IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.12.2017

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MR.JUSTICE R.PONGIAPPAN

W.P.No.31874 of 2017
and
W.M.P.No.35024 of 2014

V.N.Ashok Kumar ... Petitioner

vs.

1.The Authorised Officer,
Tata Capital Housing Finance Limited,
No.82/1, Ground Floor,
Krishna Tower, Richmond Road,
Bangalore - 560 025.

2.S.Adisesha Shetty

3.B.A.Sridhar ... Respondents

WRIT Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certioairfied Mandamus, calling for the records pertaining to the records of impugned proceedings dated 21.11.2017 passed in A.I.R.No.700/2017 in S.A.No.204/2017 on the file of Debt Recovery Appellate Tribunal, Chennai and quash the same, consequently, direct the registry of Debt Recovery Appellate Tribunal, Chennai to number the appeal.

For Petitioner : Mr.G.M.Ananthakumar

ORDER



(Order of the Court was made by S.MANIKUMAR, J)

Respondents 2 and 3 have borrowed a sum of Rs.2,50,00,000/- for business purposes and executed a memorandum of deposit of title deed dated 29.03.2016, in favour of Tata Finance Housing Loans Limited, Bangalore/first respondent, registered as Document No.5336/2016 on the file the Sub Registrar Office, Hosur.

2. According to the petitioner, respondents 2 and 3 are not in a position to pay monthly instalment of Rs.3,04,075/- every month. Hence, they proposed to sell the mortgaged property to the petitioner. Sale consideration was fixed as Rs.2,60,00,000/-.

3. Writ petitioner has made an advance of Rs.5,00,000/- and entered into an agreement of sale dated 02.06.2016 with respondents 2 and 3, and that the said document has been registered as Document No.9208/2016 on the file of the Sub Registrar, Hosur.

4. According to the petitioner, the proposal for sale of the property had taken place with the knowledge of the first respondent/Tata Capital Housing Finance Limited, Bangalore. Sum of Rs.2 crores has been sanctioned as loan by first respondent/Tata Capital Housing Finance Limited, Bangalore, vide sanction letter dated 29.07.2016. In the mean while, the second respondent/S.Adisesha Shetty, was missing on 13.07.2016 and a complaint has been registered in Crime No.290/2016, as man missing, on the file of the Inspector of Police, Bagalur Police Station, Bagalur.

5.Petitioner has further contended that, he had made payment of Rs.15,20,375/- being the monthly instalment from July 2016 to November 2016 and a further payment of sum of Rs.5,00,000/- to borrower, totalling to Rs.20,20,375/- out of total sale consideration of Rs.2,60,00,000/-.

6. Tata Capital Housing Finance Limited, Bangalore, has classified the account as non-performing asset and issued a call notice dated 16.03.2017 under Section 13(2) of the SARFAEST Act, 2002. Thereafter, Tata Capital Housing Finance Limited, Bangalore, has issued a notice dated 13.06.2017 under Section 13 (4) of the SARFAEST Act, 2002. Challenging the possession notice, petitioner has filed an appeal in S.A.No.204 of 2017, before the Debts Recovery Tribunal - III, Chennai. Vide proceedings dated 04.09.2017, stay of possession, sought for in S.I.A.No.1013 of 2017, has been dismissed by the Debts Recovery Tribunal - III, Chennai. Thereafter, on 04.10.2017, Debts Recovery Tribunal -III has dismissed S.A.No.204 of 2017.



7. According to the petitioner, he has paid a sum of Rs.2,39,79,625/- to the first respondent/Tata Capital Housing Finance Limited, Bangalore, but the Tribunal erred in dismissing the S.A.No.204/2017. Being aggrieved, petitioner has filed A.I.R.(SA) No.700/2017, before the Debts Recovery Appellate Tribunal, Chennai. Registry has required the petitioner to pay proper Court fee on par with that of the borrower.

8. Petitioner has contended that he is not a borrower and therefore, there is no need to pay Court fee under Rule 13 (2) (1) (a) & (b) of SARFAESI Rules. Rejecting the submission of the petitioner, Debts Recovery Appellate Tribunal, Chennai, vide proceedings dated 21.11.2017 in A.I.R. (SA)No.700 of 2017, has ordered as hereunder:

> "Learned Counsel Mr.R.Baskar for Appellant present.
>
> Appellant Counsel prays to ignore the Office objections, because he is a third party. Counsel placed reliance on the Judgment of Madras High Court dated 02.02.2016 in A.L.Shah Vs. The Authorised Officer, in which it has been directed that third parties are not liable for Court fees making at part with the borrowers and are not bound to file Demand Notice also.
>
> Prima facie, it appears that Appellant and borrower entered into an agreement for purchase and for all purposes, he has replaced the borrower and has stepped in the shoes of the borrowr. Hence, he is directed to pay deficit Court fees and also to produce copy of the notice as pointed out by the Registry.
>
> List for compliance of objections on 08.12.2017."

