

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO.34 OF 2015

Authorised Officer, Kotak Mahindra	]	
Bank Ltd. having his office at 418-	]	
424, 4th Floor, Sohrab Hall, 27,	]..... Applicant	
Sasoon Road, Pune – 411 001	] (org. Defendant)	

versus

M/s. Brahmo Construction Pvt. Ltd., a	]	
private limited Company having its	]	
office at Flat No.603, Pratham Bliss,	]	
Survey No.287/6A+6B, Baner, Pune -	]	
411045 represented through its	]..... Respondent.	
Director Shri Umesh Vanpal	] (org. Plaintiff)	

Dr. Birendra Saraf with Shri Nikhil Rajani I/by M/s. V Deshpande & Co. for Applicant.
Mrs. Chandana Salgaoncar for the Respondent.

CORAM : R. M. SAVANT, J.
Reserved on : 04th March 2015
Pronounced on : 16th April 2015

JUDGMENT :-

1 Admit, with the consent of the learned counsel for the parties heard forthwith.

2 The revisionary jurisdiction of this Court is invoked against the order dated 27/11/2014 passed by the learned 5th Joint Civil Judge, Junior Division Pune by which order the learned Judge has decided the preliminary

issue and has ruled that his Court is having the jurisdiction to try and entertain the suit in question.

3 The facts giving rise to filing of the above Civil Revision Application, in brief, can be stated thus :-

 The Respondent herein is the original Plaintiff who has filed the suit in question being Regular Civil Suit No.1756 of 2014 seeking a permanent injunction for restraining the Applicant herein i.e. the Defendant-Bank from re-auctioning the property. The property in contention is CTS No.1194/27-A admeasuring 552 sq.mtrs. situated at Shivajinagar, Pune which was mortgaged to the Defendant Bank as a security against the loan amount of one M/s. Pratam Motors. The Defendant Bank was pleased to sanction a loan of Rs.2,50,00,000/- with interest @ 18% p.a. and repayable in 48 installments and a loan of Rs.1,00,00,000/- with interest @ 36% and repayable in 12 installments to the said M/s. Pratham Motors. To secure the due repayment of the amounts advanced to the said M/s. Pratham Motors, the said property was mortgaged to the Defendant Bank by one Rajiv Yeshwant Bhale, who was the Managing Partner of the said M/s. Pratham Motors and two others under a registered Deed of Mortgage whereby the said mortgagors have mortgaged their right, title and interest in the said property known as "Yashomala". On default being committed by the said M/s. Pratham Motors in repayment of the said loan amounts, the account maintained by the Defendant Bank was classified as

a Non Performing Asset. The Authorized Officer of the Defendant Bank thereafter issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity's sake herein after referred to as "the SARFAESI Act") calling upon the said M/s. Pratham Motors and its partners/guarantors to pay an aggregate amount of Rs.3,92,35,022.38 payable as on 24/5/2012 with further interest @ 3% p.a. From 25/5/2012 till payment and/or realization. In view of the fact that inspite of the said notice, the same was not complied with, the Defendant Bank proceeded to take measures under Section 13(4) of the SARFAESI Act and had taken physical possession of the said property by following the due process of law and in conformity with the Security Interest (Enforcement) Rules, 2002 (for short "the Rules of 2002"). The said property was thereafter put up for auction on 14/11/2013. In view of the fact that no offer was received pursuant to the said auction, fresh auction was again held by again issuing public notice on 28/11/2013. The Plaintiff participated in the said auction proceeding which was conducted on "as is where is basis" and also on "as is what is basis". The Plaintiff was declared as the successful bidder who had made the highest offer of Rs.8,51,00,000/- and paid 15% of the Earnest Money Deposit as per the terms of the auction proceedings. In view of the subsequent default committed by the Plaintiff in payment of the balance sale consideration/bid amount, the Defendant Bank proceeded to forfeit the Earnest Money Deposit made by the Plaintiff and cancelled the said sale and

put up the said property i.e. the secured asset for re-sale again by public auction by issuing an attachment.

4 The Plaintiff aggrieved by the said act on the part of the Defendant Bank of re-auctioning the property, has filed the suit in question seeking permanent injunction. It is the case of the Plaintiff that at the time of payment of further amount, the Plaintiff came to know that the said property has been under the statutory attachment of the Income Tax Department. The Plaintiff therefore immediately asked for a explanation regarding the said attachment levied by the Income Tax Department. It is further the case of the Plaintiff that though there is no bar for sale of the said property which is under attachment, however, the Defendant by hiding the same, declared the auction and also accepted the Plaintiff's bid and accepted the amount of Rs.2,12,75,000/- from the Plaintiff by suppressing the said material fact from the Plaintiff. It is the case of the Plaintiff that it is for want of the explanation from the Defendant that the Plaintiff withheld the further amount and waited for the necessary explanation from the Defendant. It is further the case of the Plaintiff that a substantial interest is created in its favour in the said property, and despite the same and with the deliberate intention of deceit, the Defendant has re-advertised the said property for auction, on account of which the Plaintiff was constrained to file the suit in question.

