

IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	30.08.2019
Pronounced On	06.02.2020

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.33872 of 2017
and
W.M.P.Nos.37560 to 37562 of 2017

- 1.V.Sukumar
- 2.R.Krishnaraj
- 3.Chette Subbaiah
- 4.Venkata Subamma
- 5.M/s.Suraj Constructions,
No.34/45, Manthoppu Street,
Villupuram 605 602.Petitioners

Vs.

- 1.Indian Bank,
Main Branch, Pondicherry.
- 2.M/s.Srivari Mutual Benefit Finance Ltd.,
Registered Office
No.24/42, 4th Cross, Brindavanam,
Pondicherry 605 013.

3.T.Natarajan

4.N.Kuberan Chettiar

5.G.Kalaialagi

6.G.Guhan

7.G.Subarna

8.V.Sasikala

9.Om Sakthi Sekar

- 10.M/s.Srivari Housing and Constructions Ltd.,
Rep by its authorized rep. A.Veerappan,
Marianman Koil Street,
Otturpalayam village, Villupuram Taluk.

11.The Registrar,
Debts Recovery Appellate Tribunal,
Chennai.

12.The Registrar,
Debts Recovery Tribunal - I,
Chennai.

13.The Recovery Officer,
Debts Recovery Tribunal - I,
Chennai.

...Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus, to call for the records of the impugned order dated 24.10.2017 passed in R.A.No.59 of 2017, on the file of the 11th respondent and to quash the same, allow the said appeal filed by the petitioners to set aside the order dated 12.01.2010 passed in O.A.No.536 of 1998 on the file of the 12th respondent in so far as the petitioners and Schedule A to E properties are concerned and consequentially set aside the auction proceedings on the file of the 13th respondent pursuant to the final order dated 12.01.2010 in O.A.No.536 of 1998.

For Petitioners: Mr.OM Prakash, Senior Counsel
Asst. by R.Imayavarman for
Mr.Ramalingam Associates.

For R1 : Mr.A.L.Somayajee, Senior Counsel
for Mr.T.Sundar Rajan

For R2 : Mr.S.Hariprasad

For R3, R4 & R8: Mr.Srinath Sridevan, Senior Counsel

For R9 : Mr.M.Vijay Narayan,
Advocate General
Assisted by V.Vasanthakumar

For R10 : Mr.V.M.Venkat Raman.

O R D E R

C.SARAVANAN, J.

The present writ petition has been filed against the impugned order dated 24.10.2017 passed by the Debt Recovery Appellate Tribunal, Chennai (DRAT) in R.A.No.59 of 2012 pursuant to a common order passed by this Court in

W.P.Nos.32008 & 34693 of 2014 and W.P.No.32723 of 2015 on 24.04.2017.

2.The DRT had earlier allowed O.A.No.536 of 1998 filed by the 1st respondent bank by an order dated 12.01.2010. In the said proceeding, the 1st respondent bank had prayed for the following reliefs:-

A perusal of OA No.536/1998 filed by the 1st respondent bank before the Tribunal below reveals that the 1st respondent has prayed for the following reliefs in Column 6 of the said OA:

"In view of the facts mentioned in para above, the Applicant prays for the following reliefs:

(i) directing the Defendants 1 to 8 and 10 to 13 to pay the Applicant Bank, a sum of Rs.4566923.83 as outstanding as on 10.02.98 in OD a/c and further interest at 20.91% p.a. with quarterly rests from the date of filing of the application till realization.

(ii) for sale of the property mentioned in the Schedule A, B, C, D and E and sale proceeds applied in satisfaction of the amounts specified in the Recovery Certificate by this Hon'ble Tribunal.

(iii) in the event of deficiency to pass a personal decree against the Defendants 2 to 8 and 11 to 13 directing them to pay the said deficiency together with interest at contractual rate till payment in full.

(iv) for costs of the suit.

(v) for issue of certificate of recovery for the amount mentioned in Clause (i).

(vi) for such further or other reliefs as this Hon' ble Tribunal may deem fit and proper in the circumstances of the case and thereby render justice.

3.In O.A.No.536 of 1998, the DRT had framed the following issues:-

i. Whether the defendants 2, 4 and 5 are not liable to pay the OA amount for the reasons stated in the reply statement?

ii. Whether the defendants 1, 3, 6 and 10 are not liable to pay the OA amount for the reasons stated in their reply statement and counter proof affidavit filed by D1?

iii. Whether the applicant Bank is entitled to get relief, for the amount mentioned in the Application for the reasons stated herein?

iv. Whether the applicant bank is entitled to get

interest as prayed for in the OA?

v. To what relief the Applicant is entitled to get?

4. Though no issues were framed against the alleged liability of the 3rd and the 4th petitioners herein (7th and 8th Defendants in O.A.No.536 of 1998), the DRT had ordered as follows:-

41. In the result, it is declared that:-

The Applicant-Bank is entitled for a Recovery Certificate as against the defendants 1, 3 to 8 and 10 to 15 jointly and severally for a sum of Rs.45,66,923.83 [Rupees Forty Five Lakhs Sixty Six Thousand Nine Hundred and Twenty Three and Paise Eighty Three Only] till the date of filing of the present OA, i.e. 10.2.1998 with further interest @10 % per annum (simple interest) from 10.2.1998 till realization along with costs, which includes the advocate fees as per rules. It is further made clear that the liability of defendants 11 to 13 and 14 & 15 being legal heirs of deceased D9 and D2 respectively, is only to the extent of the assets/ estate inherited by them from the deceased D9 and D2 and they are not personally liable for the OA claim amount. It is further ordered that in case of default of payment by the defendants, the Applicant-Bank is at liberty to sell the application schedule properties and to adjust the sale proceeds thereof towards the amount due.

If the sale proceeds are not found sufficient, after defraying the expenses of such sale for the payment of all such amounts, the defendants 3 to 8 are personally liable for the amount of such deficiency with interest and costs mentioned above until realization.

It is further ordered that amount, if any, remitted or-realized during the course of the proceedings, shall be given due credit to the loan account of the defendants.

42. Recovery Certificate be prepared as per the directions given above of this judgment and issued accordingly. A copy of the order be communicated to the parties concerned, immediately.

43. It is further ordered that 15 days time is granted to the applicant bank to file details of subsequent payments made by the defendants, if any, along with interest calculation memo as ordered above, within 15 days from the date

of receipt of this order and also details of costs, so as to prepare the recovery certificate with casts and future interest and also to direct the Recovery Officer to proceed with the matter in accordance with law. If in case, cost memo has not been filed before the above mentioned time, recovery certificate will be prepared with available records of the case Recovery Officer to proceed with available records of the case and direction will be given to the Recovery Officer to proceed with the matter in accordance with law.

44. A copy of the order be communicated to the parties concerned immediately by the Registry.

5. Pursuant to the order dated 12.01.2010 passed by the DRT in O.A.No.536 of 1998, the 1st respondent bank initiated the debt recovery proceedings before the Recovery Officer (RC) in D.R.C.No.68 of 2010 to sell Schedule A to E properties.

6. In the said proceeding, the petitioners herein filed I.A.Nos.1 & 2 of 2010. The Recovery Officer (RC) framed the following points for consideration:-

- i. Whether the petition filed under Rule 11 is maintainable?
- ii. Whether the interim order of status quo granted in the SARFAESI proceedings is a bar for initiation and continuation of the recovery proceedings under the RDDB & FI Act?
- iii. Whether, in the facts and circumstances of the case, the procedural irregularities as alleged/adverred by petitioner vitiates the recovery procedure?
- iv. Whether, in the facts and circumstances of the case, plea raised that neither mortgage was created nor guarantee was executed and that no original title deeds and other documents were filed and marked before this Tribunal in support of the claim made in the original application is sustainable?

7. While disposing the aforesaid I.As. filed by the petitioners herein in D.R.C.No.68 of 2010, the Recovery Officer disposed point No.iv with the following observation:-

It was vehemently argued that there was no creation of equitable mortgage in favour of the respondent-bank, as claimed by them. It was also argued since there was no creation of

equitable mortgage, the respondent-bank could not have filed and marked as exhibits in the original application before this Tribunal and therefore in the absence of filing and marking of the original documents, no claim could be made against the defendants/defaulters. Learned counsel even went to the extent of saying that if the bank produces before the Recovery Officer the original documents, the petitioner would forthwith pay the entire alleged dues under the recovery certificate.

It is to be noted that the original application was contested for good long ten years by filing interim applications one after the other at the instance of the defendants and thereafter a final order came to be passed upholding the claim of the respondent-bank, which was followed by a recovery certificate. The pleas, which are substantial and of having far-reaching consequences, had already been raised by the defendants in the original application, adjudicated and finding has been given by the Tribunal. The present petition has been filed challenging the attachment/sale of the schedule properties and, therefore, such pleas, as rightly submitted by the learned counsel for the respondent-bank, could not and should not be permitted to be raised* in the recovery proceedings. The Recovery Officer, being an authority under the Act to execute the Recovery Certificate, is precluded from entertaining such pleas as an appellate authority sitting over the final order. I have also gone through the final order passed in the original application wherein a detailed discussion was made by the Tribunal on the very same pleas and crystal clear findings were returned. In such circumstances, it is beyond the jurisdiction of the Recovery Officer even to here such submissions.

In so far as the availability of the original documents in the original application, which was vehemently asserted to have been filed and marked as exhibits by the respondent-bank, it is to be stated that original documents, viz. title deeds and letter of guarantees are not to be found in the records of the original application. It was submitted by the respondent-bank without filing the original documents, the original application could not be entertained at all. Such original documents are either filed along with the original application and, if not, they have to be produced before the Hon'ble Presiding Officer

in the form of Proof Affidavit during the course of hearing of the application, before whom the original documents are marked as exhibits. This is the usual and consistent procedure that is being followed in this Tribunal. Without producing the original documents and marking them as exhibits, no final order could be passed by the Tribunal upholding the claim of the bank. The very fact that the application was entertained and a final order was passed goes to show that the original documents were filed and marked as exhibits in the original application. It is not known to the respondent-bank as to how and why the original documents are not available in the original records. This particular case, on the file of this Tribunal, is having a long chequered history. I have carefully gone through the entire records of the original application. During the course of hearing of this petition, in view of the rival assertion made on the whereabouts of the original documents, a direction was issued to the Registry to produce the original documents. It was reported by the Registry that on the disappearance of Proof Affidavit, which contained the original documents, office memo were issued to the staff concerned and the matter was entrusted to Recovery Officer-1 for a preliminary report to be followed by an enquiry. The very fact that matter the Registry issued office memo and entrusted the matter for a preliminary enquiry goes to show the disappearance of certain documents from the records. I have closely gone through the final order which clearly refers to the creation of mortgage by deposit of title deeds, execution letters of guarantee, etc. and further in the list of exhibits annexed thereto there is clear reference to the original documents vide Exs. A-7 to A-11 and Exs. A-21 to A-25. Without production of original documents and marking them as exhibits, as contended by the learned counsel for the bank and rightly so in my view, the Tribunal would not have ventured to pass a final order upholding the claim of mortgage in favour of the respondent-bank. It is not known as to how and why the original documents 'mysteriously' disappeared from the records of this Tribunal. Further, in view of the clear references made to the creation of mortgage, execution of letters of personal guarantee,

etc. a legal presumption arises that necessary original documents were filed and marked as exhibits before the Tribunal and if contrary plea is raised then the onus is on the person who raises such plea to rebut the said presumption by adducing evidence. In the present case, when the petitioner raises the contra plea that he did not deposit the original title deeds with the bank and therefore the respondent-bank could not have filed and marked them as exhibits, it is for him to rebut the presumption by producing evidence showing the whereabouts of the original documents, which he failed to discharge. The argument of the learned counsel, in the absence of any contra evidence, is of no help to the petitioner. No other argument was raised on either side. For the reasons stated above, the petitions are devoid of merits and are liable to be dismissed and are, accordingly, dismissed.