9. The above said proceedings is assailed in the instant writ petition on the grounds that the petitioner is neither a borrower nor a guarantor and that therefore, he is not required to pay Court fee under Section 13(2)(1)(a) & (d) of SARFAESI Rules. On the other hand, it is suffice to pay Court fee under 13 (2) (1) (c) & (d) of SARFAESI Rules. Reliance is also made on a decision of aHon'ble Division Bench of this Court in A.L.Shah Vs. The Authorised Officer, State Bank of Hyderabad in C.R.P.Nos.1728 to 1730 of 2015.

10. Heard the learned counsel for the petitioner and perused the materials available on record.

11. Admittedly, respondents 2 and 3 have borrowed a sum of Rs.2,50,00,000/- from Tata Capital Housing Finance Limited, Bangalore/first respondent and mortgaged the subject property, with the above said finance company and executed a memorandum of deposit of title deed dated 29.03.2016, to and in favour of the first respondent/Tata Capital Housing Finance Limited., Bangalore and registered as Document No.5336 of 2016 on the file of the Sub Registrar Office, Hosur. Thereafter, they have not discharged the loan.

12. After the mortgage, petitioner is stated to have

entered into a sale agreement with S.Adisesha Shetty and B.A.Sridhar, respondents 2 and 3 respectively, on 02.06.2016 registered as Document No.9208/2016 on the file of the Sub Registrar Office, Hosur.

13. Subject property, mortgaged with Tata Capital Housing Finance Limited, Bangalore, which the petitioner intended to purchase is as hereunder:-

"SCHEDULE OF PROPERTIES"

"IN HOSUR TOWN AND TALUK, attached to HOSUR Sub Registration District and Krishnagiri Registration District of Krishnagiri District.

All That piece of land situated in Survey No.752/2 Part of Hosur Village (Avalapali Hudco) marked as "PLOT No.C-1, Commercial Plot in the Sanction Plan of Phase-VI, Hosur NHS, Hosur and measuring and thereabouts bounded as follows:-

East : Dhakshnamurthy's Land
West : Land belongs to S.Adisesha Shetty
North : Hosur to Bagalur Highways Road (NH-207)
South : Sy No.772/1, belongs to B.A.Sridhar

WITHIN THESE BOUNDARIES MEASURING:-
East to West on North Side : 40 Feet
East to West on South Side : 42 Feet
North to South on East Side : 60 Feet
North to South on West Side : 45.75 Feet
Making a Total Area of 2,168 Square Feet of Vacant land."

14. Petitioner and his wife, seemed to have approached, Tata Capital Finance Housing Limited, for the purchase of the said property and from the material on record, it could be deduced that said finance limited, vide letter dated 29.07.2016, has sanctioned a sum of Rs.2 crores, as loan for purchase of property at S.No.752/2 now forming part of TOWN SURVEY NUMBER 1 (T.S.No.1) in Ward - D, BLOCK 3. Details of the sanction are extracted here under:-

"HOME EQUITY SANCTION LETTER

To, Date:29-07-2016
Dear Mrs.Vimala V A & Mr.Ashok Kumar V N.
No.9/13 Jaaper Street, Hosur, Krishnagiri, Hosur-635109
Mob No: 7708991080.

Dear Sir/Madam

Subject: Your Home Equity Loan Application No 2016175709416 Dated - 25/07/2016.

We are pleased to inform you that based on your above mentioned application to Tata Capital Housing Finance Limited (hereinafter referred to as the "Company") under its Home Loan program, has in principle sanctioned the loan on the terms and conditions mentioned hereafter and printed overleaf against the following property/ies

Description of the Property:
S.F.No.752/2 Part, T.S.F.No.1, Ward No.D, Block No.3, Plot No.C-1, TNHB, Avalapalli Hudco, Phase VI, Rajeswari Nagar, Bagalur Road.

The salient features of financial covenants of loan are as under:

| Total Amount Santioned | Credit Life Insurance | Rate of Interest | Current TCHFL RPLR | Spread over TCHFLRPLR | Tenor | Monthly Installment (MI) | Processing Fee |
|---|---|---|---|---|---|---|---|
| Rs.2,00,00,000/- | - | 12.50% (Variable) | 16.50 % | -4.00% | 120 Months | Rs.292752/- | Rs.2,30,000/- (Inclusive of Service Tax) |

*Retail Prime Lending Rate - RPLR is the rate of interest announced by TCHFL from time to time as its retail prime lending rate and shall govern the Rate of Interest for your loan contract from time to time.

