

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

TUESDAY, THE 7TH DAY OF APRIL 2015/17TH CHAITHRA, 1937

OP (DRT).No. 97 of 2014 (O)

AGAINST THE ORDER/JUDGMENT IN OA 564/2013 of DEBTS RECOVERY
TRIBUNAL, ERNAKULAM
AGAINST THE ORDER/JUDGMENT IN M.A.NO.124/2014 of DEBT RECOVERY
APPELLATE TRIBUNAL, CHENNAI

PETITIONER(S)/PETITIONERS:

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- 1. P.TMATHAI, AGED 84,**
S/O.P.C.THOMMAN, PURAPPADATHIL HOUSE,
MULANTHURUTHY.P.O, ERNAKULAM-682314.
 - 2. SMT.MARTHA MATHAI, AGED 76,**
W/O.P.T.MATHAI, PURAPPADATHIL HOUSE, MULANTHURUTHY.P.O
ERNAKULAM-682314.

BY ADVS.SRI.C.T.JOSEPH
SRI.JOE POLLAYIL
SRI.ROSHIN IPE JOSEPH

RESPONDENT(S)/RESPONDENTS:

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- 1. THE SOUTH INDIAN BANK LTD.**
SIB HOUSE, T.B.ROAD, THRISSUR-1
REPRESENTED BY ITS AUTHORIZED OFFICER AND CHIEF MANAGER,
REGIONAL OFFICE, SIB BUILDING, INFOPARK ROAD
RAJAGIRI VALLEY.P.O, KAKKANAD, KOCHI-682039.
 - 2. M/S.P.T.MATHAI CONSTRUCTION COMPANY (P) LTD.,**
HAVING ITS REGISTERED OFFICE AT 27/370, KV 60/2
PANAMPILLY NAGAR, KOCHI-682036.
 - 3. SRI.ROJER P.MATHEW, AGED 54,**
S/O.P.T.MATHAI, G-203, PURAPPADATHIL HOUSE
PANAMPILLY NAGAR, KOCHI-682036.
 - 4. SRI.GIJU.P.MATHAI, AGED 42,**
S/O.P.T.MATHAI, 5B, MATHER BUILDING
IVORY HEIGHTS, PANAMPILLY NAGAR, KOCHI-682036.
 - 5. SMT.ACHAMMA GIJU, AGED 36 YEARS,**
W/O.GIJU P.MATHAI, 5B, MATHER BUILDING
IVORY HEIGHTS, PANAMPILLY NAGAR, KOCHI-682036.

O.P.(DRT).NO.97/2014

- 6. SMT.MARY THOMAS, AGED 41 YEARS
D/O.THOMAS, PULIKKEYIL HOUSE, MULAKKULAM
PIRAVOM-686664.**
- 7. BABU JOHN,
AGE NOT KNOWN, S/O.NOT KNOWN, PALATHUMPATT HOUSE
CHENGANNUR.P.O, ALAPPUZHA-689121.**
- 8. DAISY BABU JOHN,
AGE NOT KNOWN, W/O.BABU JOHN, PALATHUMPATT HOUSE
CHENGANNUR.P.O, ALAPPUZHA-689121.**

**R1 BY ADV.SRI.K.K.CHANDRAN PILLAI (SR.)
R1 BY ADV.SRI.K.S.DILIP
R1 BY ADV.SRI.SAJU N.A.
R1 BY ADV.SMT.G.LEKHA
R1 BY ADV.SMT.P.J.FLONY
R1 BY ADV.SMT.A.I.HAYARUNNISA
R3 BY ADV.SRI.A.JAYASANKAR
R3 BY ADV.SRI.CHANDRASEKHARAN
R3 BY ADV.SRI.C.V.MANUVILSAN
R3 BY ADV.SRI.MANU GOVIND**

**THIS OP (DEBT RECOVERY TRIBUNAL) HAVING BEEN FINALLY HEARD
ON 26-03-2015, THE COURT ON 07-04-2014 DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

EXT.P1: COPY OF NOTICE DATED 20-11-2013 BEARING NO.EKM/RO/SN/26/2013-14 UNDER S.13(2) OF THE SARFAESI ACT ISSUED BY THE FIRST RESPONDENT TO FIRST PETITIONER.

