1997, admitting the mortgage of the property with the Bank, but had alleged fraud and fabrication of documents by the respondent No. 11 (A.R. Sridharan). That, however, cannot come to the aid of the guarantor who had otherwise admitted its liability and the mortgage in question, in particular.

12. As aforesaid, the finding/opinion recorded by the DRT vide order dated 10.2.2011 has attained finality with the dismissal of the appeal (filed by the guarantor) before the DRAT on 8.2.2013 *albeit* on the ground of failure to comply with the pre-deposit condition. The guarantor cannot be allowed to approbate and reprobate from the commitment made in successive proceedings before the DRT and the High Court, as referred hitherto.

13. Notably, even in the subsequent proceedings before the DRT-III at Chennai, bearing S.I.A. SR No. 581/2015 in S.A. No. 356/2014 filed by the guarantor, for grant of injunction to restrain the Bank from bringing the scheduled property to sale till the disposal of S.A. No. 356/2014, the guarantor raised the same issue about the validity of the subject mortgage. That was answered against the guarantor by the DRT vide order dated 2.2.2015, in the following words: -

> "8. During the course of the submissions, the Ld. Counsel for the Petitioner/Applicant harped upon the second prayer in the SA at page 13 of his typed set of papers, wherein it is prayed "To restrain the first respondent from taking any action in respect of the schedule mentioned property under the provisions of the SARFAESI Act since no security interest has been validly created", and therefore as that point is not adjudicated or fell for consideration before this tribunal, his cause survives and that the present sale notice is only an off shoot of it and further that his SA is still pending enquiry,

he need not file a fresh SA and can continue the proceedings through this IA.

9. From a plain reading of the above it is distinctly evident that the said statement can only be a ground for agitating the sale notice and not any relief, although it is mentioned in the prayer column. As it is only a ground for agitating the sale notice which has become infructuous for want of bidders and a fresh sale notice has been issued, the cause of auction initiated in SA 356/2014 ceased and is no longer surviving. Whereas the Ld. Counsel is of the firm opinion that owing to the ground which he had put up at Para 2 of in the relief column that there is no valid security interest that is created he says the lis survives, which this Tribunal is not able to concede to and feel that this application is not maintainable at this stage, however, not averting to earlier litigation of the finding of the Hon'ble DRT, Madurai holding that a valid mortgage has indeed been created by the petitioner/applicant vide its order dated 10.2.2011 passed in SA No. 225/2008, which was carried in appeal but was not prosecuted owing to non payment of the ordered pre-deposit and wherein also the Hon'ble DRAT vide its order dated 28.1.2013 had upheld the findings of the Hon'ble DRT, Madurai and insisted for a pre-deposit of 50% of the amount demanded, which was not complied upon and hence the appeal failed.

10. **This concludes that the mortgage in favour of the respondent bank is held to be valid and this Tribunal while examining the present application has only felt that the petitioner is running litigation and thwarting the lawful demands of the bank by taking advantage of its own latches, which were also dealt in detail by the Hon'ble DRT, Madurai. The contention of the petitioner that no valid security interest is created and that the Memorandum of Association and the Articles of Association of the Private Limited Company are not empowering the mortgagors is also discussed by the Ld. Presiding Officer, DRT, Madurai taking into the consideration the concept of Doctrine of Indoor Management**. However the Ld. Counsel did not inform this Tribunal or submitted any of these issues at the time of hearing but had only submitted that no valid mortgage is created and that the land values had raised meteorically."