**In case you have opted for Fixed Rate of Interest, the rate of Interest shall be fixed for the period mentioned herein-above and upon expiry of the period of Fixed Rate of Interest, the Loan shall attract floating (Adjustable) Rate of Interest based on the then prevailing TCHFLRPLR. Such floating rate of interest shall vary in accordance with the TCHFLRPLR announced by the Company from time to time as its retail prime lending rate plus/minus the spread prevailing at the time of sanction.

Special Conditions:

1.Title deeds of the property/ies in original as per the legal report shall be submitted prior to disbursement.
2. If the property is jointly owned by more than one person then all owners of the property shall be co-applicants to the loan.

3. Loan shall not be used for any other purpose except the purpose as represented in the application form.
4. Subject to Legal Clearance.
5. Repayment from Current Account/OD Account
6. Subject to Debup & RCU report.
7. TCHFL Employee Residence & office Visit report to be documented.
8. Seller KYC & Bank statement proof, OCR proof, sale agreement to be stamped as per law and Draft, sale deed to be submitted prior to disbursement.
9. Subject to Shriram City Union Finance Ltd - Rs.50,00,000/-, Bajaji Fin - Rs.13,83,000/-, Kotak Mahindra Prime Ltd - Rs.12,00,000 and Rs.3,59,775/- Loan to be closed before disbursement.
10. Subject to RCU profile Check.
11. CA certified Net-worth statement of Mrs.V.A.Vimala and Mr.V N Ashok Kumar
12. Magazine license of M/s VNA traders required prior to disbursement.
13. Subject to RMOE to be executed.

The sanction shall stand revoked and cancelled if:

1. There is any material adverse change in the opinion of the Company on the basis of which the loan has, in principle been sanctioned.

2. Any material fact concerning your income, employment or ability to repay, or any other relevant as pect of your proposal for the loan is suppressed, concealed or not made known to us.

3. Any statement made in the application or otherwise is found to be misleading, incorrect or untrue.

4. Unsatisfactory track record in respect of any other finance facility availed by the applicant/s.

This sanction is valid for 3 months from the date of this letter unless waived by the company at its sole discretion.

Yours truly,

For Tata Capital Housing Finance Limited

Authorized Signatory



Terms and Conditions:

1.The applicant create an Equitable Mortgage**/Registered Mortgage of the property as may be stipulated by the Company at its discretion and the applicant/mortgagor shall be responsible and liable to register / intimate such Equitable Mortgage with the concerned officer of sub-registrar of assurances, if required.

2.The Terms and Conditions are subject to change without prior notice and at the sole discretion of the Company.

3. Notwithstanding anything stated elsewhere in this letter or otherwise, the facilities mentioned overleaf will be available solely at Company discretion and subject to compliance of all formalities and documentation as may be specified/required by the Company. The continuance of the facilities is subject to cancellation and/ or repayment of the Company on demand without assigning any reasons for the same.

4. Part pre-payment and Foreclosure Charges will be applicable as per below details:

| | | FORECLOSURE* | | PARTIAL PREPAYMENT CHARGES |
|---|---|---|---|---|
| RATE DESCRIPTION | PARTY TO THE AGREEMENT | CLOSURE BY OWN FUNDS | CLOSURE BY BALANCE TFR | CLOSURE BY OWN FUNDS |
| FLOATING RATE SCHEME | ALL INDIVIDUAL | NO CHARGES | NO CHARGES | NO CHARGES |
| | NON INDIVIDUAL AS A PARTY TO THE AGREEMENT | 4%+TAXES | 4%+TAXES | 4% ON PREPAID AMOUNT OVER 25% OF PRINCIPAL O/S |
| FIXED RATE SCHEMES | INDIVIDUALS/ NON INDIVIDUALS | 4%+TAXES | 4%+TAXES | 4% ON PREPAID AMOUNT OVER 25% OF PRICIPAL O/S |

*Foreclosure Charges will be levied on the Principal Outstanding and all part payments, if any, made within immediate preceding 12 months of such foreclosure
*In case of Semi-Fixed Loans (fixed rate for initial period and then floating), the foreclosure and Pre-payment norms for floating rate loans would be applicable on loan being converted into floating rate

5. The rate of interest applicable to the facilities shall be as prevailing on the date/s of disbursement(s). The Company shall

review and, it considered necessary, revise the Rate of Interest at any time and from time to time as per its policy, market conditions, TCHFLRPLR and/or applicable laws and regulations, if any during the tenor of the loan at its sole discretion. The spread over TCHFLRPLR would be constant throughout the loan tenure, unless the risk profile of the customer deteriorates.