5 The Applicant herein i.e. the original Defendant filed an Application under Section 9A of the Civil Procedure Code. After stating the antecedent facts leading to the auction sale and thereafter cancellation of the sale made in favour of the Plaintiff and forfeiture of the amount paid by the Plaintiff, the Defendant raised a preliminary issue as regards jurisdiction of the Civil Court to entertain the suit on the touchstone of Section 34 of the SARFAESI Act. The jurisdiction of the Civil Court was questioned on the ground that the action taken by the Defendant was a measure taken under Sections 13(2) and 13(4) of the SARFAESI Act and therefore in terms of Section 17 r/w Section 34, the Civil Court has no jurisdiction to entertain the suit as the Plaintiff has an alternate remedy by way of an Appeal/Application to be filed under Section 17 of the SARFAESI Act before the concerned Debts Recovery Tribunal.

6 The said Application was considered by the Trial Court, and as indicated above, by the impugned order dated 27/11/2014 the Trial Court has held that it has the jurisdiction to try and entertain the present suit. The Trial Court has observed that since the Plaintiff is challenging the auction carried out by the Defendant on the ground that it is fraudulent, the Tribunal does not have jurisdiction to try the issue as to whether such a fraud is practiced by the Defendant on the Plaintiff, and the said question will have to be decided in the present suit, and therefore, the Civil Court is having jurisdiction to try and

entertain the present suit. The Trial Court has relied upon the judgment of a learned Single Judge of this Court in *State Bank of India v/s. Shri Sagar s/o. Pramod Deshmukh and ors.*¹ The Trial Court observed that in the said judgment the action of the secured creditor to take possession of the property and to sell the same being fraudulent and void, it was held that the suit filed challenging such action is not barred by Section 34 of the SARFAESI Act in view of the judgment of the Apex Court in the case of *Mardia Chemicals Limited and ors. v/s. Union of India & ors.*² The Trial Court distinguished the judgment of this Court in the case of *Saraswat Co-operative Bank Ltd. v/s. Madan S Jha and ors.* rendered in *Civil Revision Application No.377 of 2008* by observing that in the said case, the auction under Section 13(4) of the SARFAESI Act was challenged, and therefore the facts in the said case stand apart from the facts of the present case. As indicated above it is the said order dated 27/11/2014 which is taken exception to by way of the above Civil Revision Application.

7 **SUBMISSIONS ON BEHALF OF THE APPLICANT – ORIGINAL DEFENDANT BY THE LEARNED COUNSEL DR.BIRENDERA SARAFA**

A] That the Trial Court has erred in relying on the judgment rendered in *State Bank of India's* case (supra) as the facts in the said case stand apart from the facts of the present case as in the said case

¹ 2011 (2) ALL MR 520

² 2004 Vol. 106(3) Bom. L.R. 238 (SC)

the mortgage created in favour of the bank by the father was called in question by his sons on the ground that mortgaged property was a joint family property and the father had no exclusive right to mortgage the same and had therefore sought partition of the property. The sons had also alleged that there was a collusion between the Bank officials and their father. It is in the said circumstance that the learned Single Judge held that the issue of partition etc of the property which was put to auction can only be tried by the Civil Court.

- B] That the remedy under Section 17 of the SARFAESI Act is available to the Plaintiff as the expression “any person” appearing in Section 17 is held to be having a wide amplitude in view of the judgments of this Court as well as the judgments of the Apex Court.
- C] That the judgment in *Mardia Chemicals Ltd.'s* case (supra) carves out a very restricted exception, it is only when a fraud is alleged in respect of the mortgage which is created, that a suit would lie and merely because in the instant case it is alleged by the Plaintiff that a fraud has been committed would not entitle the Plaintiff to maintain a suit when the remedy under Section 17 is available. The learned counsel for the Applicant/Defendant in support of the

said contention has placed reliance on the following judgments :-

- (A) State Bank of India v/s. Jigishaben B Sanghavi & ors³ and
 (B) V. Thulasi v/s. Indian Overseas Bank Sowcarpet Branch, Chennai 600 079⁴.

D] Assuming that there is a non-disclosure of the attachment of the Income-Tax Department, that at the highest can be said to be a breach of Rule 8(f) of the Rules of 2002 in the matter of conducting auction and that the said case can very well be tried before the Debts Recovery Tribunal by filing an Appeal/Application under Section 17 of the SARFAESI Act.