EXT.P2: COPY OF THE ORIGINAL APPLICATION FILED BY FIRST RESPONDENT AS O.A.564/2013 BEFORE THE HON'BLE DEBTS RECOVERY TRIBUNAL, ERNAKULAM

EXT.P3: COPY OF THE WRITTEN STATEMENT FILED BY DEFENDANTS 1 TO 3 IN O.A.564/2013 BEFORE THE HON'BLE DEBTS RECOVERY TRIBUNAL, ERNAKULAM.

EXT.P4: COPY OF I.A.1267/2014 IN O.A.564/2013 ON THE FILES OF THE HON'BLE DEBTS RECOVERY TRIBUNAL, ERNAKULAM.

EXT.P5: COPY OF THE OBJECTION FILED BY THIRD RESPONDENT (FOURTH DEFENDANT) TO EXT.P4.

EXT.P6: COPY OF THE VALUATION REPORT BEARING NO.DRTE/1/14 DATED 2-7-2014 FILED BY G.VELAYUDHAN NAIR

EXT.P7: COPY OF THE VALUATION REPORT BEARING NO.VAL.GEN/09/17/2014-15 DATED 7-7-2014 FILED BY K.V.KURIAKOSE

EXT.P8: COPY OF THE VALUATION REPORT BEARING NO.VAL/4304 -LB-DRT/14 DATED 5-7-2014 FILED BY AJITH.P

EXT.P9: COPY OF THE OBJECTION FILED BY PETITIONERS HEREIN TO EXT.P8 BEFORE THE HON'BLE DEBTS RECOVERY TRIBUNAL,ERNAKULAM.

EXT.P10: COPY OF THE OBJECTION FILED BY THIRD RESPONDENT HEREIN TO EXTS.P6 AND P7.

O.P.(DRT).NO.97/2014

EXT.P11: COPY OF THE PROFORMA OF AJITH.P. FILED BY FOURTH DEFENDANT BEFORE THE HON'BLE DEBTS RECOVERY TRIBUNAL, ERNAKULAM.

EXT.P12: COPY OF I.A.1670/2014 IN O.A.564/2013 ON THE FILES OF THE HON'BLE DEBTS RECOVERY TRIBUNAL,ERNAKULAM.

EXT.P13: COPY OF THE COUNTER AFFIDAVIT TO EXT.P12 FILED BY THE FIRST PETITIONER HEREIN.

EXT.P14: COPY OF THE ORDER DATED 22-7-2014 IN I.A.1267/2014 AND I.A.1670/2014 IN O.A.564/2013 PASSED BY THE HON'BLE DEBTS RECOVERY TRIBUNAL,ERNAKULAM.

EXT.P15: COPY OF THE LEDGER EXTRACT OF THE FIRST PETITIONER'S ACCOUNT NO.0025053000003850 FOR THE PERIOD STARTING 29-7-2014 TO 29-7-2014

EXT.P16: COPY OF THE MEMORANDUM OF APPEAL FILED BY THE THIRD RESPONDENT AS M.A.124/2014 BEFORE THE HON'BLE DEBTS RECOVERY TRIBUNAL,CHENNAI.

EXT.P17: COPY OF THE ORDER DATED 13-10-2014 IN M.A.124/2014 PASSED BY THE HON'BLE DEBTS RECOVERY TRIBUNAL, CHENNAI.

RESPONDENT(S)' EXHIBITS: NIL.

//TRUE COPY//

P.S. TO JUDGE

'C.R.'

A.K.JAYASANKARAN NAMBIAR, J.