6.In case of any revision in rates as mentioned in above clause, EMI amount and/or tenure of repayment may be varied.

7. Other charges applicable to the loan
a) Commitment Fee - 1% per annum on the undisbursed amount
b) Processing Fee- Up to 1.00% of the sanctioned amount + service tax
c) Additional Interest - @ 2% per month on the overdue amount for the defaulted period
d) Cheque dishonour Charges - Rs.700/- per dishonour per cheque
e) Loan cancellation charges Rs.25,000/- plus service tax
f) Charge for issue of duplicate copy of agreement - Rs.200/- per copy of agreement
g) Charge for issue of statement of account - Rs.100/- per statement
h) Other Charges incurred by the Company - Actual charges incurred by the Company
i) CERSAI Charges: All applicable charges as stipulated by CERSAI and as may be set out in the loan agreement to be executed
j) Loan will be auto cancelled if cheque is not availed by customer within 30 working days from date of disbursement with all charges pertaining to auto cancellation waived.
k) Any Other Charges will be applicable as per MOST IMPORTANT TERMS AND CONDITIONS (MITC) to be signed by the applicant

8. The due date for the payment of MI shall depend on date of disbursement of loan. Accordingly the applicant shall be liable to make payment of interest for broken period and the same will be communicated at the time of disbursement.

9.The applicant shall immediately intimate the Company in the event of any change in his repayment capacity. Without limitation; this shall include a loss/change in job/profession etc. as also any change in any information stated in the application.

10.The applicant will have to insure the property for the reconstruction value of the property and assign the same in favor of the Company.

11.The applicant shall mention their application number for any service related queries.

12.Please note that the payment of non refundable processing fee is a prerequisite for the loan to be sanctioned.

13.The Term Applicant shall also include Co Applicant wherever appropriate, except where the context implies otherwise and ll references to Company, shall mean Tata Capital Housing Finance Limited, unless the context implies otherwise.

14.Acceptance of this letter is a confirmation that, the applicant has read and understood the contents as mentioned aforesaid and it also confirms that the applicant has has not been promised any free gifts/discounts or any other commitment whatsoever which is not the documented in the loan agreement with the Company. It is further confirmed that no cash/bearer cheque has been collected from the applicant with respect to the loan. This sanction letter is subject to the legal, financial, technical and other due diligence of the Applicant, Co-Applicants and the property to the satisfaction of TCHFL. The Applicant and Co-applicants shall make available all necessary and material information and extend full cooperation to lawyers and other advisors of TCHFL for undertaking the due diligence. In addition to the above, the sanction is also subjet to the standard terms and conditions, according to the company rules / policies as applicable from time to time. All statutory levies or taxes applicable from time to time will have to be borne by the applicant.

This letter of sanction does not create any binding obligations on us to disburse funds till the execution of appropriate loan and security documents and till such time same may be cancelled without any prior notice. In case you require any further clarifications or information regarding the loan account or any of out other services are required please feel free to contact Tata Capital Housing Finance Limited at 18002096060.

ACCEPTED

Primary Applicant: Mrs.Vimala V A
Signature---------------
Co-Applicant: Mr.Ashok Kumar V N
Signature---------------"



15. Petitioner has also entered into a memorandum of understanding agreement dated 07.08.2016, with the sons, daughter and wife of the Aadhishesa Shetty, the borrower. Details of which are extracted here under:

MEMORANDUM OF UNDERSTANDING CUM AGREEMENT

THIS MEMORANDUM OF UNDERSTANDING CUM AGREEMENT IS MADE AND EXECUTED AT HOSUR ON THIS 17th DAY

OF AUGUST 2016.

" BETWEEN"

1.Mr.. B.A. SRIDHAR, S/o.S.Adisesha Setty, Hindu, aged about 33 years,
2.Mr.A.Balaji, S/o.S.Adisesha Setty, Hindu, aged about 29 years,
3.Mrs.A.Lakshmi, D/o.S.Adisesha Setty, Hindu, aged about 31 years,
4.Mrs.Santhamma, W/o.S.Adisesha Setty, Hindu, aged about 50 years,

All are residing at No.2/138, Malur Main Road, Bagalur Village and Post, Hosur Taluk, Krishnagiri District.

(Hereinafter jointly referred to as "THE FIRST PARTY")

Mr. V.N.ASHOK KUMAR, S/o,Late,V.B.Nanjunda Setty, aged about 54 years, residing at No.13/A, Janapar Street, Bagalur Road, Hosur Town & Taluk, Krishnagiri District.