E] That it is well settled that if the alternative remedy is available under the statute in question, the Civil Court would not exercise its jurisdiction. In support of the said contention the learned counsel for the Applicant/Defendant has placed reliance on the following judgments rendered in the context of Article 226 of the Constitution of India :- (A) United Bank of India v/s. Satyawati Tondon and others⁵ and (B) General Manager, Sri Siddeshwara Cooperative Bank Limited and another versus Ikbal & others.⁶

³ 2011(3) Bom.C.R. 187

⁴ (2011) 8 MLJ 441

⁵ (2010) 8 SCC 110

⁶ (2013) 10 SCC 83

- 8 **SUBMISSIONS ON BEHALF OF THE RESPONDENT – ORIGINAL PLAINTIFF BY THE LEARNED COUNSEL MRS. CHANDANA SALGAONCAR.**
- i] That in view of non-compliance of Rule 8 in the matter of making full disclosure, the Defendant has suppressed vital facts and thereby has played a fraud on the Plaintiff, and therefore, the Plaintiff is entitled to file a suit for seeking the relief which has been sought and the Plaintiff's case is therefore covered by the exception in *Mardia Chemicals Ltd.*'s case (supra)
- ii] That the judgment in *Mardia Chemicals Ltd.*'s case (supra) cannot be construed so as to mean that only a restricted exception is carved out and would also cover the cases where a fraud has been alleged by the Plaintiff in the matter of taking measures under Section 13(2) or 13(4) of the SARFAESI Act. In the instant case since a fraud has been alleged by the Plaintiff in the matter of carrying out the auction on account of non-disclosure, hence the suit is maintainable. In support of the said contention reliance is placed on the judgments of the Apex Court in *Mardia Chemicals Ltd.*'s case (supra), and in the case of *Nahar Industrial Enterprises Limited v/s. Hong Kong Shanghai Banking Corporation*⁷, and the judgment of a learned Single Judge of this

7 (2009) 8 SCC 646

Court in the case of *State Bank of India's*_case (supra).

iii] That the Rules in question are mandatory and any infringement thereof would amount to violation of the rights of the Plaintiff, and would therefore entitle the Plaintiff to file a suit and seek appropriate reliefs in the said suit. In support of the said contention, the learned counsel for the Respondent/Plaintiff has placed reliance on the following judgments of the Apex Court :-

(A) Mathew Varghese's v/s. M. Amritha Kumar and ors.⁸

(B) J. Rajiv Subramaniyan and another v/s. Pandiyas and ors⁹

(C) Vasu P Shetty v/s. Hotel Vandana Palace and others¹⁰

CONSIDERATION :-

9 The issue that arises for consideration in the above Civil Revision Application is, whether the suit filed for permanent injunction against re-auctioning of the property in question is maintainable. Hence the vexed issue whether a suit against the measures taken under Section 13 of the SARFAESI Act is maintainable has once again attracted the attention of this Court.

10 In the context of the said issue a few facts are required to be

⁸ (2014) 5 SCC 610

⁹ (2014) 5 SCC 651

¹⁰ (2014) 5 SCC 660

noted. As indicated above the Plaintiff is an auction purchaser in the auction held under Section 13(4) of the SARFAESI Act. It is an undisputed position that the auction was held on “as is where is basis” and “as is what is basis” of the property in question. The Plaintiff having not paid the balance of the auction/bid price, the acceptance of the offer of the Plaintiff was cancelled and the amount paid by the Plaintiff as earnest money was forfeited and the property was set down for re-auction. It is the case of the Plaintiff that it did not pay the balance amount as it came to know that the property was under attachment of the Income Tax Department. It is further the case of the Plaintiff that without disclosing the attachment of the Income Tax Department, the Defendant had carried out the auction. It is further the case of the Plaintiff that the action of the Defendant of re-advertising the property for auction is totally ultra vires, unlawful and illegal, and further amounts to criminal breach of trust.

The relevant paragraphs of the plaint which are material in the context of the challenge raised in the above Civil Revision Application are paragraphs 6, 11 and 12 which for the sake of ready reference are reproduced herein under :-

“(6) It is further submitted that ‘attachment’ of the Income-Tax Department does mean that there is a bar for sale of the said property being under attachment and still the Defendant by hiding the same declared the auction and not only that accepted the Plaintiff’s bid and further accepted the amount of Rs.2,12,75,000/- (Rs. Two Crore Twelve lower Appellate Court Seventy Five Thousand only) from the

Plaintiff by suppressing the said material fact from the Plaintiff.

(11) Plaintiff submits that thus the substantial interest has been created in the said property and despite the same and with the deliberate intention of the deceit, the Defendant has re-advertised the auction of the said property to be held on 29th October, 2014; and, therefore, the Plaintiff has been constrained to file the present suit against the defendant.

(12) Plaintiff submits that the action of the defendant of re-advertising the auction of the said property is totally ultra vires, unlawful, illegal and further amounts to criminal breach of trust, and, therefore, this suit.”