(emphasis supplied)

Even this decision has become final and must operate against the guarantor. The guarantor filed yet another application being I.A. No. 23/2018 in O.A. No. 11/2008 for impleadment of the appellant herein as the twelfth (12th) defendant in O.A. No. 11/2008, raising the same plea of validity of mortgage in question. That has been noted and negatived in paragraph 8 of the order of the DRT at Madurai, dated 15.2.2019 in the following words: -

> "8. The petitioner company filed SA No. 225/2008 challenging the possession notice dated 15.10.08 issued by the R-bank. One of the contentions raised by the petitioner company is that there is no valid creation of mortgage over the properties, which are the subject matter of OA 'B' Schedule. This Tribunal passed order in above SA on 10.02.11 by holding that there are no violations of provisions of the SARFAESI Act 2002 in respect of issuance of the possession notice. A finding has been given in the above said order that valid security interest has been created over the above said properties. Admittedly, it cannot be disputed that the appeal preferred by the petitioner company against the above order of this Tribunal before the Hon'ble DRAT, Chennai was dismissed for non compliance of the conditional order passed by the Hon'ble DRAT, to satisfy the 2nd proviso u/s 18 of the SARFAESI Act 2002. Therefore, the order of this Tribunal passed in SA No. 225/2008 still holds good."

The guarantor continued to raise the same plea in the application being M.A. No. 92/2017 in SASR No. 4969/2017 filed before the DRT-III at Chennai, challenging the auction sale notice dated 9.2.2017, sale held on 28.2.2017 and consequential sale

certificate issued to the appellant herein on 29.4.2017. That application was, however, rejected vide order dated 6.5.2019 on the ground of proceedings being barred by limitation.

14. Suffice it to observe that the guarantor has successively raised the issue regarding the validity of subject mortgage in different proceedings unsuccessfully. As aforestated, the concerned forum/Court unambiguously rejected the same. More importantly, the guarantor through its Director(s) having offered to pay the entire outstanding dues and also admitting on affidavit the factum of existence of subject mortgage in favour of the Bank, the question of showing any indulgence to the guarantor (by the High Court) did not arise. The guarantor cannot be allowed to raise the same plea repeatedly on every occasion/in every proceeding. Notably, the auction sale stands concluded and followed by issuance of sale certificate in favour of the appellant. Resultantly, the Bank is under legal obligation to handover the title deeds or original documents being Exhibits A110 to A114 to the appellant for completion of the formalities of sale.

15. Thus understood, the High Court should have been loath in entertaining the writ petition filed by the guarantor, raising the

same plea *ad nauseam*. The reason weighed with the High Court, in our opinion, is flimsy and untenable. That cannot be countenanced at the instance of the guarantor. The inevitable effect of entertaining the stated plea of guarantor will entail encouraging vexatious plea and procrastination of the concluded auction sale by delaying handing over of title documents to the highest bidder, in whose favour sale certificate has already been issued. It is a different matter that the direction for handing over of original documents would ostensibly appear to be in reference to an interim application in the pending O.A., but that course is inevitable in the fact situation of the present case.

16. The next question is: whether despite the decree of a Court of competent jurisdiction in favour of respondent No. 11 (A.R. Sridharan) concerning land bearing Paimash No. 722/4 admeasuring 1.80 acres, can the documents pertaining to that land be still made over to the appellant/auction purchaser, merely because sale certificate has been issued by the Bank in that regard? The sale certificate, as issued by the Bank, does make reference to land bearing survey No. 282, which inter alia, consists of old Paimash No. 722/4. Therefore, to the extent of

land referred to in the decree dated 16.2.1990 passed by the Court of District Munsiff, Chengalpattu in O.S. No. 186/1976 in favour of the respondent No. 11 (A.R. Sridharan), despite the issuance of sale certificate, the title document in respect of old Paimash No. 722/4 ought not to be released until the final decision in O.A. No. 11/2008. We say so because the decree passed by the Court of competent jurisdiction, which had attained finality with the dismissal of the special leave petition by this Court on 11.5.1992 cannot be disregarded. The fact that other proceedings, including about the title in respect of land admeasuring 1.80 acres bearing Paimash No. 722/4 are pending between the parties, cannot be the basis to overlook the claim of the respondent No. 11 (A.R. Sridharan) until a Court of competent jurisdiction declares that the respondent No. 11 (A.R. Sridharan) had no subsisting right, title or interest in that property.