(Hereinafter referred to as "THE SECONDPARTY")

Whereas, the party Nos.1 & 2 are the sons and Party No.3 is the daughter and Party No.4 is wife of one S.Adisesha Setty of the first party. The party No.1 of the first party along with his father S.Adisesha Setty have jointly purchased a vacant site in the schedule mentioned property, under a registered Sale Deed dated 12.09.2011, registered as Document No.12877/2011, registered before the Office of the Sub Registrar, Hosur. The said registered sale deed is also rectified for some rectification of the survey number under a registered Rectification Deed dated 30.01.2012, registered as Document No.1749/2012, registered before the Office of the Sub Registrar, Hosur. The party No.1 of the first party and his father are in joint possession and enjoyment of the schedule mentioned property eversince from the date of the said registered sale deed and rectification deed in their favour.

Whereas, the party No.1 of the first party and his father S.Adisesha Setty have, jointly constructed an RCC Roofed building and also ACC sheet building on the entire vacant land and the same is also assessed for municipality tax. The buildings are also electrified and the TNEB has also given service connection to the said building under the schedule mentioned property.

Whereas, the party No.1 of the first

party and his father S.Adisesha Setty have availed a mortgage loan on the schedule mentioned property amounting to Rs.2,50,OO,OOO/- (Rupees Two Crores Fifty Lakhs Only) before TATA Capital Housing Finance Ltd., and executed a Memorandum of the Deposit of the Title Deeds dated 29.03.2016, registered as Document No.5336/2016, registered before the Office of the Sub Registrar, Hosur. The party No.1 of the first party and his father S.Adisesha Setty were also paying a monthly installment of Rs.3,04;075/- to the said TATA Capital Housing Finance Ltd., as per the terms of the Memorandum of Deposit of Title Deeds and other connected loan documents.

Whereas, the party No.1 of the first party and his father S.Adisesha Setty have decided to sell and dispose of the schedule mentioned property due to their financial crisis and also to clear the entire loan dues before the TATA capital housing finance ltd., and offered the same to the second party. The second party has also agreed to purchase the schedule mentioned property with a condition that the loan before the TATA capital housing finance Itd has to be cleared by the party No.1 of the first party and his father S.Adisesha Setty. The party No.1 of the first party and his father were in dire necessity of the funds to meet their day to day expenses and also due to their financial commitments wanted to enter into a registered sale agreement with the second party. The second party . has also agreed to enter into a registered sale agreement by mentioning the details of the loan taken by the party No.1 of the first party and his father S.Adisesha Setty.

Whereas, the party No.1 of the first party and his father S.Adisesha Setty have finally concluded the sale transaction and they have agreed to sell the schedule mentioned property for a total, valid and binding sale consideration amount of Rs.2,60,00,000/- to the second party before the common witnesses.
Accordingly, the party No.1 of the first party and his father have jointly received an initial advance amount of Rs.5,OO,OOO/-by way of cash out of the total sale consideration amount of Rs.2,60,OO,OOO/-and executed a registered sale agreement dated 02.06.2016, registered as Document No.9208/2016, registered before the

Office of the Sub Registrar, Hosur. It is very specifically mentioned that the Vendors under the sale agreement have taken a loan in TATA Capital Housing Finance Ltd., and the purchaser has agreed to pay the loan amount to the TATA Capital Housing Finance Ltd., pertaining to the loan account No.9582057 of party No.1 of the first party and his father S.Adisesha Setty..

Whereas, the second party on the basis of the registered sale agreement has applied. for the loan before the same TATA Capital Housing Finance Ltd., along with his wife showing other his business ventures. That the said loan was under the process of sanction and the TATA Capital Housing Finance Ltd., has also agreed to adjust the sanctioned loan amount against loan account of party No.1 of the first party and his father S.Adisesha Setty.

Whereas, while things are being so, the said S.Adisesha Setty father of party Nos.1 to 3 and husband of party No.4 of the first party seems to have missing from 13.07.2016 and the party No.2 of the first party has also lodged a police complaint before the Bagalur Police Station and the police have also registered FIR under F.I.R.No.290/2016, dated 13.07.2016.

Whereas, the second party has received a communication from TATA Capital Housing Finance Ltd., that his loan application No.2016175709416 is being processed and a loan amount of Rs.2,00,00,000/- is being sanctioned through its communication dated 29.07.2016.
Subsequently, the second party met the first party showing his willingness and readiness to perform his part of the contract as per the registered sale agreement dated 02.06.2016. The first party have jointly expressed their inability to perform their part of the contract as agreed upon under the sale agreement as the said Adisesha Setty is missing and a man missing case is registered before the Bagalur Police Station as stated above.