(Emphasis supplied)

11 Since the Defendant has raised a preliminary issue regarding maintainability of the suit on the touchstone of Section 34 of the SARFAESI Act against a measure taken under Section 13, and since it is also the contention of the Defendant that the Plaintiff could take recourse to Section 17 of the said Act against the auction of re-advertising of the property in question. It would be necessary to refer to Sections 13, 17 and 34 of the SARFAESI Act which for the sake of ready reference are reproduced herein under :-

“13. Enforcement of security interest

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a

secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17-A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5-B) Where the secured creditor, referred to in sub-section (5-A), is declared to be the purchaser of the immovable property at any subsequent sale, the

amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5-C) The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5-A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor

shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529-A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation : For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.”

“17. Right to appeal--

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section(4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the

borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 and the rules made thereunder.

“34. Civil Court not to have jurisdiction----

No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

It would also be necessary to refer to Rule 8 of the Security Interest (Enforcement) Rules 2002 which also has a bearing on the instant matter. The said Rule 8 clause (f) is therefore reproduced herein under for the sake of ready reference :-

“8. Sale of immovable secured assets

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an

owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the web-site of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

A reading of section 13 of the SARFAESI Act makes it clear that any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal. In the event the borrower fails to discharge his liability in full within the period specified, the secured creditor is entitled to take recourse to transfer by way of lease assignment or sale for realizing the secured assets. In so far as the measure that is taken under Section 13 is concerned, Section 17 provides for an application to be

made by any person aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor. Sub-section (2) of Section 17 imposes a duty upon the Debts Recovery Tribunal to consider, whether any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are in accordance with the provisions of the SARFAESI Act and the Rules made thereunder. Hence whether there is a compliance of the provisions of the SARFAESI Act and Rules thereunder can be gone into by the Debts Recovery Tribunal.

12 The bar to a Civil Court exercising jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or Appellate Tribunal is empowered by or under the SARFAESI Act to determine is imposed by Section 34. The bar is therefore to a matter being brought before the Civil Court which the Debts Recovery Tribunal or Appellate Tribunal is empowered to determine.

13 Now coming to Rule 8, the same provides for how the sale of the secured asset is to be carried out, the secured creditor in terms of clause (f) of the said Rule 8 is obliged to disclose any other thing which the Authorized Officer considers it material for a purchaser to know. At this stage it would also be apposite to refer to the judgment of the Apex Court in ***Mardia Chemicals Ltd.'s*** case (supra). Paragraph 51 of the said Judgment is material

and is reproduced herein under :-

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V. Narasimhachariars case (supra) a judgment of the learned Single Judge where it is observed as follows in 22.

“The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought : *Adams v. Scott* (1859) 7 WR (Eng) 213 (249). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See *Rashbehary Ghose Law of Mortgages*, Vol. II, Fourth Edn., page 784)”

Hence in so far as invoking the jurisdiction of the Civil Court is concerned, a very limited exception is carved out by the Apex Court where the action of the

secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe.

In the said context a useful reference could be made to the judgment of the Division Bench of this Court in *Jigishaben B Sanghavi's* case (supra). Paragraphs 21 and 21A of the said judgment are material and are reproduced herein under :-

21. The case, however, which has been sought to be established in these proceedings on behalf of the original Plaintiffs is that the Plaintiffs have in the averments in the plaint brought their case within the purview of the exception carved out by the Supreme Court in *Mardia Chemicals*. Now, as we have stated earlier, in determining whether such a plea has to be accepted, the Pleat as a whole has to be read. As the Supreme Court observed in *Popat and Kotecha* (supra), a plaint cannot be compartmentalized or dissected, nor can the averments be read in isolation. The pleading has to be construed as a whole. In *Mardia Chemicals*, the Supreme Court held that "to a very limited extent, the jurisdiction of the Civil Court can also be invoked" (at para 51, page 2392). The limited exception which is carved out by the Supreme Court is where the action of the secured creditor is alleged to be fraudulent or where the claim of the secured creditor is so absurd and untenable that it would not require any probe whatsoever. Similarly, the Supreme Court held that an exception would be carved out to the extent the scope is permissible to bring an action in a Civil Court in a case involving an English mortgage. In that context, the Supreme Court reiterated the principle which was enunciated by the Madras High Court that a mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But even in such a case, the pleadings in an

action for restraining a sale by a mortgagee must "clearly disclose" a fraud or irregularity on the basis of which the relief is sought.