8. Meanwhile, the petitioners filed R.A.No.59 of 2012 before the Debt Recovery Appellate Tribunal (DRAT) against the order dated 12.01.2010 passed by the DRT in O.A.No.536 of 1998.

9. R.A.No.59 of 2012 was disposed by the DRAT by an order dated 11.11.2014. By the said order, the DRAT had remanded the case back for fresh consideration by the DRT in O.A.No.536 of 1998. The relevant portion of the said order dated 11.11.2014 of DRAT is reproduced below:-

19. It is seen that the OA has been filed against Defendant Nos. 1 to 8 and 10 to 13 for the recovery of a sum of Rs.45,66,923.83 as outstanding as on 10.2.1998 in OD account. A perusal of the sanction ticket dated 1.9.1997 issued by the 1 respondent bank with respect to the Temporary Overdraft reveals that the said temporary overdraft has been sanctioned by the 1st respondent bank on the strength of the personal guarantees dated 25.8.1997 executed by Dr. V.Sambasivam, Chairman, Mr.T. Natarajan, Director and Mr. N. Kuberan, Director of the 1st defendant company. The said letter has been marked as B7 in the OA. A reading of the letter sent by the 2nd respondent, marked as Exhibit B8 in the OA reveals that all the three people viz., Dr.V. Sambasivam, Chairman, Mr.T.Natarajan, Director and Mr.N. Kuberan, Director have accepted the terms and conditions set out in the said

sanction ticket which has been marked as B7. A combined reading of Exhibits B7 and B8 reveals that there are only 3 guarantors in this loan and the loan is based on the said sanction ticket dated 1.9.1997 and this when compared with the prayer made in the OA reveals that the Defendants 2, 4 and 5 alone have signed the guarantees and the OA could not have been filed against the other defendants.

20. A reading of the order of the Ld. Presiding Officer reveals that the Ld. Presiding Officer has not considered the prayer made in Paragraph 6 of the OA and has also not considered the prayer made in the OA in the light of Exhibits B7 and B8 in the OA and therefore this Tribunal is driven to conclude that the prayer in the OA itself appears to be unsupported by documents except Exhibits B7 and B8 in the OA. However the Ld. Presiding Officer has held all other defendants also liable as prayed for in the OA without appreciating Exhibits B7 and B8. Further, it is seen in this case that the Tribunal below had allowed the cross-examination on 25.2.2000 and 21.11.2000 and that the bank's witness did not appear for cross examination on both the days. Further it is also seen that IASR 574/2009 was filed before the Tribunal below seeking cross examination of the bank's witness and for production of documents and inspite of the same the witness was not produced by the bank and therefore the cross examination could not be done by the defendants in this case.

21. Therefore that the Ld. Presiding Officer in this case is required to consider the prayer made in the OA in the background of the Temporary Overdraft facility given as per the Sanction Ticket dated 1.9.1997, marked as Exhibit B7 in the OA and the acceptance of the facility in Exhibit B8, from the fact that the Ld. Presiding Officer has not based his findings with respect to the liability of the defendants other than Defendants 2, 4 and 5 on any document, from the fact that the Ld. Presiding Officer is required to look into the evidence that may be brought in through the oral testimony of the bank witness in cross examination and which opportunity had not been afforded to the defendants in this case so far, this Tribunal is driven to conclude that the Ld. Presiding

Officer has to be directed to rehear the matter after giving sufficient opportunities to the defendants to cross examine the bank's witness and re-examine the documents in this case, more particularly Exhibits B7 and B8 in the OA and also identify the documents which establish the liability of the defendants other than Defendants 2, 4 and 5 it would be appropriate if the following order is passed:

"The order of the Ld. Presiding Officer, DRT-I, Chennai dated 12.1.2010 made in OA No.536/1998 is hereby set aside and equally the sale conducted by the Ld. Recovery Officer pursuant to the Recovery Certificate issued in OA 536/1998 is also set aside. The Ld. Presiding Officer is directed to take up the OA for a fresh disposal and dispose of the same on or before 31.12.2014 after hearing all the parties concerned and after affording opportunities to the defendants to cross examine the bank's witness".

22. The Registry is directed to send the amount lying in this Tribunal along with the accrued interest to DRT-I, Chennai and the Ld. Presiding Officer, DRT-I Chennai is directed to pass appropriate orders at the time of disposal of the OA. It is also directed that the LCR be returned to DRT-I, Chennai along with all the documents submitted by R11 and the Ld. Presiding Officer is directed to verify and pass suitable orders on the documents submitted by R11 at the time of passing of final orders in OA 536/1998.

23. This appeal is disposed of accordingly.

10. Though a well-reasoned order, the above order was set aside by a co-ordinate bench of this Court vide its order dated 24.04.2017 in W.P.Nos.32008 & 34693 of 2014 and W.P.No.32723 of 2015. By the aforesaid order dated 24.04.2017, a Co-ordinate Bench of this Court remitted the case back to the DRAT with the following observations:-

5. We are of the considered view that the order of remand made by DRAT is bad in law and we direct the DRAT to exercise its power for re-appreciation of the evidence by securing the evidence and pass appropriate orders in accordance with law, as expeditiously as possible, preferably within a period of three

months since the matter has been pending from the year 1998 onwards.

6. With the above directions and observations, these writ petitions are disposed of. No costs. Consequently, connected MPs are closed. However, insofar as the miscellaneous petition in W.M.P.No.7111 of 2017 is concerned, it has been filed by the auction purchaser, seeking for return of money with interest. In view of the disposal of the present Writ Petitions as directed above, remanding the matter to the DRAT for fresh disposal, the auction purchaser is also at liberty to approach the DRAT with similar prayer if so advised and the DRAT is directed to dispose of petition being filed by him, in accordance with law and on merits.

11. Thus, R.A.No.59 of 2012 was taken up to for a fresh hearing by the DRAT once again which has culminated in the impugned order dated 24.10.2017 of DRAT.

12. The impugned order dated 24.10.2017 of the DRAT is brief and is, therefore, reproduced below:-

1. Appellants/guarantors have challenged the part of the order dated 12.1.2010 of DRT-I, Chennai, by which O.A.No.536/1998 of Respondent No.1 Bank was allowed to the extent of share of the Appellants in properties of Schedule 'A' to 'E' of the O.A.

2. According to O.A. (Page No.39 of typeset), necessary facts in short are that Respondent No.2/Defendant No.1 (hereinafter referred as R2/D1) borrower Company approached Respondent No.1 Bank (hereinafter referred as R1 Bank) for 'At Par' facility in respect of Cheques issued by them and entered into an agreement with the Bank on 30.11.1992. R1 Bank on condition that R2 will ensure a Cushion Fund of Rs.2.70 Crores agreed to purchase/honour the Cheques issued by seven Centres of R2 situated at Pondicherry, Villipuram, Kallakurichi, Madurai, Salem, Tiruvannamalai and Gudiyatham, payable 'at par' by 28 designated branches of the Bank.

R1 Bank vide letter dated 19.8.1997 informed to R2 borrower Company that total amount of Cheques received by them from designated branches for reimbursement exceeded the Cushion Fund and suffered a shortfall. In such

backdrop, R2 availed facility of Overdraft on 3.9.1997

3. According to Appellant No.1 Mr.V.Sukumar, he stood as guarantor in personal capacity also for shortfall arising in honouring of the Cheques and signed Agreement of Guarantee on 25.8.1997 and 26.8.1997. Claim of R1 Bank is not based on genuine documents Ex.A16 is a totally unconnected document and it was not signed by Appellant No.1 in his own capacity. Rather, it has been signed as a representative of Defendant No.9 in the OA Mr. Gunasekara Udayar. According to Appellants, R1 Bank had suppressed the material facts in the OA. Ex.B7 and B8 documents dated 1.9.1997 and 3.9.1997 respectively were brought on record at the behest of Appellants only. According to those documents, it is established that Appellants are not liable for repayment of the loan as guarantors in respect of Overdraft facility, because for Overdraft facility, personal guarantee was extended by Dr.V.Sambasivam, Chairman, Mr.T.Natarajan, Director, Mr.N.Kuberan alone. In such a situation, order of decree of OA against the Appellants is not sustainable and is illegal.

4. Appellants have further challenged the sale of the property conducted by R1 Bank on the ground that Auction Purchaser had paid the amount in contravention of the schedule of the sale. Sale is challenged on the ground that Recovery Officer deliberately included properties which are not the subject matter of Schedule of the OA wherein land alone was shown in the Schedule and subsequently added the flats also. Auction Purchaser has failed to make deposits of 25% of auction price and 75% of auction price respectively on the due dates. Acceptance of amount by post-dated Cheques by R1 Bank is a clear instance of illegality and collusion between Bank and the Auction Purchaser.

5. On the other hand, R1 Bank supported the impugned order that Agreement of Guarantee by Appellant No.1 and Respondent No.3 by way of Ex.A8 and A9 executed on 25.8.1997 was valid and is a continuing guarantee till date, because it has been followed by deposits of original title deeds on the basis of Memorandum. At subsequent occasions also, Appellants had given clear undertaking letters

confirming the fact of deposit of title deeds along with continuation of the guarantee. In response to the legal notice of Bank, fact situation had been clearly obtained. There is hardly any difference and distinction between the facilities of 'At Par' and 'Shortfall'. Appellants cannot escape of their liability in the name of creating a difference between these two.