Whereas, the first party have also jointly requested the second party to make the equated monthly installment to the TATA Capital Housing Finance Ltd., and the second party as per the request of the first party has also paid a monthly installment to the said TATA Capital Housing Finance Ltd., since the said Adisesha

Setty is not to be traced as on date by the family members of the first party and also the Bagaiur Police, the first party have agreed to allow the second party to make the EMl's to the said TATA Capital Housing Finance Ltd., as agreed upon under the registered sale agreement. Therefore the first party have requested the second party to make the EMI payments to the said TATA Capital Housing Finance Ltd., towards and out of the balance of sale consideration under the valid registered sale agreement dated 02.06.2016 and they have agreed to perform the terms of the sale agreement once the said Adisesha Setty is being traced or even after the conclusive decision on his man missing case.

Whereas, the second party is ready and willing to take the sale deed with ready funds and arrangement in his bank account and also loan sanctioned by the said TATA Capital Housing Finance Ltd., as per the terms of the sale agreement. The TATA Capital Housing Finance Ltd., has also sanctioned the loan to the second party on the basis of the registered sale agreement executed by the party No.1 of the first party along with this father S.Adisesha Setty and the original sale agreement is also deposited to the said TATA Capital Housing Finance Ltd., as per its demand and request.

Whereas, the first party have no other option but to request the second party to make the EMI payments to the said TATA Capital Housing Finance Ltd., and they have also voluntarily and unconditionally delivered possession of the schedule mentioned property to the second party in consideration of the registered sale agreement and also continuous payments of EMI to the said TATA Capital Housing Finance Ltd., The first party have also agreed to extend the time fixed under the registered sale agreement till the date of conclusive legal decision on the man missing case registered under Bagalur Police Station regarding missing of the said Mr.S.Adisesha Setty. The first party have jointly and voluntarily agreed to execute regular registered sale deed as per the terms of the registered valid sale agreement without any other preconditions in favour of the second party or his nominees, legal heirs etc., after the conclusive legal decision on the man missing case without resorting to any legal issues as the second party is paying EMl's to the said TATA Capital Housing Finance Ltd., The second party has also voluntarily and unconditionally agreed to pay the EMI's to the TATA Capital Housing Finance Ltd without any default till the conclusion of the transaction legally and lawfully and the first party have also agreed to abide by the same under the following mutually agreed terms and conditions.

NOW THIS MEMORANDUM OF UNDERSTANDING CUM AGREEMENT WITNESSETH AS FOLLOWS:-

1. The first party have jointly states and confirms that they shall voluntarily and unconditionally agreed for the arrangement of paying the Equated Monthly Installments under the Loan Account No.9582057 by the second party on behalf of the first party to the said TATA Capital Housing Finance Ltd.,

2. The second party in pursuance of the said registered sale agreement and as per its terms and conditions, though he is ready and willing to take the registered sale deed has agreed to make the monthly installments to the said TATA Capital Housing Finance Ltd., as per the request of the first party.

3. The first party have unconditionally agreed to execute necessary registered sale deed on conclusive legal decision on the man missing of the said S.Adisesha Setty.

4. The first party have delivered actual, physical possession and enjoyment of the 'schedule mentioned property to the second party today itself and they have handed over the original keys of the schedule mentioned premises.

5. The second party is at liberty to receive all the fruits and proceeds of the schedule mentioned property henceforth without any hindrance from the first party or any persons claimed under them or the said S.Adisesha Setty.

6. The second party is also at liberty to make all the improvements, developments to the schedule mentioned property without any reference to the first party being a fiduciary owner of the said property under the valid registered sale agreement.

7. The second party is at liberty to pay all the taxes to the concerned departments, Hosur Municipality, TNEB bills and maintain the

records on behalf of the first party and the the said S.Adisesha Setty. The registered deposit of title deeds and also the sale agreement contains only the vacant land but on ground the existing RCC and ACC buildings are constructed on the schedule mentioned properties.

8. The first party have voluntarily extended the time fixed under the registered sale agreement dated 02.06.2016, registered as Document No.9208/2016 till the conclusive legal decision on the man missing case of the said S.Adisesha Setty and the said registered sale agreement shall be enforced and executed before the court of law incase of failure on the part of the first party to perform even after the conclusive decision on the said man missing case of the said S.Adisesha Setty. The second party is supported by the registered sale agreement, payment of EMl's, payment of tax, payment of TNEB..Bills and also actual, physical possession and enjoyment of the schedule mentioned property and the first party shall not make any dispute in future at any rate and at any point of time.

9. The first party and second party are jointly binding under this Memorandum of Understanding cum Agreement to perform their duties and responsibilities and they shall not refuse to perform at any cost.

10. The first party and second party have agreed that the terms and conditions shall be binding not only between the parties to this Memorandum of Understanding cum Agreement but also against the nominees, successors in assigns, their legal heirs and legal representatives, in case of death of any of the parties.