O.P.(DRT).NO.97 OF 2014 (O)

Dated this the 7th day of April, 2015

J U D G M E N T

The challenge in this original petition (DRT) is against Ext.P17 order of the Debt Recovery Appellate Tribunal, Chennai, that allowed an appeal preferred by the 3rd respondent against Ext.P14 order of the Debts Recovery Tribunal, Ernakulam.

2. The brief facts necessary for a disposal of the original petition are as follows:

The 1st petitioner is the Managing director, and the 2nd petitioner as well as the 3rd and 4th respondents, are the Directors of the 2nd respondent company, which is the principal debtor of the 1st respondent bank. The petitioners, as well as respondents 3 to 6, are also the guarantors to the loan availed by the 2nd respondent company. On 22.11.2010, the 2nd respondent had availed an overdraft facility with a limit of Rs.17 crores, and a further facility for bank guarantee with a limit of Rs.8 crores, by executing the necessary agreements with the 1st respondent. By 20.11.2013, the 2nd respondent company had drawn an amount of Rs.20,65,43,369/- from

the overdraft facility that was extended to it by the 1st respondent bank, and it had also availed a bank guarantee to the tune of Rs.2,14,19,000/- from the 1st respondent. On 23.11.2013, the 2nd respondent company received a notice from the 1st respondent bank under Section 13 (2) of the Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as the 'SARFAESI Act'. It was indicated in the said notice that the loan of the 2nd respondent company with the said bank had become a non-performing asset on 30.9.2013. The 1st respondent bank, thereafter, filed O.A.No.564/2013 before the Debts Recovery Tribunal [DRT], Ernakulam, against the petitioners and respondents 3 to 5, for recovery of amounts due under the loan transactions. In the original application before the DRT, Ernakulam, the petitioners were arrayed as defendants 2 and 3, the 2nd respondent as defendant No.1, and respondents 3 to 8 as defendant Nos.4 to 9. The petitioners filed I.A.No.1267/2014 in the O.A., under Section 19 (25) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as the 'RDDBFI Act', praying inter alia for a release of an item of property that was included in the schedule to the O.A. The facts would disclose that the schedule to the O.A. comprised of 14 items of property, and item No.12, the tharavad property, was sought to be released from the

mortgage. The description of the property in the schedule to the O.A. is as follows:

ITEM NO 12

DISTRICT	:	ERNAKULAM
SUB-DISTRICT	:	MULAMTHURUTHY
TALUK	:	KANAYANNUR
VILLAGE	:	MULAMTHURUTHY
FIRKHA	:	THIRUVAMKULAM
SURVEY NUMBER	:	836/3, 906/3, 907, 836/1, 915/1, 831/4, 832/1, 833/2, 836/1, 843/2, 831/2, 820, 820,
EXTENT	:	9.31 ARES (23 CENTS), 21.7 ARES (54.250 CENTS), 2.6 ARES (6.5 CENTS), 6.47 ARES (16 CENTS 8.19 ARES (20.25 CENTS), 38.85 ARES (96 CENTS), 24.69 ARES (61 CENTS), 58.28 ARES (144 CENTS), 24.28 ARES (60 CENTS) 8 ARES (20 CENTS)
TOTAL EXTENT	:	501 CENTS

DESCRIPTION OF PROPERTY

All that part and parcel of land measuring 9.31, 21.7, 2.6, 6.47, 8.19, 38.85 Ares, 24.28 Ares, 8 Ares, equivalent to 23, 54.250, 6.5, 16, 20.25, 96, 61, 144, 60.20 cents situated in Mulanthuruthy Village, Kanayannur Taluk, Ernakulam District together with buildings existing and constructed thereon and covered by deed No.122/73, 1675/64, 1095/1973, 1065/73, 184/1963, 542/1962, 543/62, 1433/1972, 488/67 of Mulanthuruthy SRO.