6. Ld.Counsel for Appellants submitted that the whole Appeal is based on two documents i.e. Ex.B7 and B8. Ex.B7 available at Page No.276 of the typeset is a letter dated 1.9.1997 of R1 Indian Bank addressed to borrower firm which reads as below:-

"Sub: You're a/c 3026-sanction letter-temp, overdraft-reg

This is with reference to your request for temporary overdraft in your above said account and the discussion you along with your Directors Shri T.Natarajan and Mr N Kuberan had with the undersigned and our Zonal Manager, Pondicherry.

We are pleased to inform you that your request for temporary over draft has been considered favourably on the following terms and conditions:

1. You will be allowed to draw upto a limit of Rs.1,00,00,000= (Rupees one crore only) purely as a temporary overdraft (TOD) in your above referred account for a period of -3-(THREE)monthly only.

2. The temporary overdraft is allowed on the strength of the personal guarantees dated 25/8/1997 executed by Dr V Sambasivam, Chairman, Mr T Natarajan, Director and Mr N Kuberan, Director of your company.

3. The personal guarantees of Dr V Sambasivam, Chairman, Mr T Natarajan, Director and Mr N Kuberan will remain in force till the account along with interest if any is adjusted and settled in full

4. The guarantors Dr Sambasivam, Mr T Natarajan and Mr N Kuberan shall not dispose off any of the properties standing

in their names without obtaining prior permission from the Bank till the account/ TOD along with interest if any is adjusted and settled in full.

5. The rate of interest payable on TOD will be 20.91% p.a. (Commercial) with quarterly rests.

6. You are hereby called upon to sign and return the original copy of this sanction letter towards token of having accepted the terms and conditions/sanction.

7. Subject to the above you will be allowed TOD in your above account from 3rd Sep 1997."

7.Ex.B8 available at Page No.277 of the typeset, a letter signed by Dr.V.Sambasivam, T.Natarajan and N.Kuberan, in which date is nor legible reads as below:-

SUB: Our A/c No. 3026- Sanction of TOD-reg

This is with reference to your sanction letter of even date and we hereby sincerely thank you for the same.

As required by you we are returning herewith the original sanction letter duly signed / acknowledged by the guarantors for having accepted the terms and conditions.

As already requested and discussed with you, we request you to kindly allow temporary overdraft at the earliest.

We once again assure you that the overdraft will be adjusted within a period of three months as mentioned in your sanction letter.

Kindly acknowledge receipt.

Thanking you,

Yours sincerely,
For SRIVARI MUTUAL BENEFIT FINANCE LTD.

(Dr V Sambasivam) (T Natarajan) (N Kuberan)
CHAIRMAN Director
Director

would be appropriate to mention that in earlier round of hearing, vide Order dated 11.11.2014 Tribunal had decided this Appeal in following terms:-

"21.The order of the Ld. Presiding Officer, DRT-I, Chennai dated 12.1.2010 made in OA No.536/1998 is hereby set aside and equally the sale conducted by the Ld. Recovery Officer pursuant to the Recovery Certificate issued in OA 536/1998 is also set aside. The Ld. Presiding Officer is directed to take up the OA for a fresh disposal and dispose of the same on or before 31.12.2014 after hearing all the parties concerned and after affording opportunities to the defendants to cross examine the bank's witness.
22. The Registry is directed to send the amount lying in this Tribunal along with the accrued interest to DRT-I, Chennai and the Ld. Presiding Officer, DRT-I, Chennai is directed to pass appropriate orders at the time of disposal of the OA. It is also directed that the LCR be returned to DRT-I, Chennai along with all the documents submitted by R11 and the Ld. Presiding Officer is directed to verify and pass suitable orders on the documents submitted by R11 at the time of passing of final orders in OA 536/1998."

9. Aforesaid order of remand was challenged before the High Court of Madras. Vide order dated 24.4.2017 in Writ Petitions, High Court had directed as follows:-

5. We are of the considered view that the order of remand made by DRAT is bad in law and we direct the DRAT to exercise its power for re-appreciation of the evidence by securing the evidence and pass appropriate orders in accordance with law, as expeditiously as possible, preferably within a period of three months since the matter has been pending from the year 1998 onwards

6. With the above directions and observations, these writ petitions are disposed of. No costs. Consequently, connected MPs are closed. However, insofar as the miscellaneous petition in W.M.P.No.7111 of 2017 is concerned, it has been filed by the auction purchaser,

seeking for return of money with interest. In view of the disposal of the present Writ Petitions as directed above, remanding the matter to the DRAT for fresh disposal, the auction purchaser is also at liberty to approach the DRAT with similar prayer if so advised and the DRAT is directed to dispose of petition being filed by him, in accordance with law and on merits. Consequently, other connected miscellaneous petitions are closed,"

10. According to Appellants, order of setting aside of sale is still in force though High Court has remanded the case for reconsideration to DRAT. According to R1 Bank, the moment High Court had remanded the case for reconsideration, order of DRAT came to an end for all purposes and everything will be required to be considered afresh into legality of the sale.

11. On careful perusal of pleadings of the parties, submissions of the Counsel of the parties and record and both orders, in my considered opinion, order of setting aside of sale by my predecessor also has come to an end. Order of High Court remanding the case for reconsideration makes it clear that the order of DRAT had been set aside for all purposes forever. In such a situation, fate of the sale will be assessed as if it was existing on the date of passing of the impugned order by the PO of DRT. In this backdrop, only two questions are to be mainly answered in this Appeal. First is, whether Ex.B7 and B8 will absolve the Appellants of their Guarantee Agreement casting the liability of repayments only on three persons, whose names are mentioned in Ex.B8, and second is whether the sale is suffering from any illegality or not and it has to be set aside or not?

12. According to Appellants, impugned order is bad because R1 Bank Officers did not appear for cross-examination despite directions given by the PO of DRT. On 22.5.2000 *, PO of DRT marked the documents as Exhibits and posted the case for cross-examination of the defendants. According to Rule-12(6) of Debt Recovery Tribunal (Procedure) Rules, 1993, such documents cannot lead into facts at all.

13. According to R1 Bank, on 27.8.1997, Appellants executed letter of confirmation of deposit of title deeds in respect of Schedule-A to D properties vide Ex.A13 to A16 and Schedule-E property by Ex.A17. There had been a shortfall in the account for want of Cushion Fund where 'At Par' facility was granted. Vide Ex.B7 and B8, three of them approached the Bank for Overdraft also. It does not mean that letters signed by the Appellants just four days ago confirming the guarantee by depositing the title deeds will come to an end.

14. On careful perusal of the text of guarantee letter Ex.A9 and letter of deposit of title deeds Ex.A13 to A17, it cannot be suggested by any stretch of imagination that Ex.B7 and B8 signed by three of them will discharge the Appellants of their liabilities which fastened on them after signing the documents. At the most, it can be presumed that either there had been serious disputes, quarrels and differences between the borrowers themselves or all of them colluded together against R1 Bank to delay and defer the recovery. Nowhere Bank had stated that Appellants have been discharged of their liabilities on account of letter Ex.B8 signed by three of the borrowers/guarantors.

15. So long R1 Bank is in possession of deposit of title deeds, Bank will have a right to proceed against all borrowers and guarantors for recovery of the dues. In so far as illegalities in sale is concerned, by way of typeset, Bank had produced Loan Register Book for the period from 4.2.1991 to 27.9.2001. Certified copy of Sale Deeds in French along with translated copy has been produced along with Partition Deeds. Bank had sufficient documents for creation of mortgage on the basis of deposit of title deeds by the Appellants also. Ex.B8 is not a letter which can relieve them of their liabilities. Again, at the cost of repetition, it is observed that either it is a result of disputes and quarrel between the Respondents and borrowers themselves or it is collusion.

16. In so far as illegalities in sale are concerned, soon after the Sale Notice, a Corrigendum was issued by the Bank reflecting the number of flats also. Record reveals that

auction was fixed on 29.10.2010. On 28.10.2010, EMD amount of Rs.20 lakhs was paid by way of Demand Draft by the Auction Purchaser. Auction Purchaser had purchased the property for a sum of Rs.2,10,98,765/-. On 29.10.2010, he tendered a Cheque of Rs.35 lakhs to the Recovery Officer, which was credited on 4.11.2010. Hence, it appears that 25% amount was not deposited on the same date. Remaining 75% amount also was not paid within 15 days, because Auction Purchaser paid Rs.70 lakhs on 12.11.2010 by Cheque credited on 16.11.2010. Cheque dated 12.11.2010 of Rs.88,09,752/- was realised on 24.11.2010. All these clearances have been made beyond the prescribed period.

17. Record reveals that after having been fed up with litigations, Auction Purchaser filed an application in Hon'ble High Court in WMP No.7111/2013 requesting for return of auction price deposited by him by stating that long back he had abandoned interest in the property. In my considered opinion, such prayer of Auction Purchaser will not make any disentanglement what he has earned after auction sale and after deposit of sale amount of more than Rs.2 Crores, that too in the year 2010. Litigations how complicated they may be, will not overtake the substance in the matter. Substance of this matter is that OA should have been decreed against the Appellants also.

18. On perusal of the impugned order along with grounds of Appeal, it appears that Ld.PO of DRT had elaborately dealt with the matter in right perspective and reached to the correct conclusions. Defaulters cannot take any advantage of their internal disputes. Banks are the custodian of public money and also interest of the third party bidder purchaser should be protected who had spent more than Rs.2 Crores in the year 2010 as a bonafide purchaser, but has been indulged in litigation on some or other grounds.

19. Ex.B7 and B8 did not absolve the Appellants of their basic liability of Ex.A9 and A13 to A17. There appears no need to remand the matter for cross-examination of Bank Officers on Ex.B7 and B8 letters. Documents are self-speaking/explanatory. Some delay in deposits by the Auction Purchaser by a few days, at the most, will be a matter of

prejudice to R1 Bank only. A chronic defaulter and habitual litigant like the Appellants cannot take advantage of this position. Accordingly, Appeal being devoid of substance deserves to be and is hereby dismissed. Impugned order is affirmed.

20. In the result, impugned order is hereby affirmed. Appeal stands dismissed. Consequently, all pending IAs are closed. Respondent Bank is directed to collect the pre-deposit amount lying in this Tribunal with accrued interest and deal with it according to law.

(* Note: As per the order sheet of the DRT furnished, proof affidavit was purportedly filed on 25.02.2000)

13. The petitioners herein have challenged the impugned order dated 24.10.2017 passed by the DRAT in the remand proceedings pursuant to the order dated 24.10.2017 in the above mentioned three writ petitions.

14. The impugned order has affirmed that there was a valid mortgage of the Schedule A, B, C & E properties by the 1st and 2nd petitioners and of Schedule D property of late Gunasekara Odayar (the 9th defendant).