21-A These observations of the Supreme Court emphasize that the exception which is carved out is a limited exception. Like all exceptions, this exception must be strictly construed. A borrower or a third party cannot be permitted to defeat or to render nugatory the provisions of the Act merely by a stray reference to an allegation of fraud or, as in the present case, by an averment in paragraph 15 of the plaint of "a systematic fraud". The entirety of the plaint has to be construed. Essentially, in the present case, the averments in the plaint are that: (i) The HUF was a co-owner/tenant in common of the residential flat; (ii) The Bank has taken recourse to proceedings for recovery to which the HUF was not a party; (iii) The Plaintiffs had, in the course of the recovery proceedings, raised an objection before the Recovery Officer to the tenability of the action taken by the Bank; (iv) The Bank had taken recourse to its remedy under the Securitization Act without awaiting the result of the objection raised by the Plaintiffs; (v) The action under Section 13(2) was initiated in disregard to the provisions of the Securitization Act; (vi) The mortgage executed by the Second, Third and Fourth Defendants was defective because the original Share Certificates were not with the Bank; (vii) The First Defendant had no security interest and no secured assets and, therefore, was not entitled to invoke the provisions of Sub-section (4) of Section 13 against the right claimed by the HUF; (viii) A 'systematic fraud' was played by the First Defendant to pressurise the Plaintiffs; and (ix) There was an absence of legal necessity which would vitiate the mortgage alleged to have been created by the Second Defendant as Karta of the HUF. The reliefs which are sought in the suit have already been adverted to earlier. These averments, when construed in their entirety, would reveal that the grievance which the Plaintiffs have in the suit is in respect of the validity of the mortgage which is alleged to have been executed by the Second Defendant as Karta of the HUF and of the tenability of the action adopted by the Bank under the Securitization Act, so as

to meet the interest of the HUF claimed in the residential flat. The Plaintiffs as third parties have sufficient recourse to challenge the lawfulness of the action of the Bank by invoking their remedies under Section 17. Thus, clearly within the meaning of Section 34, a suit in respect of any matter which the Tribunal is empowered by or under the provisions of Section 17 to determine is barred. The suit, therefore, in our view, was clearly barred by Section 34. The stray reference to an allegation of fraud in paragraph 15 of the Plaint is not sufficient to bring the case within the scope of the exception carved out by the Supreme Court in *Mardia Chemicals*.”

The Division Bench of this Court has held that the exception which is carved out is a limited exception and like all exceptions would have to be strictly construed and that a borrower or a third party cannot be permitted to defeat or to render nugatory the provisions of the Act merely by a stray reference to an allegation of fraud. Meaning thereby the Division Bench has held that just because allegations of fraud are made, the suit cannot be held to be maintainable.

It would also be apposite to refer to the judgment of the Division Bench of Madras High Court in *V Thulasi's* case (supra). Paragraphs 25 and 29 of the said judgment are material and are reproduced herein under :-

25. As per the ratio laid down in *Mardia Chemicals* case, ((2004) 4 SCC 311), where only the action of the secured creditor is fraudulent or where his claim is so absurd, the jurisdiction of the Civil Court could be invoked. In the light of the plaint averments and the plaint documents, it is to be seen whether the plaintiffs have shown that the transaction is fraudulent or claim

of secured creditor is so absurd so as to attract the jurisdiction of the Civil Court.

29. By clever and astute drafting, the plaintiff might create an illusion of cause of action by trying to bring civil suit within the parameters laid down by the Supreme Court in *Mardia Chemicals case*, (2004) 4 SCC 311. Pointing that Court has duty to see if such allegations of fraud are thrown just for the purpose of maintaining a suit, in *Punjab National Bank v. J. Samsath Beevi*, 2010 (3) CTC 310 : LNIND 2010 Mad 1331 : (2010) 3 MLJ 439, Justice V. Ramasubramanian held as under: -

"8. But at the same time, the Court has a duty to see, if such allegations of fraud are thrown, just for the purpose of maintaining a suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. If by clever drafting, the plaintiff creates an illusion of a cause of action, the Court is duty bound to nip it in the bud. To find out if it is just a case of clever drafting, the Court has to read the plaint, not formally, but in a meaningful manner. So is the dictum of the Apex Court in [T.Arivandandam vs. T.V.Satyapal](#) [1977 (4) SCC 467]. It was again reiterated by the Court in [I.T.C. Ltd vs. Debts Recovery Appellate Tribunal](#) [1998 (2) SCC 70], by holding that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order VII, Rule 11(a).

9. A Court is obliged to see if the allegations of fraud and collusion made in the plaint, are themselves a product of "fraud and collusion" between the family members of the borrowers, so as to escape liability and save the secured assets, somehow or the other. In the recent past, there is a sudden spurt in the number of civil cases filed against the actions initiated by Banks and Financial Institutions, either under the 1993 Act or under the SARFAESI Act, 2002. All these cases fall under 3 or 4 categories viz.,

(i) cases filed by strangers claiming that their properties are brought to sale on the basis of forged documents or certified copies of documents submitted by borrowers to Banks

(ii) cases filed by guarantors claiming that they never signed letters of guarantee or offered their properties as securities

(iii) cases filed by close relatives of borrowers such as spouses, children, brothers and sisters, claiming that they have a share in the properties mortgaged by the borrowers and that they were never aware of and they never gave consent to the properties being offered as securities and

(iv) cases filed by third parties claiming that the properties were sold to them by the borrowers or guarantors by suppressing the creation of the mortgage and that they are bona fide purchasers for value without notice of the encumbrances.