11.This Memorandum of Understanding cum Agreement may be executed before the competent courts of law. This MOU need not be registered at the instance of the parties and the parties have agreed to notarize this indenture before the Notary public, Hosur.

12. In case of any disputes, it shall be referred to a common arbitrator/panchayatdar, and his decision shall be respected and honored. The contents of this Memorandum of Understanding cum Agreement is read over to the parties and having understood by both the parties and signed this MOU cum Agreement before the undersigned witnesses.

"SCHEDULE OF PROPERTIES"

IN HOSUR TOWN AND TALUK, attached to HOSUR Sub Registration District and Krishnagiri Registration District of Krishnagiri District.

All that piece and parcel of land and constructed ACC Sheet and RCC Buildings situated in Survey No.752/2 Part of Hosur Village (Avalapalli Hudco) marked as PLOT NO.C- 1, Commercial Plot in the Sanction Plan of Phase-Vi, Hosur NHS, Hosur and measuring and thereabouts bounded as follows :-

Within these boundaries measuring:-

East : Dhakshnamurthy Land
West : Land belonging to S.Adisesha Setty
North : Hosur to Bagalur Highways Road
South : Land in Survey No.772/1 belonging to B.A.Sridhar

Within these boundaries measuring:-

East to West on North Side : 40 Feet
East to West on South Side : 42 Feet
North to South on East Side : 60 Feet
North to South on West Side : 45.75 Feet

Making a Total Area of 2,168 Square Feet.

The above said Survey Number 752/2 is now forming part of TOWN SURVEY NUMBER 1 (T.S.No.1) in WARD - D, BLOCK 3.

IN HOSUR TOWN AND TALUK, attached to HOSUR Sub Registration District and Krishnagiri Registration District of Krishnagiri District.

All that piece and parcel of land situated at Rajeshwari Nagar (Rajeev Nagar) Ward D, Block No.3, New Town Survey No.21 Part, Hosur Village Survey No.772/1, Dry Extent Hect.0.13.0, Asst.Rs.0.64np, out of this an Extent of 850 Square Feet of Vacant within the following boundaries:-

East : Private Buinding
West : Land belonging to S.Adisesha Setty
North : Land in Survey No.752/2 Part belonging to B.A.Sridhar
South : Land belonging to Nagaraja Setty and others

Within these boundaries measuring:-

East to West on North Side : 42 Feet
East to West on South Side : 43 Feet
North to South on East Side : 20 Feet
North to South on West Side : 20 Feet

Making a Total Area of 850 Square Feet.

The above said Survey Number 772/1 is now forming part of TOWN SURVEY NUMBER 21 PART (T.S.No.21 PART) in WARD - D, BLOCK 3.

Altogether making a Total Area of 3,018 Square Feet (THREE THOUSAND EIGHTEEN SQUARE FEET) along with constructed ACC Sheet and RCC Building with all shutters, doors, electrical installations and other fixtures and accessories etc., is covered under this MEMORANDUM OF UNDERSTANDING CUM AGREEMENT.

IN WITNESSES WHEREOF THE ABOVE MENTIONED PARTIES HAVE SET THEIR HANDS AND SIGNED THIS MEMORANDUM OF UNDERSTANDING CUM AGREEMENT ON THE DAY, MONTH AND YEAR MENTIONED.

16. Thereafter, Tata Capital Housing Finance Ltd., Bangalore, has issued possession notice dated 16.03.2017 and the same is extracted hereunder:-

"POSSESSION NOTICE

(As per Appendix IV read with rule 8(1) of the Security Interest Enforcement Rules, 2002)

Loan Account Nos.9582057

Whereas, the undersigned being the Authorized Officer of the TATA Capital Housing Finance Limited., under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of powers conferred under Section 13(2) read with rule 9 of the Security Interest (Enforcement) Rules, 2002, issued a demand notice dated 16$^{th}$ March 2017 calling upon the borrower Mr.Balaji A, Mr.B.A.Sridhar, Mrs.Santhamma Adiseshasetty, Mrs.Vidya Priyadarshni, and Mr.S.Adiseshasetty as the Co-borrowers to repay the total outstanding amount in both the loan accounts mentioned in the notice being Rs.2,59,74,262/- (Rupees Two Crore Fifty Nice Lakhs Seventy Four Thousand Two Hundred Sixty Two Only) along with interest, penal interest, charges, costs etc., within 60 days from the date of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower in particular and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him under Section 13(4) of the said Act read with rule 9 of the said Rules on this-------day of --------------2017.

The borrower in particular and the public, in general, are hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the TATA Capital Housing Finance Limited for an amount of Rs.2,59,74,262/- (Rupees Two Crore Fifty Nine Lakhs Seventy Four Thousand Two Hundred Sixty Two Only) along with interest thereon and penal interest, charges, costs etc. from 16 March, 2017.