15. These properties were sold to the 9th respondent in an auction conducted by the Recovery Officer on 29.10.2010 pursuant to the order dated 27.01.2010 of the DRT in O.A.No.536 of 1998 in the recovery proceedings. A finality has been given to the sale made by the Recovery Officer in these proceedings.

16. The impugned order has also confirmed that the Exhibits A1 to A25 were marked by the 1st respondent bank on 25.02.2000. Since there was some doubt as to whether the documents were indeed marked or not we had called for the records of order sheet of the DRT and have perused the same.

17. It appears that the 1st respondent bank had purportedly filed its proof affidavit on 25.02.2000. The order Sheet of the DRT reads as under:-

O.A.536/98 dt.25.2.2000Rs.

For PA and Counter in I.A. xxxx 21.11.2000.

Bank filed PA Exh A1 rto A25 were marked. The bank shall furnish copy of the PA to C for the defts. CE By 21.11.2000.

(Initialed)

18.The above order sheet dated 25.2.2000 of the DRT seems to indicate that on said date, the case was adjourned to 21.11.2000 "For PA and Counter in I.A".

19.However, in the next sentence, the DRT records that "Bank filed PA Exh A1 rto A25 were marked. The bank shall furnish copy of the PA to C for the defts. CE By 21.11.2000".

20.There is yet another order sheet dated 05.11.2009 of the DRT which reads as under:-

Counsel for the parties present. Ex.A1 to 25 filed on behalf bank. Ex.B1 to 12 and B17 to 19 filed on behalf of D3, 6 to 13. B13 to 16 filed on behalf of D1 Company. AR is instructed to check the exhibits filed by both the sides and put up detailed note before PO for marking by 18.11.09 as this is a Hon'ble High Court direction.

21.The above Order Sheet is however initialed which initial is seen in the succeeding pages of the order sheets as well. It seems to indicate that Exhibits were marked on 05.11.2009.

22.Though there is no doubt that the proof affidavit was filed by the 1st respondent bank before the DRT, it is not clear whether the proof affidavit was tendered by the Bank's witness and whether the documents were marked as an exhibits.

23.The Order sheet also does not name the deponent of the Bank who signed the proof affidavit. The order sheet also does not state whether the deponent was physically present for marking the Exhibits.

24.Section 22 of the Recovery of Debts and Bankruptcy Act, 1993 deals with the procedure of the DRT and DRAT. For discharging their functions, they have the same powers vested with civil suits under CPC.

25.When O.A was filed in 1998, Rule 9 of the Debt Recovery Tribunal (Procedure) Rules, 1993 read as under:-

9. Documents to accompany the application: (1) Every application shall be accompanied by a paper book containing:-

- i. A statement showing details of the debt due from a defendant and the circumstances under which such a debt has become due;
- ii. All documents relied upon by the applicant and those mentioned in the application;

iii. Details of the crossed demand draft or

crossed Indian Postal Order representing the application fee;

iv. Index of documents.

(2) The documents referred to in sub-rule 91) shall be neatly typed in double space on one side of the paper, duly attested by a senior officer of the bank, or Financial Institution, as the case may be, and numbered accordingly.

(3) Where the parties to the suit or proceedings are being represented by an agent, documents authorising him to act as such agent shall also be appended to the application:

Provided that where an application is filed by a legal practitioner, it shall be accompanied to the application.

26. As per Regulation No.32 of the Debts Recovery Tribunal Regulation of Practice, 1997, recording of deposition whenever necessary shall be recorded in the prescribed form. Each page of the deposition of the witness has to be initialed by the presiding officer.

27. Regulation 33 states that the witnesses called by the applicant/petitioner shall be numbered consecutively as PWs and those by the defendants as DWs and any witness examined at the instance of the tribunal shall be numbered as CWs.

28. Regulation 35 of the aforesaid Regulation states that documents filed by the applicant shall be marked in the application and affidavits, if any as Exhibits.A.1 series and documents filed by the defendants shall be marked in reply and affidavits as Exhibits R.1 series and so on.

29. Regulation 38 of the aforesaid Regulation states that any party to the application may file certified true copy/copies of the original title deed/s along with application under section 19 of the Act and the original/s shall be produced before the Registrar/Presiding Officer as and when required.

30. As per Regulation 39 of the aforesaid Regulation, the Tribunal may, on the application of the of either party after assigning reasons and after hearing, order the attendance of the deponent who has sworn to an affidavit for cross-examination or may reject such an application.

31. From a reading of the provisions of the Debt Recovery Tribunal Regulations Of Practice, 1997, it is evident the procedure is in place regarding the manner in which documents are to be filed and evidence recorded by the DRT.

32. The deponent who swears to a proof affidavit has to be physically present for marking the document. The recording of

the evidence has to be in the prescribed form. The originals of the title deeds is to be produced before the Registrar/Presiding Officer as and when required.

33.From the manner in which the evidence was recorded and the documents were purportedly marked as exhibits shows a very casual approach was adopted by the DRT.

34.After the documents are marked, originals are to remain in the custody of the DRT. However, according to the 1st respondent bank, the proof affidavit and the exhibits which were marked on 25.2.2000 went missing.

35.The fact that the originals of the documents went missing as has been observed by the Recovery Officer shows that records particularly the exhibits are not safe in the custody of the DRT.

36.It is the contention of the petitioners that none of the original of the documents particularly and in particular Exhibit A -21 to 25 which correspond to the Schedule A to E properties in the O.A were never marked.

37.According to the petitioners originals of the documents referred to as Exhibit A -21 to 25 were never tendered for creating an equitable mortgage for the "Over Draft Facility" and that the liability in the "At Par Facility" had been completely discharged by the 2nd Respondent Company and therefore the petitioner and the Exhibit A -21 to 25 assets of the Petitioner cannot be proceeded against the dues of the 2nd respondent company.

38.On the other hand, it is the contention of the 1st respondent bank, the proof affidavit along with the originals of the Exhibits were stolen from the custody of the DRT and Exhibit A 21 to 25 which correspond to the Schedule A to E properties were later filed by the 10th respondent before the DRAT. We shall deal with this point later in this order.

39.It appears that on 25.02.2000, when the bank had purportedly filed its proof affidavit some of the petitioners had remained exparte. After the proof affidavit was purportedly filed along with Exhibits A1 to A25 by the 1st respondent Bank on the aforesaid date, the petitioners had filed various Miscellaneous Applications vide M.A.Nos. 7 to 9 of 2001 which were dismissed on 11.02.2003.

40.Some of the petitioners later filed application to set aside orders setting them exparte which was allowed subject to payment of 10% of the claim amount without prejudice to their rights.

41.Before proceeding further, we would like to emphasize that the scope of review of an order of subordinate authority

under Article 226 of Constitution of India is very limited.

42. We are not sitting as an appeal court while exercising our jurisdiction under Art. 226 of the Constitution of India. Here the Courts are to tread on a narrow path while being aware of wide powers it has. Courts are merely required to examine the decision making process adopted by the respective Tribunals.

43. Only if there is any material irregularity in the process adopted by the lower authority or where there is perversity in the impugned order, orders can be quashed under Article 226 of the Constitution of India.

44. On perusing the impugned orders of the DRT and the DRAT, there are indications that the proceedings have not been carried out as was expected under the above referred Rules and Regulation.

45. The Petitioners were not given an opportunity to cross examine the officials of the Bank to establish that there was no mortgage through this Court had granted such relief to the Petitioner on an earlier occasion.

46. The proceeding before DRT also does not discuss the available documents properly to give a proper finding on facts. DRT being ultimate fact finding authority has not properly discussed the evidence.

47. Likewise, the DRAT has also not complied with the direction of co-ordinate bench of this Court while passing the impugned order. It may not be out of place to recollect that after DRAT had earlier passed its first order on 11.11.2014 and had remanded the case back to the DRT. Pursuant to remand proceeding, DRT had also commenced cross-examination of the Bank officials.

48. However, after the cross-examination commenced, the 1st respondent Bank obtained a stay from this Court on 23.12.2014 in W.P.No.34693 of 2014. Since the petitioners had also filed Writ Petitions, the proceeding further got delayed. These Writ Petitions were finally disposed on 24.04.2017. The Division Bench of the Court while passing order on 24.04.2017 had categorically directed the DRAT to re-appreciate evidence by securing evidence and pass appropriate orders in accordance with law even though the DRAT has no procedure for recording evidence.

49. Though the Co-ordinate Bench of this Court by an order dated 24.04.2017 had remitted the case back to the DRAT to consider the case after recording the evidences, it is noticed that DRAT has not complied with the said direction while passing the impugned order.

50. In our view, the DRAT ought to have called for the records of DRT and completed the recording of evidence before passing the impugned order. We are constrained to make the above observation as both the proceedings before the DRT in the first instance and the DRAT in the 2nd round show that they were conducted in a lackadaisical manner.

51. The presiding officer of the DRT also ought to have ordered a CBI investigation as to how the Proof Affidavit along with Exhibits marked went missing from its custody. It shows that the records were not safe in DRT and proceedings were conducted in a casual manner DRT.

52. The Learned presiding officer of the DRT should have caused an enquiry and discussed the same in the order. It is the contention of the learned counsel for the petitioners that these originals were never given but were filed by the 10th respondent before the DRAT on 20.08.2013 do not show any marking by the DRT either on 25.02.2000 or on 22.05.2000 as has been noted in the impugned order and therefore submits that there was no equitable mortgage of these properties. The DRAT before whom the originals of Exhibit A21 to A25 were produced by the 10th respondent on 20.08.2013 should have discussed in the impugned order.

53. The learned presiding officer of the DRAT has also not given any finding as to whether the documents which were produced bore any endorsement of the Presiding Officer of the DRT either on 25.2.2000 or on 22.05.2000, when these Exhibits were purportedly marked before the DRT. In our view, the proceedings conducted both before the DRT and the DRAT has been unsatisfactory.

54. Though these Tribunals were to act as effective substitute for the Court and were to achieve the avowed object of giving speedy disposal of bank suits, the fact that the DRT passed its final order on 12.01.2010 is a telling sign that the DRT has not achieved the object for which it was created. To compound further, the proof filed along with the documents which were marked went missing before DRT and there is no discussion on this in the impugned order of the DRT and DRAT.

55. Since the dispute pertains to alleged debt due to the 1st respondent bank and since the DRAT also failed to comply with the order dated 24.04.2017 of this Court, we were constrained to go through the documents filed before us thread bare. To remand the case back would mean a further delay. Therefore, we were constrained to examine the records in detail to give our decision in this order on the merits.

56. For better appreciation of issue, we are describing the status of the properties qua, the petitioners in the proceedings before this Court, DRT and the DRAT.