BOUNDARIES

NORTH	:	PROPERTY OF ABRAHAM & THODUI
SOUTH	:	ROAD
EAST	:	PROPERTY OF CHEERAMALIL THOMAS
WEST	:	PROPERTY OF ABRAHAM MATHAI

3. The 1st respondent bank did not file any objection to the application filed by the petitioners and submitted before the DRT that the bank was agreeable for releasing the said property. The 3rd respondent, however, who was the eldest son of the petitioners, filed his objection to the application preferred by the petitioners contending inter alia that the said property had to be sold in public auction after getting the property valued through an approved valuer.

4. Inasmuch as the value of the property was a contentious issue between the parties, the DRT directed the parties to forward a list of valuers, who were approved valuers of nationalized banks as per the Wealth Tax Act, for the purposes of valuing the property, the release of which was sought for by the petitioners. Accordingly, the DRT, in the interlocutory application filed by the petitioners, appointed three persons, namely, Sri.K.V.Kuriakose (suggested by the petitioners as well as respondents 4, 5 and 6) , Sri.G.Velayudhan Nair (suggested by the 1st respondent bank) and Sri.Ajith.P. (suggested by the 3rd respondent) to value the tharavad property. The said three persons filed their respective valuation reports before the DRT. Thereafter, after considering the objections filed by the parties to the valuation reports obtained by them, the DRT, by Ext.P14 order, fixed the value of the property at Rs.4,90,00,000/- by taking the highest

value for immovable property and for the residential property, separately, from the valuation reports that were made available before the DRT. It is pertinent to note that the valuation report submitted by Sri.Ajith.P., who was the valuer suggested by the 3rd respondent, was rejected by the DRT on finding that the said person was only a valuer of plant and machinery, and not a civil valuer as per the Wealth Tax Act and, therefore, incompetent to value the property of which release was sought for by the petitioners. It is also relevant to note that, when arguments were addressed before the DRT, the 3rd respondent was queried on whether he was willing to purchase the property in question for a sum higher than what was fixed by the DRT based on the admissible valuation reports. The 3rd respondent, on that occasion, refused the offer and instead filed I.A.No.1670/2014 seeking a month's time for finding a purchaser who would be prepared to purchase the property at a value higher than what was fixed by the bank. While passing Ext.P14 order, the DRT, while allowing the prayer of the petitioners in I.A.1267/2014, also dismissed I.A.No.1670/2014 that was preferred by the 3rd respondent.

5. Immediately on passing of Ext.P14 order, the 1st petitioner remitted an amount of Rs.4,90,00,000/- into the overdraft account of the 2nd respondent maintained with the 1st respondent bank. On

receipt of such remittance, the 1st respondent released item No.12 property in O.A.No.564/2013 to the petitioners. Subsequent thereto, the 3rd respondent preferred an appeal before the Debts Recovery Appellate Tribunal, Chennai as M.A.No.124/2014. By Ext.P17 order dated 13.10.2014, the Debts Recovery Appellate Tribunal, Chennai, set aside Ext.P14 order on the ground that the said order had been passed without any jurisdiction. The Appellate Tribunal opined that the Presiding Officer of the DRT had exceeded his jurisdiction and traversed Section 25 of the RDDBFI Act and had usurped the powers of the Recovery Officer under the RDDBFI Act. It was found that the DRT could only pass a single final order that determined the liability of persons who are arrayed as defendants in a particular case, and it was not open to the DRT to pass an order in the nature of a preliminary decree which permitted the petitioners to obtain release of one of the items of mortgaged property. As already noticed, Ext.P17 order of the Appellate Tribunal, is impugned in the present original petition.

6. I have heard Sri.Roshan Ipe Joseph, the learned counsel appearing for the petitioners, Sri.K.K.Chandran Pillai, the learned Senior counsel appearing for the 1st respondent bank and also Sri.Chandrasekharan, the learned counsel appearing for the 3rd

respondent.