10. It is not very difficult for a seasoned litigant or an intelligent lawyer to draft the Complaint in such a manner as to make a secured asset, come within anyone of the above 4 categories, by a clever drafting of the Complaint, thereby creating an illusion of fraud, collusion, misrepresentation and the like. Today, with the advancement of technology, the creation of an illusion and the creation of a virtual world are both possible. The moment the Civil Suit is taken on file, the proceedings before the Debts Recovery Tribunal or under the SARFAESI Act, 2002 gets slowed down. This results in two consequences viz., (i) out of frustration, the Banks agree for one time settlements, or (ii) third party rights get created by taking advantage of the situation. Therefore, the Courts have a greater responsibility to scan the pleadings and see if the allegations of fraud and collusion made in the Complaint are actually a product of fraud and collusion between the borrowers and those making such claims."

We fully endorse the above views of the learned single Judge."

The Division Bench of Madras High Court has therefore held that the Court which is dealing with the suit questioning the measure taken under Section 13 is required to consider whether by clever drafting an illusion of cause of action is created and the suit is sought to be brought within the ambit of the exception carved out by the Apex Court in *Mardia Chemicals Ltd.*'s case (supra).

14 In the instant case, as indicated above, the relevant averments in the plaint are in Paragraphs 6 11 and 12. The allegations in the said paragraphs have been made on the basis that the Defendant in the auction notice and in terms of the conditions of the auction has not disclosed or suppressed the factum of there being an attachment of the Income Tax Department on the secured asset. The plaint does not contain any complicated facts leading to the case of fraud or how the action of the Defendant Bank is fraudulent. There are therefore no complicated issues of fact which are to be tried. It would have to be borne in mind that the auction was on “as is where is basis” and “as is what is basis”. The intending participant in the said auction is therefore expected to make necessary inquiries if one can say so having regard to the general practice adopted at the time of auction. In fact in the instant matter the Plaintiff in Paragraph 6 of the plaint accepts the position that the attachment of the Income-Tax Department does not mean that there is a bar for the sale of the said property which is under attachment. It is in the said

context that the maintainability of the suit was required to be considered by the Trial Court.

If the test laid down in the judgment of the Division Bench of this Court in *Jigishaben B Sanghavi's* case (supra) and the judgment of the Division Bench of Madras High Court in *V. Thulasi's* case (supra) is applied, by taking the plaint as a whole the conclusion that is required to be drawn is that the instant suit does not fall within the exception carved out in *Mardia Chemicals Ltd.'s* case (supra).

15 In so far as the conduct of the auction is concerned, Rule 8 applies and in terms of clause (f) thereof the authorized officer is required to disclose any other thing which the authorized officer considers it material for a purchaser to know. Hence assuming that there was a non-disclosure by the Defendant of the attachment of the Income-Tax Department at the time of auctioning the secured assets, the same at the highest may amount to the auction being conducted in violation of Rule 8 of the Rules of 2002, and for the said reason also the instant suit does not fall within the exception carved out by *Mardia Chemicals Ltd.'s* case (supra).

16 As regards the efficacy and the nature of the Security Interest (Enforcement) Rules 2002 and what effect their non-observance on the sale of

the secured assets, it would be necessary to refer to the judgments of the Apex Court on the said aspect. The relevant paragraphs of the Apex Court judgments are reproduced herein under along with their citations :-

A] Paragraphs 42 and 43 of the judgment in *Mathew Varghese's* case (supra) :-

“42. In Ram Kishun (supra), paragraphs 13, 14 and 28 are relevant for our purpose, which are as under:

13. Undoubtedly, public money should be recovered and recovery should be made expeditiously. But it does not mean that the financial institutions which are concerned only with the recovery of their loans, may be permitted to behave like property dealers and be permitted further to dispose of the secured assets in any unreasonable or arbitrary manner in flagrant violation of the statutory provisions.

14. A right to hold property is a constitutional right as well as a human right. A person cannot be deprived of his property except in accordance with the provisions of a statute. (Vide Lachhman Dass v. Jagat Ram and State of M.P. v. Narmada Bachao Andolan) Thus, the condition precedent for taking away someone's property or disposing of the secured assets, is that the authority must ensure compliance with the statutory provisions.

28. In view of the above, the law can be summarized to the effect that the recovery of the public dues must be made strictly in accordance with the procedure prescribed by law. The liability of a surety is coextensive with that of the principal debtor. In case there are more than one surety the liability is to be divided equally”

43. The above principles laid down by this Court also makes it clear that though the recovery of public dues

should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a Constitutional Right, as well as the Human Right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside.”

B] Paragraph 15 of the judgment in *J.Rajiv Subramaniyan's* case (supra) :-

“15 As noticed above, this Court also examined Rules 8 and 9 of the Rules, 2002. On a detailed analysis of Rules 8 and 9(1), it has been held that any sale effected without complying with the same would be unconstitutional and, therefore, null and void.”