Name of the Party	Rank in the Writ Petition	Rank in DRT	Rank in DRAT	Remarks
Mr.V.Sukumar	1 st petitioner	3 rd defendant	1 st appellant	The Managing Director of 2 nd respondent, the alleged guarantor and mortgagor of Schedule E 1 st respondent that as power agent, the 1 st petitioner mortgaged Schedule A to E
Mr.R.Krishna raj	2 nd petitioner	6 th defendant	2 nd appellant	Alleged guarantor and mortgagor of Schedule E properties.
Mr.Chette Subbiah	3 rd petitioner	7 th defendant	3 rd appellant	Alleged mortgagor of Schedule A and C properties.
Mrs. Venkata Subbamma	4 th petitioner	8 th defendant	4 th appellant	Alleged mortgagor of Schedule B property.
M/s. Suraj Construction	5 th petitioner	10 th defendant	5 th appellant	Alleged guarantor and mortgagor of Schedule properties through the 1 st petitioner.

57. With these factual background, we shall now proceed to pass discuss the submission and correctness or other wise of the impugned order.

58. The 1st respondent bank had filed O.A.No.536 of 1998 against the 2nd respondent company and their directors and guarantors who had allegedly guaranteed the repayment of amounts due to it by offering collateral securities. O.A.No.536 of 1998 was filed by the 1st respondent Bank to recover a sum of Rs.45,66,923.83/- as on due 10.02.1998 in respect of outstanding due in respect of overdraft account (OD A/c); for sale of schedule A to E Properties for applying the sale proceeds to satisfy the amounts specified in the recovery certificate and in the event of deficiency to pass a personal

<https://hcservices.courtservices.gov.in/hcservices> 2nd to 10th defendants by directing them to pay

for the deficiency.

59. The petitioners were 3rd and 6th to 10th defendants in O.A.No.536 of 1997. The 1st petitioner (3rd Defendant) was the Managing Director of the 2nd Respondent company (1st Defendant). The 2nd respondent (6th Defendant) was an employee of the 2nd Respondent company (1st Defendant).

60. The 5th petitioner is a partnership concern which was engaged in construction of apartment on the Schedule A to E properties promoted by the 10th respondent (which impleaded itself before the DRAT and filed originals of the Title deeds on 20.08.2013 of the Schedule A to E properties which were allegedly marked as Ex.21 to 25 by the DRT on 25.02.2000).

61. The other 5 defendants in O.A No.536 of 1998 were as follows:-

- i. The 1st defendant (2nd respondent herein) is the borrower;
- ii. The 2nd defendant late Dr.V.Sambasivam was the chairman of the 1st defendant (2nd respondent herein) who has since deceased pending O.A.No. 536 of 1997 and was represented by his legal representatives namely 14th and 15th defendants. Since the 14th defendant has also deceased, only the 15th defendant represents the interest of the 2nd defendant as 8th Respondent in this writ petition;
- iii. The 4th defendant Mr.T.Natarajan the (3rd respondent herein) is the director of the 2nd respondent company;
- iv. The 5th defendant Mr.N.Kuberan Chettiar (the 4th respondent herein) is also the director of the 2nd respondent company.
- v. The 9th the defendant late Gunasekara Odayar who also died and is represented by his legal representatives namely respondents Nos. 5, 6 and 7 herein;

("the legal heirs of the 2nd defendant and the 9th defendant were later impleaded in the proceedings before the DRT and thus there were 15 defendants in the said proceedings)

- vi. The 10th respondent got impleaded in the Appellate proceedings before DRAT.

62. The petitioners herein are the owners of the Schedule A to C & E properties (except Schedule D property) and therefore attempt of the petitioners is to distance themselves from the liability of the 2nd respondent and to extricate properties from the recovery proceedings ordered pursuant to the order of the DRT.

63. Schedule A to C properties belonging to the 3rd and the 4th petitioners were allegedly mortgaged by the 1st petitioner on the strength of Exhibit 12 A dated 26.10.1994 Power of Attorney executed by them while Schedule E were allegedly mortgaged by the 1st and 2nd petitioners vide Ex.A17 to the 1st respondent bank.

64. Schedule D Property was owned by the 9th defendant who has since deceased and his interest was represented in the proceeding before the DRT and the DRAT by the 5th and 6th respondents herein. These securities were allegedly created by the 1st petitioner on 27.08.1997.

65. The 1st and 2nd petitioners are owners of the Schedule E property which was purportedly mortgaged to the Bank. The 3rd and the 4th petitioners (7th and 8th Defendants) had purportedly mortgaged Schedule A to C properties to secure the interest of the 1st respondent bank for the debts of the 2nd Respondent company (1st Defendant) through the 1st petitioner.

66. The 1st respondent bank had earlier allowed/extended an "At Par Facility" to the 2nd respondent company in the year 1992 which entitled the 2nd respondent company to issue cheques to its customers/clients to be encashed through 1st respondent banks' 28 designated branches.

67. Under the arrangement, the 2nd respondent company was required to maintain at all times during the subsistence of the arrangement, an amount equivalent to sum of Rs.2,70,00,000 [Rupees Two Crores and Seventy Lakhs] as cushion fund equivalent to 3 days drawings at any given point of time. There was no other security offered by the 2nd respondent company for the "At Par Facility".

68. It was further agreed that the 2nd respondent company will pay interest for delayed payments apart from commission to 1st respondent bank. It was further agreed that the 1st respondent bank will be charging commission with a minimum of Rs.3 per instrument besides postage charges and other out of pocket expenses.

69. This was in terms of an agreement dated 13.11.1992 which was renewed from time to time. The last mentioned extension/renewal of the agreement was on 27.2.1997 wherein the 2nd respondent company was informed that Rs.1,20 lakhs (i.e 3 days drawing) had to be maintained as cushion fund in the 2nd respondent's non-operative account with the 1st respondent bank and that the total drawings per day from all the seven centres of the 2nd respondent company should not exceed Rs.40 lakhs at any given point of time. The facility was reduced as the 2nd respondent company had repeatedly default in repayment.

1st respondent bank issued a notice dated 19.8.97 vide Exhibit A3 and informed the 2nd respondent company and its Chairman (late V.Sambasivam, the 2nd defendant) in O.A.No.536 of 1998 that the total amount of cheques received by them from the designated branches for reimbursement was Rs.1,23,66,449/- whereas the balance that was available in the Current Accounts of the 2nd respondent company as on 18.08.1997 was Rs.33,68,399.86/- thus, registering a shortfall of Rs.89,95,049.14/-.

71.It appears prior to that CBI had raided the 2nd respondent company and had searched the premises of its directors on 21.08.1997 and therefore to safeguard the interest of the 1st respondent bank, signatures were obtained in blank form from 1st and the 2nd petitioners who offered documents of Schedule A to E properties from the possession of 10th respondent company in which late V.Sambasivam (the 2nd defendant), the 1st and 2nd petitioners were directors.

72.According to the petitioners, this was on the strength of Board Resolution dated 25.08.1997 of the 10th respondent which was however never acted upon.

73.It is stated that the 2nd respondent company was only called upon to provide sufficient funds in the account to enable the 1st respondent bank to honour the cheques presented to it.

74.As on 03.09.1997 it was noticed that the account of the 2nd respondent was still overdrawn by Rs.65,51,457.45 and therefore the 1st respondent bank called upon the 2nd respondent company to regularize the shortfall.

75.By Exhibits A5 & A6 dated 08.09.1997 and 18.09.1997, the 2nd respondent company assured that it would regularise the shortfall. However, it failed to do so. Under these circumstances, O.A.No.536 of 1997 was filed.

76.It was the case of the 1st respondent bank, that the 2nd to 5th defendants in O.A.No. 536 of 1997 i.e late Dr.Sambasivam (now represented by his legal representative 8th Respondent), the 1st petitioner herein, 3rd respondent herein, 4th respondent herein had executed a personal guarantee for the shortfall that may arise vide Ex.A7, A8, A9 and A10 all dated 25.08.1997.

77.That apart, according to the 1st respondent Bank, the 1st and 2nd petitioners also signed Agreement of Guarantee vide Ex.A11 dated 26.08.1997. Apart from these persons, the 1st, 2nd and the 3rd Petitioner had executed letters of guarantee to secure repayment of the outstanding.

78. It was further the case of the 1st respondent bank that

the 1st petitioner and the 2nd petitioner who are the partners of the 5th petitioner had mortgaged Schedule E property and had confirmed the same vide Ex.A17 letter dated 27.08.1997.

79. Apart from the above, it was claimed that the 1st petitioner (3rd defendant) had mortgaged Schedule A, B & C properties of the 3rd and the 4th petitioners (7th & 8th defendants) and schedule D property of late Gunashekara Odayar (9th defendant in O.A) now represented by 5th, 6th and 7th respondents herein.

80. The details of securities which the Bank has relied upon are as follows:-

Ranks		Exhibits			Schedule
W.P	O.A	Letter of Guarantee and Date	Deposit of Title Documents	Title Deeds	
P1	D3	A8 (25.08.1997)	-	-	-
P2	D6	A11 (26.08.1997)	A17 (27.08.1997)	A25	E
P3	D7	Nil	A13 & A15 both dated (27.08.1997)	A21 & A23 (17.07.1989 & 07.08.1992)	A & C
P4	D8	Nil	A14 (27.08.1997)	A22 (17.07.1989)	B
P5	D10	A12	-	-	-
-	-	A12-A POA	-	-	-
R6 & R7 (Lrs of D9)	D9		A16	A24	D

81. We have heard at length arguments of the Mr. Om Prakash, the learned Senior Counsel assisted by Mr. R. Iyayavarman for M/s. Ramalingam Associates for the petitioners, Mr. A. L. Somayajee learned Senior Counsel for Mr. T. Sundar Rajan for the 1st respondent bank, Mr. S. Hari Prasad the learned counsel for the 2nd respondent, Mr. Srinath Sridevan learned Senior Counsel for the 3rd, 4th and 8th respondents, Mr. M. Vijay Narayan the learned Advocate General for Mr. V. Vasanthakumar for 9th respondent and Mr. V. M. Venkat Raman for 10th respondent.

82.We have also perused the records and considered the arguments advanced by the learned counsel for the petitioners and the respondents.

83.It is the case of the petitioner that all liabilities of the 2nd respondent company in the "At Par Facility" stood discharged as on 29.08.1997 and so called securities offered at the time of extension of "At Par Facility" were never acted upon and therefore cannot be enforced against the petitioners for the alleged due under the "Temporary Over Draft Facility" given subsequently to the 2nd respondent company by the 1st respondent bank.