7. The contentions of the petitioners, which are supported by the learned senior counsel appearing for the 1st respondent bank, briefly stated, are as follows:

- The Debt Recovery Appellate Tribunal erred in finding that the Debts Recovery Tribunal had no jurisdiction to pass an order in the nature of Ext.P14 because the provisions of Section 19 (25) of the RDDBFI Act gives ample powers to the DRT to pass such orders so as to prevent abuse of its process and to secure the ends of justice. It is pointed out that the scope and ambit of the powers of the DRT have been enumerated in the following decisions:

Lalitkumar Jivabhai Thakkar v. SBI [AIR 2010 Guj. 4], Industrial C. and I. Corporation v. Grapco Industries [(1999) 4 SCC 710], Allahabad Bank v. Radha Krishna Maity [(1999) 6 SCC 755], Annai Jayabharathi v. Debt Recovery Tribunal [2005 (1) KLT 921], ICICI Bank v. DRAT, Chennai [AIR 2012 Mad. 111], Sarathy v. SBI [(2000) 5 SCC 355] and Nahar Industrial Enterprises v. HSBC [(2009) 8 SCC 646].

- While passing Ext.P14 order, the DRT had passed

a composite order disposing two interlocutory applications, namely, I.A.No.1267/2014 and I.A.No.1670/2014. While the 3rd respondent did not challenge the order in I.A.No.1670/2014, he had challenged Ext.P14 order only to the extent it disposed I.A.No.1267/2014. While the conduct of the 3rd respondent indicated that there was no bona fide on his part in pursuing the case, his conduct in not challenging the order in I.A.No.1670/2014 also prevented him from mounting a challenge against Ext.P14 order of the DRT on the principles of res judicata. Reliance is placed on the decisions reported in **Ajay Mohan v. H N Rai [(2008) 2 SCC 507]**, **Brij Narain Singh v. Adya Prasad [(2008) 11 SCC 558]**, **Ram Prakash v. Charan Kaur [(1997) 9 SCC 543]**, **Janardhanan Pillai v. Kochunarayani Amma [1976 KLT 279]**, **Raghavan Nambiar v. K.Sumathi Amma [1991 (1) KLJ 61]** and **Avira Joseph v. Varghese Mathai [2010 (3) KHC 564]**.

- Faced with an argument, at the time of hearing of the O.P(DRT), that the Appellate Tribunal was justified in setting aside Ext.P14 order of the DRT because, it was an order that the DRT could not have passed owing to the principles of indivisibility of the mortgage that ought to have informed the DRT while passing Ext.P14 order,

counsel for the petitioners would urge that the 3rd respondent had never argued the issue of partial redemption of mortgage before the DRT. The pleadings before the DRT reveal that the 3rd respondent was never opposed to a partial redemption, and his efforts were entirely to obtain a higher price for the item of property that was proposed to be redeemed. In that sense, therefore, the pleadings before the DRT as also the conduct of the 3rd respondent would lead one to infer that the 3rd respondent had consented to the divisibility of the mortgaged property and therefore he was prevented from raising such a contention on the principle of estoppel and constructive res judicata. Reliance is placed on the decisions reported in **Mathevan Sankaran v. Narayanan Narayanan [1993 (2) KLJ 1065]**, **Jai Narain Parasrampur v. Pushpa Devi Saraf [(2006) 7 SCC 756]**, **Deewan Singh v. Rajendra Prasad Ardevi [(2007) 10 SCC 528]**, **Vijayan v. Kamalakshmi Amma [(1994) 4 SCC 53]** and **Nawab Azimut Ali v. Jowahar Singh [(1870) 13 MIA 404]**.

8. Per contra, the submissions of Sri.Chandrasekharan, the learned counsel for the 3rd respondent, briefly stated, are as follows:

- Ext.P17 order of the Debt Recovery Appellate Tribunal, Chennai, is legally sustainable

inasmuch as it has correctly held that the DRT could not pass orders in the nature of Ext.P14 and had necessarily to decide the O.A. itself while passing a final order in respect of the loan amounts availed by the petitioners.