17. Reverting to the argument canvassed before us by the learned counsel for the contesting respondents that the appeal by the appellant ought not to be entertained, in our opinion, the same deserves to be rejected. We say so because the appellant is

the auction purchaser and sale certificate has also been issued in its favour by the Bank. As a consequence thereof, the appellant is entitled to receive the title documents in respect of the properties referred to in the sale certificate. The fact that the Bank did not challenge the impugned decision of the High Court, cannot undermine the direct interest of the appellant in getting the relief which was claimed by the Bank to fulfil its obligation of handing over the original documents to the auction purchaser. Admittedly, the appellant is party to the O.A., as well as, in the application filed by the Bank for return of documents. The Bank has supported the stand taken by the appellant. We find no infirmity in the appellant having approached this Court instead of the Bank, the applicant before the DRT. Even the appellant could have itself approached the DRT for this very relief. Taking any view of the matter, the objection under consideration is of no avail to the contesting respondents.

18. It was faintly urged by the contesting respondents that the Bank had filed the application in question for return of original documents, on 11.11.2016, even before the auction sale in which the appellant turned out to be the highest bidder was conducted

on 28.2.2017, or the sale certificate issued on 29.4.2017. This argument, in our opinion, is an argument of desperation. The same overlooks the factual matrix and the background in which the subject application was moved by the Bank on 11.11.2016. By that time, the Bank had already commenced the auction sale process. It is a different matter that the auction process had to be repeated as no fair offer was forthcoming. In other words, the subject application was filed by the Bank in anticipation that the auction would be concluded and by the time the application was decided, the sale certificate in favour of the highest bidder would have been issued. There is nothing wrong in Bank moving such application before the conclusion of the auction process and issuance of a sale certificate, in anticipation. No provision has been brought to our notice, which prohibits such a course to be adopted by the Bank. Accordingly, even this objection of the respondents is rejected.

19. Both sides have invited our attention to the decisions of this Court on the proposition whether the DRT is competent to answer the question regarding validity of the subject mortgage and also *res judicata*. We do not wish to dilate on the said decisions as the factum of validity of mortgage need not detain

us, in the facts of the present case. Similarly, the issue of *res judicata* will be of no avail in light of the unambiguous stand taken by and on behalf of the guarantor, acknowledging the mortgage in question and also offering to pay all the outstanding dues of the Bank. Further, the O.A. is still pending before the DRT, in which both the parties would be free to urge all contentions, as may be permissible in law. The DRT may consider those contentions appropriately. In the present appeal, we must confine our consideration as to whether the DRT ought to have allowed the application filed by the Bank for return of original documents in view of peculiar indisputable facts of this case. For the reasons already recorded, we have no hesitation in reversing the decision of the High Court and hold that it ought not to have entertained the writ petition filed by the guarantor.

20. Although we are inclined to reverse the impugned decision of the High Court, however, for the nature of controversy brought before us, it may be appropriate to modify the operative order of the DRAT to the effect that the application filed by the Bank being I.A. No. 995/2017 in O.A. No. 11/2008 is partly allowed by ordering return of the original documents, except in respect of the land bearing Paimash No. 722/4 admeasuring 1.80 acres being subject matter of decree in O.S. No. 186/1976. This

arrangement will meet the ends of justice in the facts of the present case.

21. We make it clear that the parties are free to raise all contentions available to them on facts and in law before the DRT in the pending O.A. No. 11/2008, which need to be decided on their own merits in accordance with law. In other words, the DRT will be free to pass appropriate directions in respect of the stated documents including in respect of the title documents made over to the appellant herein in terms of this order, if necessary.

22. Accordingly, we partly allow this appeal in the above terms with no order as to costs. Pending interlocutory applications, if any, shall also stand disposed of.

.....J.
(A.M. Khanwilkar)

.....J.
(Ajay Rastogi)

New Delhi;
April 24, 2020.