84.To buttress this point, the Learned Senior Counsel for the petitioner drew attention to the sequence of event and Exhibit B 7 and Exhibit B dated 01.09.1997 signed by late Dr.V.Sambasivam and 3rd and 4th respondents only.

85.It is the contention of the learned Senior counsel for the petitioner that the respondent bank had extended an "At Par Facility" to the 2nd respondent company and since there were certain defaults, the 2nd, 4th and 5th defendants i.e Dr.V.Sambhasivam and the 3rd and 4th respondents (5th and 4th defendants) alone had executed Letters of Guarantees undertaking dated 25.08.1997 to repay the Temporary Over Draft Facility vide Exs A7, A9, A10 after the "At Par Facility" came to an end on 29.08.1997 when Temporary Over Draft Facility was sanctioned.

86.It is the contention of the learned Senior counsel for petitioners that previously when the default was noticed in the "At Par Facility", the 1st respondent bank had wanted securities and therefore the petitioners had offered photo copies of the documents of schedule A to C & E properties for verification alone and executed documents in Blank. The original title deed of Schedule A to E properties were never offered to the 1st respondent Bank.

87.The main arguments of the learned Counsel for the petitioners that is none of the documents in Exs.A21 to A25 were marked by the 1st respondent Bank. According to the petitioners, the original of these documents were never given to 1st respondent bank and therefore, there was no question these documents being marked before the Presiding Officer.

88.He further submits that only photocopy of Ex.A1 to A25 were purportedly marked on behalf of the 1st respondent bank on 25.02.2000. He submits that Ex.B1 to B12 and B17 to B19 on behalf of the petitioners clearly demonstrate that the 1st respondent bank cannot recover the dues in respect of Over Due Facility based on the documents given earlier.

89.The learned counsel for the petitioners relied on the following decisions:-

- i. Delhi Development of Authority Vs. Durga Chand Kaushish, AIR 1973 SC 2609.
- ii. C.N. Paramasivam Vs. Sunrise Plaza, (2013) 9 SCC 460.
- iii. Axis Bank Vs. SBS Organics Pvt. Ltd. and another, (2016) SCC OnLine Sc 353.

90. It is submitted that the 1st respondent bank collected signatures in EX.A8, A11 & A12 letter in blank from the 1st petitioner and Ex A12-A photo copy of the POA together with photo copy of title deeds in Ex A21, A22, A23 & A25 only along with Ex A16 of the 9th respondent from the 1st and 2nd petitioners for proposed additional security of as they were partners of the 5th petitioner and Directors and employees of the 2nd and 10th respondent Company who were jointly promoting the construction of flats on these properties.

91. The learned Senior Counsel for the petitioners reiterated that at that stage, they had given only the photo copies of the title deeds of the Schedule A to E properties for verification purpose alone and that the 1st respondent bank but had also obtained signatures in Exhibits A8, A11 and A12 from 1st, 2nd and 5th petitioners respectively in blank along with the aforesaid documents which were partly returned.

92. The learned senior counsel for the petitioner submitted that these securities were not acted upon as Originals of Exhibits A 21 to 25 were never offered to the 1st respondent Bank. The learned senior counsel for the petitioner further submitted that the 1st respondent bank accepted a fresh letter of guarantee from the 2nd, 4th and 5th defendants i.e deceased Dr. Sambasivam, 3rd and 4th respondents herein pursuant to Ex.B7 dated 01.09.1997.

93. It is further submitted that theory with the Exhibits and documents went missing from the custody of DRT has not been probed deliberately as such enquiry would show that there was no equitable mortgage of the above properties.

94. Therefore, it is submitted that in absence of any evidence of deposit of title deed of the documents purportedly marked vide Exs.A21 to A25 in respect of Schedule A to E properties has not made out.

95. Exhibits A 13-16 documents titled "Letter of Acknowledgment to be signed by Third-Party (other than the borrower) who has deposited the title deeds" were signed in Blank.

96. It is further submitted that though the 1st petitioner was the Managing director of the 2nd respondent company, he had not offered any security when the Temporary Overdraft Facility was given to the 2nd respondent company and therefore, it is submitted that any liability arising out of default in the

Temporary Over Draft Facility cannot be fastened on the petitioners as they had neither executed the aforesaid letter of guarantee for Temporary Over Draft Facility nor given the original of the title deed.

97. Apart from the letters of guarantees from 1st petitioner and 2nd defendant (late Dr.V.Sambasivam), following letters of guarantees from the deceased chairman Dr.V.Sambasivam, the 3rd respondent / 4th defendant and 4th respondent/ 5th defendant Letters of guarantees dated 25.08.1997 were marked as Exs.A7, A9 and A10 respectively.

98. Similarly, it is stated that the 2nd petitioner who was the 6th defendant in O.A.No.536 of 1998 also stated that he had not given any security either by way of mortgage of the Schedule E property or any guarantee for the Temporary Overdraft Facility for the 2nd respondent.

99. According to the petitioners, "At Par Facility" came to an end on 29.08.1997 and thereafter, Temporary Over Draft Facility which was given was secured only by the securities offered by deceased Dr.Sabasivam, 3rd and 4th respondents herein and therefore, the petitioner cannot be made liable.

100. It is noticed that the petitioners herein had filed I.A.Nos. 233-36 of 2004 and also another I.A.No. 574 of 2009 during the pendency of O.A.No. 536 of 1998 for the following relief:-

To cross examination the bank witness and directing them to produce various records/documents as mentioned in the schedule to the petition.

101. According to the learned Senior counsel for the 1st respondent Bank, the outstanding due in the "Over Draft Facility" was the balance in "At Par Facility" which remained unpaid and therefore, the bank obtained additional securities and was therefore entitled to recover the same from the petitioners and the other respondents jointly and severally.

102. Since the amount was not paid, the 1st respondent bank was entitled to sell the assets offered as a security through auction sale which has been done.

103. He submits that the case of the petitioners that they are neither the guarantors nor had given any of the documents as security to the 1st respondent bank for the dues of the 2nd respondent company cannot be countenanced in the light of over whelming evidence on record.

104. The learned counsel for the 1st respondent Bank relied on the following decisions:-

- i. V.Chandrasekaran and Another Vs. Administrative Officer and Others, (2012) 12 SCC 133.
- ii. Dalip Singh Vs. State of Uttar Pradesh And Others, (2010) 2 SCC 114.
- iii. D.R.Logistics (P) Limited vs Pridhvi Asset Reconstruction and Securitization Company Limited and Others, 2019 SCC OnLine Mad 88.

105. The learned counsel for the 3rd, 4th and 8th respondents relied on the decision of the High Court of Bombay in Bank of Maharashtra Vs. United Construction Company, 1985 SCC OnLine Bom 65 and also relied the definition of Over draft from the Encyclopaedic Law Dictionary (P.Ramanatha Aiyar's Advanced Law Lexicon) to state that outstanding dues in the "At Par Facility" was sanctioned as an "Over Draft Facility".

106. The learned counsel for the 9th respondent also relied on the decision of the Hon'ble Supreme Court in Janatha Textiles and Others Vs. Tax Recovery Officer and Another, (2008) 12 SCC 582.

107. The learned counsel for the 10th respondent supporting the writ petitioners submitted that the 1st respondent bank produced the execution register / attendance register (Loan register) on 15.12.2014 before the DRT. Though the said register was not marked, it is evident that there was no entry pertaining to the alleged deposit of title deeds to the 1st respondent Bank in respect of Schedule A to E properties.

108. From the documents that have been filed by either of the contesting parties herein before the DRT and before this Court, it appears that the 3rd and the 4th petitioners (7th & 8th Defendants in the original proceedings) had executed a Power of Attorney dated 26.10.1994 vide Exhibit 12A in favour of the 1st petitioner/3rd defendant in respect of Schedule A, B and C properties.

109. It is noticed that when O.A.No.536 of 1998 was first filed during February 1998, the 1st respondent bank had filed only 19 documents along with statement of account as the 20th document. Ex.12A dated 26.10.1994 Power of Attorney of 3rd and 4th petitioners giving power to 1st petitioner to mortgage the property was not filed at that time. Similarly, Ex.A21, A22, A23, A24 and A25 were also not filed along with the O.A.

110. The 1st respondent bank purportedly filed proof affidavit on 25.02.2000. Apprehending adverse order from DRT, the petitioners filed W.P.No.25879 of 2008. This court by an order dated 01.12.2008 allowed the said writ petition and directed the DRT to dispose I.A.Nos.233-36 filed by the

111. Similarly, the 9th defendant late Mr Gunsekara Odayar (whose interest is represented by defendant Nos.11-13/ 5th -7th respondents in the present writ petition) had purportedly executed a Power of Attorney dated 14.09.1995 in favour of the 1st petitioner/ 3rd defendant in respect of Schedule D property.

112. However, copy of the Power of Attorney dated 14.09.1995 is neither available in the records nor appears to have been marked before the DRT by the 1st respondent bank. However, this property also has been ordered to be sold in the recovery proceedings. However, the 5th and 7th respondents have not challenged the same.

113. Exs.A7 to A11 dated 25.08.1997 Letters of Guarantee were marked. These are purportedly Agreement of Guarantees Executed by defendant Nos.2, 4, 5 and 6 (i.e Exhibit A7 by late Dr Sambasivam, Exhibit A8 by 3rd defendant/ 1st petitioner herein, Exhibit A9 by 4th defendant/3rd respondent herein, Exhibit A10 by 5th defendant/4th respondent herein and Exhibit A11 by 3rd and 6th defendants /1st and 2nd petitioners herein.

114. According to the petitioners, these documents i.e Exhibits A7 to A11 dated 25.08.1997 alone were available to the 1st respondent Bank to enforce against the defendant Nos.2, 4, 5 and 6 (i.e Exhibit A7 by late Dr Sambasivam, Exhibit A8 by 3rd defendant/1st petitioner herein, Exhibit A9 by 4th defendant/3rd respondent herein, Exhibit A10 by 5th defendant / 4th respondent herein and Exhibit A11 by 3rd and 6th defendants / 1st and 2nd petitioners herein.

115. All these documents bear the signature of the 1st petitioner/ 3rd defendant and uniformly state that schedule mentioned documents (i.e. Schedule B, D & E as in the O.A.536 of 1997) were deposited with the 1st respondent bank on 26.8.1997 for creation of an equitable mortgage.

116. Exs.A13 and A14 appear to be one and the same from the Typeset of documents and relate to Schedule B property of the 8th defendant/ 4th petitioner herein (Venkata Subbama) signed by the 1st petitioner/3rd defendant. Exhibit A-16 pertains to Schedule D property of 9th defendant late Mr.Gunasekara Odayar whose legal representatives have been arrayed as 11th -13th defendant/ 5th -7th Respondents.