- He would place reliance on the decisions of this Court in **Huthasanan Nambudri v. Parameswaran Nambudri and Others [1899 ILR 22 Madras 209, Jagmittar Sain Bhagat and Others v. Director, Health Services, Haryana and Others [(2013) 10 SCC 136] and Union of India and Another v. Association of Unified Telecom Service Providers of India and Others [(2011) 10 SCC 543]** to contend that going by the principle of indivisibility of a mortgage, it was not open to the petitioners to seek a redemption of one of the mortgaged properties, to the exclusion of the other properties that were enumerated in the schedule to the O.A. He would further submit that the alleged consent given by the 3rd respondent, to redeem item No.12 property of the schedule to the O.A., was a conditional one subject to realisation of a particular value for the same. Inasmuch as the said value was not realised, it could not be said that there was a consent by a co-mortgagor for the redemption of an item of mortgaged property by another

co-mortgagor. It is his contention, therefore, that the principles of estoppel and res judicata will not apply to the facts of the instant case.

- It is contended that, after invoking the provisions of Section 13 of the SARFAESI Act, it was not open to the 1st respondent bank to release a portion of the mortgaged property to a particular mortgagor, without receiving the entire amount that was due to the respondent bank from all the mortgagors. The respondent bank had necessarily to sell the properties, that were mortgaged to it by the borrowers and mortgagors, for realisation of the loan amounts from the said persons. It is also contended that based on the amended provision of Section 19, the respondent bank had also to seek the permission of the DRT to withdraw the O.A. and, as this had not been done, it was not open to the respondent bank to permit a release of one of the mortgaged properties during the pendency of the O.A.

9. On a consideration of the submissions of counsel on either side, I find that the following issues arise for consideration in the instant case:

- (i) Whether the principle of indivisibility of a

mortgage transaction would apply to the facts and circumstances of the instant case, so as to render the decision of the DRT legally unsustainable?

(ii) Whether the impugned order of the DRAT, Chennai is legally sustainable?

Issue (i):

The facts in the O.P.(DRT) would reveal that, on an application preferred by the petitioners, who were mortgagors of one of the items of property that was offered as security for the loans advanced by the respondent bank to the 2nd respondent company, the respondent bank had agreed to release the said item of property from the mortgage, in effect, permitting a partial redemption of the mortgaged properties. The DRT had passed Ext.P14 order, based on the consent given by the 1st respondent bank, to the partial redemption of the property that was listed as Item No.12 in the Schedule to the O.A. filed by the bank before the DRT. An issue that is raised by the 3rd respondent herein, while defending Ext.P17 order of the DRAT, Chennai, is that on account of the principle of indivisibility of mortgage transactions, it was not open to the DRT to permit the petitioners to redeem one of the items of mortgaged properties alone, based on the consent of the

1st respondent bank. It is necessary, therefore, to examine the legal position with regard to partial redemption of mortgages, and the circumstances, if any, under which it is permitted under the law.

10. On a consideration of the provisions of the Transfer of Property Act, in particular Section 60 thereof, the decisions of the Privy Council in **Mirza Yadalli Beg v. Tukaram and another [AIR 1921 PC 125]** and **Shah Ram Chand v. Pandit Parbhu Dayal and others [AIR (29) 1942 PC 50]**, and the decisions of this Court in **Frenchikkose Thommi and others v. Chacko Devasia and others [AIR 1963 Kerala 75]** and **Mathevan Sankaran v. Narayanan Narayanan and others [1993 (2) KLJ 1065]**, the general principles that can be culled out are that, the owner of the equity of redemption of one of two estates, comprised in a single mortgage, cannot insist on redeeming that estate separately. He cannot also be compelled to redeem it separately, as his right is essentially to redeem the whole, subject to the equities of the other persons interested. It is also apparent that the character of indivisibility of a mortgage exists, not only with reference to the mortgagee, but also with reference to the mortgagor. If a mortgagor transfers his rights over a mortgaged property, the transferee of a portion of the equity of redemption is entitled to redeem the mortgage in its entirety, subject only to the