C] Paragraph 25 of the judgment in *Vasu P Shetty's* case (supra) :-

“25 The moment we find that the mandatory requirement of the Rules had not been waived by the borrower, consequences in law have to follow. As held in Mathew Varghese’s case, when there is a breach of the said mandatory requirement the sale is to be treated as null and void. Moreover, the appellant have no answer to many other infirmities pointed out by the High Court. We, therefore, are of the opinion that present appeals lack merit.”

If one has to crystallize what the Apex Court has held, then it can be said that the Rules of 2002 are mandatory in nature and if the requirements of the Rules have not been waived by the borrower, the consequences would have to follow. As indicated above, in the instant case though it has been alleged against the Defendant that the sale was carried out without disclosing the attachment of the Income-Tax Department, the Plaintiff has thereafter alleged

that the re-auction is sought to be carried out by deceit and in criminal breach of trust as a right has already been created in favour of the Plaintiff by virtue of the acceptance of the offer of the Plaintiff in the first auction. As observed in the earlier part of this order, non-disclosure of the fact of there being an attachment of the Income-Tax Department, assuming it be so, can at the highest amount to the breach of clause (f) of Rule 8 and may therefore amount to auction sale being carried out in violation and in breach of the Rules of 2002. The question therefore that arises is, whether the Debts Recovery Tribunal can adjudicate upon the matter under Section 17 of the SARFAESI Act. The said provision, especially sub-section (2) thereof confers the jurisdiction on the Debts Recover Tribunal to consider, whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of the said Act and Rules made thereunder. The Debts Recovery Tribunal is therefore vested with the jurisdiction to adjudicate whether the measures taken are in accordance with the Act and Rules. Hence apart from the fact that in the light of the averments made in the plaint of the instant suit, they cannot be said to fall in the exception carved out in *Mardia Chemicals Ltd.'s* case (supra). It would also have to be held that in the instant case the suit is not maintainable in view of the fact that in the instant case there is no issue which cannot be adjudicated upon by the Debts Recovery Tribunal.

17 Having come to the conclusion that the grievance of the Plaintiff can be addressed under Section 17 of the SARFAESI Act. It would be relevant to refer to the judgments of the Apex Court cited on behalf of the Defendant on the point of efficacy of the remedy available under Section 17 of the SARFAESI Act as also the exhaustion of the said remedy by the borrower or the aggrieved person, though in the context of exercise of the writ jurisdiction under Article 226 of the Constitution of India. The said judgments have relevance in the context of the limited exception carved out in *Mardia Chemical Ltd.'s* case (supra). In *United Bank of India's* case (supra) the Apex Court held that both the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. The Apex Court observed that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. The Apex Court in the facts of the said case held that the High Court unfortunately overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that the said Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institution. The Apex Court concluded that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the

Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc and the particular legislation contains a detailed mechanism for redressal of his grievance.

The Apex Court in *General Manager, Sri Siddeshwara Cooperative Bank Ltd.'s* case (supra) has reiterated the principle of exhaustion of the alternative remedy when statute provided for efficacy and adequate remedy to the aggrieved person.

In the said context, a reference is also required to be made to an order dated 24/03/2014 passed by a learned Single Judge of the Delhi High Court in Writ Petition (C) No.1901 of 201. The facts in the said case before the learned Single Judge of the Delhi High Court can be said to be identical to the facts of the present case, as the person whose bid has been accepted was informed that his bid has been treated as cancelled and 25% of the amount deposited was forfeited. Against the said action, the bidder had invoked the writ jurisdiction of the Delhi High Court under Article 226 of the Constitution. The learned Single Judge of the Delhi High Court held that the expression 'any person' appearing in Section 17 of the Act, 2002 is of very wide amplitude and would also cover the Petitioner therein. The learned Single Judge of the Delhi High Court relied upon the judgment of the Apex Court in *Jagdish Singh v/s.*

Heeralal and others¹¹ wherein the Apex Court has held that irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of section 17 of the Securitisation Act, in case the bank (secured creditor) adopts any measure including the sale of the secured assets, on which the Plaintiffs claim interest. Relying upon the said judgment, the learned Single Judge of the Delhi High Court held that the Plaintiff would have to file an appeal/application under section 17 of the SARFAESI Act. Hence except where the cases fall within the exception carved out in ***Mardia Chemicals Ltd.'s*** case (supra), the weight of the judgments of the Apex Court is on the aggrieved persons invoking the remedy under section 17 of the SARFAESI Act.