117. Ex.A15 is also signed by the 1st petitioner / 3rd defendant and was purportedly signed pursuant to deposit of title deeds on 26.8.1997 on the strength of a Power of Attorney 14.9.1995 which however is not available in the file. This would have required verification.

118. Ex.A16 pertains to Schedule D property of the 9th defendant also signed by 1st petitioner. Ex.A17 is a continuation of Exhibit 16. It is also a similar letter signed

by the 1st to 2nd petitioners / the 3rd and the 6th defendant herein in respect of Schedule E property seeking to mortgage in favour of the 1st respondent bank.

119. Thus, the 1st petitioner became the Power of Attorney holder in respect of Schedule A and C Property of the 7th defendant/ 3rd petitioner (Mr.Chette Subbaiah) herein. There are indication that there was indeed a deposit of title deed, though not necessarily with the deposit of originals.

120. Exhibits B7 and B8 both dated 01.09.1997 addressed to the 2nd defendant Dr.V.Sambasivam by the 1st respondent Bank states that a Temporary Overdraft Facility in A.C.No 3026 was being sanctioned in the 2nd respondent (1st defendant company). It specifically states that the personal guarantees of Dr.V. Sambasivam, Chairman, T.Natrajan and Mr.N.Kuberan (3rd and 4th respondents herein) were to remain in force till the account along with interest if any is adjusted and settled in full. It further mandates that the properties of these guarantors i.e 2nd defendant Dr.V. Sambasivam, Chaiman, 3rd and 4th respondents herein were not be disposed of without obtaining prior permission of the 2nd respondent bank until the Temporary Over Draft (TOD) account along with interest if any is adjusted and settled in full. However, strangely the 1st respondent had not obtained any title deeds from them.

121. These 3 persons were also called upon to sign and return the original copy of the sanction letter towards token of having accepted the terms and conditions/sanction and subject to the above Temporary Overdraft (TOD) was to be allowed from 03.09.1997.

122. Vide Exhibit B8 dated 01.09.1997, these three persons have also acknowledged the receipt of the above letter and assured repayment of the outstanding amount in the Temporary Over Draft Facility in the 2nd respondent's Account No.3026.

123. The 1st petitioner in the capacity of the Managing Director of the 2nd respondent company on 25.08.1997 had written a letter to the Chief Manager of the 1st respondent Bank, regarding short fall to the tune of Rs.10,00,000/- in A/C.No.3026 and steps being taken to rectify the same. By the said letter, the 1st petitioner as Managing Director of the 2nd respondent assured that all the short fall will be made good by them and that attempts have been made to reduce the outstanding.

124. The copy of the above letter was filed neither before the DRT nor before the DRAT. However, a copy of the same letter has been filed by the counsel for the 3rd, 4th and 8th respondents in their typeset of papers. In this said letter, the 1st petitioner as the Managing Director of the 2nd respondent company has stated that he and his family have

provided of the properties at Villupuram to the tune of Rs.1,25,00,000/- as security to the 1st respondent Bank to be met the short fall. Thus, there is no dispute that there was indeed an equitable mortgage intention to create equitable mortgage.

125. On the same day, Ex.A12 dated 25.08.1997 letter was also addressed on the letter head of the 5th petitioner duly signed by the 1st and 2nd petitioners as partners of the 5th petitioner to that effect that the 1st petitioner being the Managing Director of the 2nd respondent company and the 2nd petitioner being the employee of the 2nd respondent company were interested in the 2nd respondent company and that they have unconditionally offered the properties standing in the name of the 5th respondent as additional security to secure the debt due to the 1st respondent bank by the 2nd respondent company. This also confirms that there was an intention to create equitable mortgage.

126. The above letter dated 25.08.1997 (not marked) signed by the 1st petitioner for the 2nd respondent company (filed in the typeset of papers by the 3rd, 4th and 8th respondents) indicates that on 25.08.1997, the properties of the 1st petitioner and his families at Villupuram valued Rs.1,25,00,000/- were to be provided as security to be met short fall in A/c No.3026.

127. The 1st petitioner vide Ex.A6 letter dated 18.09.1997 had also referred to the same property valued at Rs.1,25,00,000/- with reference dues relating to "At Par Facility" in A/c.No.2104 to the 1st respondent Bank.

128. The said letter in Ex.A12 dated 25.08.1997 also states that the properties were located in a prime locality and 25 apartments were under construction of total area of 3227sq.ft. and that the current market value of the land and three fourth of the completed project construction with superstructure was approximately Rs.40 lakhs. The description of the property in the said letter reads as under:-

Pondicherry Registration District,
Ouzhavarkarai Sub Registration District,
Ouzhavarkarai commune Panchayat,
Thattanchavadi Revenue Village, No.34,
Shanmughapuram, Cadstre No.2099 pt.
R.S.No.165/5, Patta No.868, property with
house of literoofting with electricity
connection bearing No.50512/A2. Municipal
water connection policy No.15927 and land
measuring to an extent of 0-03-00 Hectares
(3227 sq.ft.)

129. The above property is Schedule E property. In the said letter, the 1st and 2nd petitioners have also categorically stated that they have handed over the original title deeds of the aforesaid property with request to create equitable

mortgage as additional security for the liability standing in the name of the 2nd respondent company.

130. The petitioners themselves have also filed a copy of another letter dated 25.09.1997 (not marked before DRT and DRAT) in their typeset of papers dated 11.08.2018. The said letter was addressed to the Chief Manager of the 1st respondent Bank at Pondicherry by the 1st petitioner in his capacity as the partner of the 5th petitioner herein.

131. In the said letter, there is reference indicating the liability of the 2nd respondent company to the 1st respondent Bank and has alluded to the "At Par Facility" having been terminated on 29.08.1997 and as per the terms and conditions of the Over Draft Facility, Dr.V.Sambasivam, T.Natarajan and N.Kuberan alone were liable and the securities obtained in the Ex.A7 dated 25.08.1997.

132. In the said letter dated 25.09.1997, the 1st petitioner had requested the 1st respondent bank to return the title deeds of the properties and to confirm that whether the signatures obtained in blank documents were destroyed as they were no longer require for the new "Over Draft Facility".

133. The 1st petitioner had also requested the 1st respondent bank to immediately return all the blank signed papers or letter heads, the available of the petitioner's and confirm the same in writing that no signed blank papers/deed documents papers available with the 1st respondent bank pertaining to the personal guarantee of the 1st petitioner and the 2nd petitioner. This letter also calls upon the 1st respondent bank to desist from making any demand in future in respect of any liability that may arise on account of "Over Draft Facility."

134. The 1st petitioner has also filed a copy of another letter dated 27.09.1997 (not marked before DRT and DRAT) signed by the Chief Manager of the 1st respondent Bank addressed to the 1st petitioner. It reads as follows:-

We acknowledge the receipt of your letter dated 25.09.1997. In this connection we wish to inform you that we had filled up the D32 EM form and D57 form signed by yourself and your partner Mr.R.Krishnaraj and the same has been kept along with other documents under safe custody.

We are returning the following unused blank forms and letter heads as required by you:

1.Two set of D32 EM form signed by Mr.V.Sukumar.

2.Four letter head papers of M/s Srivari Housing and Construction Ltd. (In 3 papers

Some few lines are typed)

3.Four Letter head papers of M/s Sirivari Mutual Benefit Finance Ltd. (In 3 papers some few lines are typed)

We do not have any other blank forms and other agreement forms duly signed by yourself and your partner other than those mentioned above. Kindly acknowledge receipt of the same.

The original title deeds are under lock and key which is under the custody of our higher authorities and as such we are taking up the matter with them.

135. Thus, it is evident that Exs.A21 to A25 had been mortgaged by the 1st petitioner himself to the 1st respondent bank to secure the interest of the 1st respondent bank on account of the short fall in payment in the "At Par Facility".

136. The amounts which were outstanding in the "At Par Facility" were sanctioned as "Over Draft Facility" and by that letter dated 25.09.1997 referred supra, a feeble request was made by the 1st petitioner where he solicited the 1st respondent Bank to return all the title deeds of the property which was offered as security.

137. The 1st respondent Bank in their letter dated 27.09.1997 has clearly stated that the original title deeds were under the lock and key and in the custody of the higher authorities and as such they have taken up the matter of the higher authorities and decisions will be communicated.

138. The 1st respondent Bank has also declined to return the title deeds as there was no decision taken by its higher authorities as to whether the outstanding amounts due in the "At Par Facility" which was later treated as loan under the "Over Draft Facility" was to be treated separately or not.

139. In the facts of the present case, it is evident that the 1st respondent bank had extended "At Par Facility" to the 2nd respondent company. It mandated cushion fund to be maintained by the 2nd respondent company as discussed above.

140. The 2nd respondent company however failed to do so and therefore fell in arrears. By Exhibit A3 dated 19.8.1997, the 1st respondent bank addressed a letter to the Chairman of the 2nd respondent company (2nd defendant, Late Dr.V.Sambha Sivam) that the 2nd respondent company had overdrawn an amount of Rs.89, 95,049.14/-and therefore called upon the 2nd respondent company to pay for the shortfall and square up the dues.

141. The 2nd respondent company was also asked to send a detailed reconciliation statement for the months of April 1997 to July 1997 immediately. By Exhibit A4 dated 03.09.1997

another reminder was sent by the 1st respondent bank to the 2nd respondent company and called upon latter to take immediate steps for adjustment of the entire liability with OD interest failing which, they would be taking necessary actions and that the matter will be viewed seriously by the higher authorities.

142. In Exhibit A5 dated 08.09.1997, the 1st petitioner as the Managing Director of the 2nd respondent company informed that the shortfall in the account cannot be ascertained due to data corruption but informed that it would be approximately Rs.70 lakhs and that a sum of Rs.10 lakhs were being remitted immediately and substantial amount would be remitted on the following day.

143. The fact that the title deeds of the Schedule A to E properties were filed as security is not in dispute. The 1st petitioner has denied the liability only on the ground that he has not renewed the liability incurred by the 2nd respondent company after 29.08.1997 and that he was merely a Managing Director of the 2nd respondent company when "Temporary Over Draft Facility" was granted and was acting under the instruction of the Chairman Dr.V.Sambasivam (2nd defendant) and therefore was not liable for the alleged due for the "Over Draft Facility" cannot be countenanced.

144. The 1st petitioner has however admitted that having put a signature on the documents to safeguard the interests of the 1st respondent bank in view of the pressure exerted by the officials of the 1st respondent bank. However, letter dated 18.09.1997 in Ex.A6 does not show any pressure. The submission of the petitioner that the 5th petitioner does not own any property and only blank signatures were obtained from the 1st and 2nd respondents to make it seem as if the 1st petitioner never mortgaged the properties with the bank is not made out.