safeguarding of the equal title to redeem of any other person who has a right of redemption. As a corollary, he cannot compel the mortgagee to allow him to redeem his part by itself. Section 60 of the Transfer of Property Act does not state that one of several mortgagors cannot redeem more than his share, unless the owners of the other shares consent or do not object. It only states that one of several mortgagors cannot insist on the mortgagee permitting him to redeem his share alone, on payment of a proportionate part of the amount remaining due on the mortgage, except in situations where the mortgagee(s) have acquired, in whole or in part, the share of a mortgagor.

11. Distinct and different from the above situations, is a case where the mortgagors and the mortgagees agree to the splitting up of a mortgage transaction and, consequently, to a partial redemption of mortgaged properties. In such cases, Section 60 of the Transfer of Property Act does not get attracted, as it is a case where the parties to a mortgage, which is a contractual transaction, agree to alter the terms of the contract. Thus, although the principle of indivisibility of a mortgage exists for the benefit of mortgagees and mortgagors, if all the parties interested in the mortgage, ie. all the mortgagors and mortgagees, consent to alter the indivisible character of the mortgage, the principle of indivisibility cannot be seen as a bar

against partial redemption. If there is consent among the mortgagors and the mortgagees to alter the indivisible character of the mortgage, it will not be a defence, thereafter, to say that the mortgage is indivisible. The rule of indivisibility of a mortgage can be altered by an agreement entered into by all the mortgagors and the mortgagees together and such an agreement or bargain can either be express or implied.

12. On a consideration of the pleadings before the DRT, in the instant case, it is seen that while the petitioners, as mortgagors of Item No.12 property, and the 1st respondent bank as mortgagee of the said property, were agreeable to a redemption by the petitioners of the said item of property, none of the other co-mortgagors of property, save the 3rd respondent herein, had any objection to the bank permitting the petitioners herein to redeem the said item of property alone. Further, even the 3rd respondent was not opposed to the petitioner's redeeming the said item of property, as the pleadings would show that his objection was only with regard to the value fixed for redemption of the said property. To that extent, therefore, it could be inferred that there was an implied agreement on his part to the redemption of the said item of property. Consequently, he cannot now turn around and contend that he never agreed to a partial redemption

of the property in question. The principles of estoppel and constructive res judicata would prevent him from raising such a contention at this belated stage of the proceedings. Thus, inasmuch as Ext.P14 order of the DRT was passed based on the consent of co-mortgagors and the mortgagee, the principle of indivisibility of mortgage transactions was not attracted in the instant case, and consequently, Ext.P14 order cannot be seen as vitiated on that ground.

13. There is yet another aspect of the matter. Ext.P14 order of the DRT, that was impugned by the 3rd respondent in the appeal preferred before the DRAT, Chennai was a composite order passed in two applications viz. I.A.No.1267/2014 filed by the petitioners herein and I.A.No.1670/2014 filed by the 3rd respondent. In the appeal filed by him, the 3rd respondent impugned only the order passed in I.A.No. 1267/2014. The common issue in both the I.A's involved the valuation of Item No.12 property that was sought to be redeemed by the petitioners herein. The decision in **Ram Prakash v. Charan Kaur [(1997) 9 SCC 543]** is authority for the proposition that, when the same issue is directly in issue in a composite order, and only part of the order is challenged, the appeal so filed is barred by res judicata on account of the non-filing of the appeal against the unchallenged

part of the composite order. The principle was recently reiterated by the Supreme Court in **Sri Gangai Vinayagar Temple and Another v. Meenakshi Ammal and Others [(2015) 3 SCC 624]**, where at paragraph 27, it was stated as follows:

27. Procedural norms, technicalities and processual law evolve after years of empirical experience, and to ignore them or give them short shrift inevitably defeats justice. Where a common judgment has been delivered in cases in which consolidation orders have specifically been passed, we think it irresistible that the filing of a single appeal leads to the entire dispute becoming sub judice once again. Consolidation orders are passed by virtue of the bestowal of inherent powers on the courts by Section 151 CPC, as clarified by this Court in *Chitivalasa Jute Mills v. Jaypee Rewa Cement* [(2004) 3 SCC 85]. In the instance of suits in which common issues have been framed and a common trial has been conducted, the losing party must file appeals in respect of all adverse decrees founded even on partially adverse or contrary speaking judgments. While so opining we do not intend to whittle down the principle that the appeals are not expected to be filed against every inconvenient or disagreeable or unpropitious or unfavourable finding or observation contained in a judgment, but that this can be done by way of cross objections if the occasion arises. The decree not assailed thereupon metamorphoses into the character of a "former suit". If this is not to be so viewed, it would be possible to set at naught a decree passed in Suit A by only challenging the decree in Suit B. Law considers it an anathema to allow a party to achieve a result indirectly when it has deliberately or negligently failed to directly initiate proceedings towards this purpose. Laws of procedure have picturesquely been referred to as handmaidens to justice, but this does not mean that they can be wantonly ignored because, if so done, a miscarriage of justice inevitably and inexorably ensues. The statutory law and the processual law are two sides of the judicial drachma, each being the obverse of

the other.

Thus, the DRAT, Chennai could not have passed Ext.P17 order in the appeal filed by the 3rd respondent.

Issue (ii):

In Ext.P17 order of the DRAT that is impugned in the O.P.(DRT), the Appellate tribunal finds that the DRT had no jurisdiction to pass Ext.P14 order inasmuch as the order was passed in excess of the jurisdiction conferred on the Presiding officer under Section 19 of the RDDBFI Act. The appellate tribunal finds that, in an O.A filed by the bank, the presiding officer of the DRT was only to determine the debt and then leave it to the recovery officer to recover the money found due, in accordance with Section 25 of the said Act. Counsel for the petitioner would vehemently contend, and in my view rightly so, that the DRT was well within its powers to pass Ext.P14 order permitting a partial redemption of Item 12 property. Section 19 (25) of the RDDBFI Act confers powers on the DRT to “make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice”. While there are a plethora of judgments that recognise the legal position that the powers of the DRT under the RDDBFI Act are wider than that of the civil court (**See: Industrial C. and I. Corporation v.**

Grapco Industries [(1999) 4 SCC 710]; ICICI Bank v. DRAT, Chennai [AIR 2012 Mad 111], I note that a division bench of the Gujarat High Court in **Lalitkumar Jivabhai Thakkar v. SBI [AIR 2010 Guj. 4]** interpreted the expression “ends of justice” used in Section 19 (25) of the RDDBFI Act as meaning:

“Not only justice to the parties but also to witnesses and others which may be inconvenienced. Tribunal is empowered to make such orders and give such directions, as may be necessary or expedient to give effect to the orders lawfully passed. Tribunal is also empowered to make such orders and issue such directions so as to secure the ends of justice. Tribunal is also empowered to make such orders and issue such directions so that the process of the tribunal be not abused.”

14. In the light of the said interpretation with regard to its powers under the RDDBFI Act, Ext.P14 order of the DRT, that permitted the petitioners to redeem Item 12 property, which was a Tarwad property of sentimental value to the petitioners, by paying an amount of Rs.4,90,00,000/- to the respondent bank, based on independent and reliable valuation reports obtained by the DRT, and after taking note of the consent given by the co-mortgagors and the mortgagee bank, cannot be seen as one that the DRT did not have jurisdiction to pass. The findings of the appellate tribunal, to the contrary, are liable to be set aside and I do so.

Resultantly, I allow the O.P.(DRT) by setting aside Ext.P17 order of the DRAT, Chennai and restoring Ext.P14 order of the DRT, Ernakulam. Parties are directed to bear their own costs.

A.K.JAYASANKARAN NAMBIAR
JUDGE

prp