18 The Trial Court as can be seen from the impugned order has placed reliance on the judgment of a learned Single Judge of this Court in ***State Bank of India's*** case. It would therefore be necessary to advert to the facts of the said case. The Plaintiffs therein had filed a suit being Special Civil Suit No.52 of 2010 for declaration, partition, separate possession and permanent injunction in respect of the suit property. In the said suit, the Plaintiffs had file an application for temporary injunction restraining the Applicant/Defendant No.3 Bank for taking possession of the suit property or any portion thereof and from selling the same in any manner under Section 13 of the SARFAESI Act during pendency of the said Suit. The Plaintiffs had

¹¹ (2014) 1 Comp LJ 307 (SC)

joined their father who had mortgaged the suit property as Defendant No.1. They had joined their mother as Defendant No.2, and the Secured Creditor i.e. the State Bank of India was joined as Defendant No.3. It was the case of the Plaintiffs in the said suit that the suit property was the ancestral Joint Hindu Family property and they are the coparceners having 1/4th undivided share each in the said property. It was claimed that the suit property has been purchased by the Defendant Nos.1 and 2 from out of the income from the ancestral property including the income from the agricultural fields and other immovable properties. It was claimed that the Plaintiff Nos. 1 and 2 together are carrying on the ancestral business of selling of books on the ground floor of the suit property and the first floor of the suit property is being used as the residential house of the Joint Hindu Family. It was the case of the Plaintiffs that the suit property has not been partitioned and hence a decree for partition and separate possession of their share in the suit property had been claimed by the Plaintiffs to the extent of their share. It was alleged that the Defendant Nos.1 and 2 were not the absolute owners of the entire suit property and had, therefore, no authority to mortgage the same with the Defendant No.3 Bank as the security for the loan that they had obtained. It was further claimed that the creation of mortgage was not for the benefit of the family, but was for the purposes of satisfying the vices of the Defendant No.1. It was further alleged that the creation of mortgage was in collusion with the Defendant No.3 Bank and the third parties, which are interested in purchasing the property at throw-

away price and the same was fraudulent. The Plaintiffs' claim was based on the said averments and had sought the relief for declaration that the notice dated 8/2/2010 issued by the Defendant No.3 Bank was fraudulent and void ab-initio and hence a permanent injunction was claimed against the Defendant No.3 Bank from proceeding to deal with the property in accordance with the provisions of the said Act. A preliminary issue was raised objecting to the maintainability of the said suit on the touchstone of Section 34 of the said Act as also in view of the fact that the remedy under Section 17 was available to the Plaintiffs. On behalf of the Plaintiffs, the judgment in *Mardia Chemicals Ltd.'s* case (supra) was relied upon to contend that where the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and entertainable, which may not require any probe whatsoever. The learned Single Judge whilst adjudicating the preliminary issue of the maintainability of the suit has observed that the Debts Recovery Tribunal under Section 17 of the SARFAESI Act cannot adjudicate upon the question as to whether the Defendant Nos. 1 and 2 were not the exclusive owners of the entire property and that they had no authority to mortgage the suit property with the Defendant No.3 – Bank. The learned Single Judge further observed that it also cannot adjudicate upon the question that the creation of mortgage was not for the benefit of the family, but was for the purposes of satisfying the vices of the Defendant No.1. The learned Single Judge further observed that it also cannot adjudicate upon the question as to whether the creation of mortgage was in

collusion with the Defendant No.3 Bank and the third parties, which are interested in purchasing the suit property at throw-away price and the same was, therefore, fraudulent. In the said context it is held that the jurisdiction of the Civil Court to entertain, try and decide the said Special Civil Suit No.52 of 2010 is not barred by Section 34 of the said Act.

However, the facts of the present case stand apart from the facts in *State Bank of India's* case (supra). As indicated above the allegation of the Plaintiff in the present case is that the factum of attachment of the Income-Tax Department was not disclosed, though was required to be done under Rule 8(f) of the Rules of 2002. As indicated herein above, the plaint is bereft of any averments involving complicated facts as regards how a fraud has been practiced on the Plaintiff or how the act of the Defendant in not disclosing the said attachment of the Income-Tax Department is fraudulent. The allegations if any are only found in Paragraphs 6, 11,12 of the plaint. The said allegations can therefore hardly fall within the exception carved out by the Apex Court in *Mardia Chemicals Ltd.'s* case (supra).

In my view, there being a clear distinction in facts between the present case and the facts in *State Bank of India's* case (supra), the said judgment therefore cannot be relied upon to hold that the Civil Court has jurisdiction to entertain the present suit.

19 For the reasons afore-stated, the Trial Court has committed an error of jurisdiction by coming to a conclusion that the suit filed is maintainable. The impugned order is therefore required to be set aside in the revisionary jurisdiction of this court and is accordingly set aside. It is held that the suit filed by the Plaintiff is not maintainable and is accordingly dismissed. However, it would be open for the Plaintiff to take recourse to Section 17 of the SARFAESI Act and adopt appropriate proceedings before the concerned Debts Recovery Tribunal, Pune. The above Civil Revision Application is allowed to the aforesaid extent with parties to bear their respective costs.

[R.M.SAVANT, J]

16/04/2015 :-

Today at the time of pronouncement of the judgment, the learned counsel appearing for the Respondent/Original Plaintiff states that the suit in question has been withdrawn. No cognizance of the said fact can be taken, as the said fact is brought to the notice of this Court at the time of pronouncement of the Judgment.

[R.M.SAVANT, J]