145. The submission of the 1st petitioner that as on 25.8.1997 that there was no due to the 1st respondent Bank cannot be countenanced. The 1st petitioner's denial of handing over any documents to creation of equitable mortgage is clearly an afterthought in the light of Ex.A6. The submission that the 1st respondent bank would maintain a Register of Equitable Mortgage and an attendance register and if those documents were produced before the Tribunal, it would have exposed that no equitable mortgage was created by 1st petitioner is of no relevance as the 1st petitioner has himself admitted creation of the document in Ex.A6.

146. In Exhibit B6 dated 22.01.1998 also there is a refusal of the 1st respondent bank to return the title deed in the following words:-

As on 2.9.10.1997 your company has overdrawn in the current account No.3026 and there is a debit balance of Rs.35,15,517.35. You have failed to regularise the amount despite

repeated requests.

The said facility was offered to your company on the strength of the security given by Srivari Housing & Construction Ltd* and Suraj Constructions**. The said security which was accepted by us are still subsisting. They who offered the security have not chosen to write to us that the security offered by them is null and void. If they choose to send a letter to that effect our Bank would certainly think of setting the ball in motion for initiating criminal proceedings under the relevant Sections of Indian Penal Code. Your allegation that the said transaction is attracted by Section 370 of the Companies Act is devoid of merit. The said Section is totally inapplicable and wholly irrelevant. As regards the security offered by a third party which has been accepted by our bank you do not have right to say that the security is null and void and it is being deliverately done by you to defeat and delay the realisation of the amount due to us from you.

* 10th respondent.

**5th petitioner.

147. EX.A6 dated 18.09.1997, addressed to the 1st respondent bank is also signed by the 1st petitioner. It admits to the following:-

- i. Deposit of Title Deeds of property of the Directors of 2nd respondent worth Rs.1.25 Crores to protect the interest of the 1st respondent bank.
- ii. Agreed to settle the outstanding in the 'At Par facility'.

148. In Exhibit A6 dated 18.09.1997, the 1st petitioner has himself written a letter on behalf of the 2nd respondent company in the capacity of its Managing Director as soon the 'At Par' facility in A/C.No.2104 was over drawn that the Directors had come forward to safeguard the interest of the 1st respondent bank by providing building security worth Rs.1.25 Crore as collateral apart from furnishing guarantee.

149. There is also reference to notice dated 06.11.1997 issued by the 1st respondent bank in their notice dated 13.01.1998 through its counsel wherein it is stated that an equitable mortgage was created by the 10th respondent along with the Chairman late Dr.V.Sambasivam and the 1st petitioner and Mr.T.Natrajan the 3rd respondent herein.

respondent bank in its response to letter dated 20.12.1997 of the 2nd respondent company, has stated that as on 19.08.1997, the outstanding due to the 1st respondent bank was Rs.89,95,049/- and as on 29.10.1997 the amount was over drawn by Rs.37,15,517.35 in current A/c.No.3026 (TOD) and that the "At Par Facility" was overdrawn and it was communicated to the 2nd respondent company on 28.08.1997 and that from 01.09.1997, the amount outstanding in the 'At Par' facility A/C.No.2104 was transferred to TOD A/C No.3206.

151. Thus, it is clear that "At Par Facility" was terminated on 29.08.1997 and the outstanding amounts due to the 1st Respondent Bank was treated as "Over Draft" and sanctioned as "Over Drafty Facility" vide Ex.B6. The 1st petitioner along with other directions had offered security of schedule A to E properties when there was outstanding in the "At Par Facility".

152. When the 2nd respondent Company was allowed to operate "Overdraft Facility", additional security was obtained from Dr.Sambhasivam, T.Natarajan (R3/D4) and N.Kuberan (R4/D5) over and above securities given by the 1st and 2nd petitioners along with Directors of 2nd respondent as indicated in Ex.B6.

153. By Exhibit A6 dated 18.9.1997, the 1st Petitioner as the Managing Director of the 2nd respondent company has also confirmed creation of security worth Rs.1.25 crores as collateral apart from guarantee of the directors. This proves creation of equitable mortgage. There are no other documents in the records barring the documents/properties mentioned in schedule A to E of OA.

154. The fact that there was a mortgage of the properties by the petitioners through the 1st petitioner and the 2nd petitioner is evident from Ex.B6 dated 18.09.1997 is which was marked by the petitioners themselves. Exhibit A6 dated 18.09.1997 signed by the 1st petitioner on behalf of the 2nd respondent company. In the said letter, the 1st petitioner has himself categorically admitted that to safeguard the interests of the 1st respondent bank the 1st petitioner and the 2nd respondent company along with the directors have provided building security worth Rs.1.25 crores as a collateral apart from guarantees of the directors. This proves mortgage.

155. Therefore, it stands concluded that there was an equitable mortgage. Therefore, there was no necessity to cross-examine any of the bank officers to conclude that there was no mortgage created by the petitioners. In our view Ex.A6 dated 18.09.1997 along with Ex.B6 notice dated 22.1.1998 of the bank categorically demonstrates that at the "Overdraft Facility" was nothing but the outstanding amount which had remained unpaid in the "At Par Facility" and was sanctioned as "Over Draft Facility" on the strength of letters of guarantees executed with Exs.A7 to A11 and along with Ex.A13 to Ex.A17

and in the light of comfort of deposit of title deeds of schedule A to E properties vide Exhibits A21 to A25 by the petitioner. Further, the 1st petitioner has not denied that the signatures were his documents. Though there is no discussion as to whether the Exs.A21 to A25 bore any marking by DRT, in our view, originals were not required for creating an equitable mortgage as admittedly photocopies of these documents were filed with a view to the equitable mortgage.

156. A Full Bench decision of the Rangoon High Court in Chidambaram Chettiar Vs. Aziz, AIR 1938 Rangoon 139, reviewed the English and Indian authorities and has pointed out that in order to create a valid mortgage, it is not necessary that the whole, or even the most material of the documents of title to the property should be deposited. Documents deposited should show a complete or good title in the depositors and it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title and shown to have been deposited with the intention of creating security thereon.

157. The Lahore High Court in Jessis Moyle Stewart Vs. Bank of Upper India, AIR 1916 Lah. 39, held that "title include copies, where the originals are not forthcoming."

158. Surendra Mohan Rai Choudhury Vs. MohendraNath Banerjee, AIR 1932 Cal 589, is also an authority for the same proposition wherein a similar view was expressed by the Calcutta High Court. A Division Bench of the Calcutta High Court in a later decision made an observation that it is sufficient if the deeds is deposited bona fide relating to the property and there are material evidence of title and are shown to have been deposited with the intention of creating a charge, there is an equitable mortgage. There a certified copy of redemption certificate produced was held that clearly indicated an intention to create a security on the probate.

159. In Angu Pillai Vs. Kasi Viswanathan Chettiar, (1993) 1 MLJ 334, it was held that it is sufficient if the deeds deposited bona fide relate to the property or are material evidence of title or are shown to have been deposited with the intention of creating security thereon, to constitute an equitable mortgage by the appellant in favour of the Bank in respect of his right in the property which has been mortgaged to the Bank.

160. The Supreme Court of India in K.J Nathan Vs. S.V.Maruty Reddy and Ors., [1964] 6 SCR 727, held that the term "document of title" and "title deeds" denotes such a document or documents showing a prima facie or apparent title of the depositor or some interests therein.

161. The Court held as follow:

"If the form of the documents of title that have been delivered to the creditor is such as to be derived from the deposit of such documents alone

the Court would be entitled to conclude that the documents were deposited with the intention of creating a security for the repayment of the debt, prima facie a mortgage by deposit of title-deeds would be proved; although, of course, such an inference would not be irrebuttable, and would not be drawn if the weight of the evidence as a whole told against it."

162. The Court in the above case took a view that there is no presumption of law that the mere deposit of title-deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act, 1872 or in the Transfer of property Act, 1882. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title-deeds constitute a mortgage as to the existence of one fact from the existence of some other fact or facts. Nor the fact that at the time the title-deeds were deposited there was an intention to execute a mortgage deed in itself negatives, or is inconsistent with, the intention to create a mortgage by deposit of title-deeds to be in force till the mortgage deed was executed.

163. The above view also followed in C. Rajagopal Vs. State Bank of Travaneore, Karur Branch and Ors. (1995) 1 MLJ 175 where it was held as:

The issue that, therefore, arises in cases like the present is whether the term 'document' of title would only apply to a document by which the mortgagor derives title to the property to be mortgaged, or whether it would also apply to any document which provides some, if not conclusive, evidence that the mortgagor has title to the property. In our view, it is beyond doubt that the term lends itself to the interpretation that it includes the latter category of documents.

164. Thus, there is no necessity for creation of by deposit of title deed with the original. The 1st and the 2nd petitioners had authority to create security which they did. They had intention to create such security for the outstanding amount.

165. We therefore disagree with the case of the petitioners that there was no mortgage of Schedule A to E properties or that the securities that were offered by the petitioners were only for the "At Par Facility" liability in respect of which there was no dues as on 29.8.1997. The outstanding amount that was due in the said facility was allowed to be repaid as a "Temporary Overdraft Facility" after obtaining additional securities in the form of letters from Dr V Sambhasivam, the 2nd defendant, 3rd and

the 4th respondent herein. Since the amounts were not repaid, the 1st respondent Bank was entitled to recover the due from the petitioners along with others jointly and severally and liquidate the asset to satisfy the dues.

166. We however leave the issue regarding the valuation adopted for the Schedule A to E properties in the Recovery Proceedings to be decided by the DRT afresh. In case, the properties have been sold for a lower value, the 9th respondent may be directed to pay for the same.

167. In the light of the above discussion, we are constrained to uphold the ultimate conclusion arrived by the DRT and the DRAT while remitting the case back to the DRT as far as valuation of Schedule A to E properties in the recovery proceedings. Therefore, the present Writ Petition is disposed with the above observations. No cost. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Branch Manager,
Indian Bank,
Main Branch, Pondicherry.
- 2.The Registrar,
Debts Recovery Appellate Tribunal,
Chennai.
- 3.The Registrar,
Debts Recovery Tribunal - I,
Chennai.
- 4.The Recovery Officer,
Debts Recovery Tribunal - I,
Chennai.

+2cc to Mr.V.Vasantha Kumar, Advocate, S.R.No. 9371
+2cc to Mr.Ramalingam & Assts, Advocate, S.R.No. 9532
+1cc to Mr.T.Sundar Rajan, Advocate, S.R.No. 9875
+1cc to Mr.V.M.Venkatramana, Advocate, S.R.No. 9723

W.P.No.33872 of 2017

and

W.M.P.Nos.37560 to 37562 of 2017