DESCRIPTION OF THE IMMOVABLE PROPERTY

Property No.1-
(Sub-District of Hosur and Registered District of Krishnagiri)
All the piece of land situated in Sy.No.752/2-Part of Hosur Village, (Avalapalli Hudco) marked as Plot No.1 Commercial Plot in the sanction plan of Phase - VI Hosur and measuring and thereabouts bounded as follows:
East by: Dhakshnamurthy land.
West by: Land belongs to S.Adisesha Shetty.
North by: Hosur - Bagalur Highways Road(NH-207)
South by: Sy.No.772/1 Land belongs to Mr.B.A.Sridhar.

Within these boundaries measuring:
East to West on the North Side : 40 Feet
East to West on the South Side : 42 Feet
North to South on the East Side : 60 Feet
North to South on the West Side : 45.75 Feet
Total 2168 Square Feet of vacant land
and
Krishnagiri District, Krishnagiri Registration District, Hosur Sub-Registration District, Hosur Taluk in Rajeswari Nagar, (Rajeev Nagar) Ward No.D, Block No3 and New T.S.No.21-part Hosur Village Sy.No.772/1. Dry Ext.Hec. 0.13.0 Asst.Rs.0.64 out of this an extent of 850 Sq. Feet of vacant land bounded as follows:

Within these boundaries measuring:
East to West on the North Side 42 Feet
East to West on the South Side 43 Feet
North to South on the East Side 20 Feet
North to South on the West Side 20 Feet
Total 850 Square Feet of vacant land
All together making a total extent of 3018 Sq.Feet is covered under this DEED OF RECTIFICATION There is no building in the above said land. The above said Sy.No.752/2 is not forming part of Town Sy.No.1 in Ward No.D, Block-3.



Property No.2-
In Bagalur Old Gramanatham Sy.No.55/13 of Bagalur Village, Krishnagiri District, Hosur 454449. Tamil Nadu.
Bounded by:-
East : Tak 2 & House of Siva Kumar
West : Hosur - Malur Road.

North : Property of Ganesh Setty & Lane.
South : Property of Siva Kumar & Aradhya & lane.

Date:
S/d/-

Place: AUTHORIZED OFFICER

For TATA CAPITAL HOUSING FINANCE LIMITED"

17. Being aggrieved, petitioner has filed S.A.No.204 of 2017 before the Debts Recovery Tribunal-III, Chennai, to set aside the same and consequently, prayed for a direction to Tata Capital Housing Finance Ltd., Bangalore, the first respondent herein, to receive the balance sale consideration of Rs.2,39,79,625/- out of total sale consideration of Rs.2,60,00,000/- agreed to be paid to the vendor/borrower.

18. According to the learned counsel for the writ petitioner Debts Recovery Tribunal -III Chennai, entertained the application in S.A.No.204 of 2017, on payment of Court fee, construing the petitioner as a third party, and on 04.09.2017, while dismissing the interim application S.I.A.No.1013 of 2017, for stay, the Debts Recovery Tribunal-III, Chennai, ordered as here under:

"DEBTS RECOVERY TRIBUNAL - III, CHENNAI
S.A.NO:204/2017

(1).V.N.Ashok Kumar, Krishnagiri District
Applicant
VS
Respondent...
(1).Tata Capital Housing Finance Limited, Bangalore 560 025
(2).S.A.Adisesha Setty, Krishnagiri District
(3).B.A.Sridhar, Krishnagiri District

TRUE EXTRACT OF THE PROCEEDINGS 04.09.2017

SA No.204/2017
04.09.2014

Learned counsel for the appellant is present. AOS filed. Notices to R-1 and R-3 are duly served and notice to R-2 returned unserved. This SA is filed challenging the Possession Notice dated 13.06.2017 issued by the respondent financial institution for recovery of sum of Rs.2,59,74,262/-.

As no urgency is established by the appellant, S.I.A.No.1013/17 dismissed. S.I.A.No.1014/17 for stay is taken up. Heard learned counsel for the appellant who submits that he is a third party proposed purchaser of the schedule mentioned property from the borrower with the consent of the respondent financial institution and it is his express case that respondent financial institution itself had sanctioned loan to him for purchase of the property but as one of the vendors is not traceable, the transaction could not be processed through, resulting in the respondent financial institution issuing the subject impugned possession notice. It is the case of the appellant that he is willing to deposit the sale proceeds if a reasonable time is granted.

Consequently, the appellant is permitted to deposit the admitted sale consideration with the respondent financial institution. Call on 04.10.2017 for reporting compliance or otherwise and for appearance of the respondent bank and for filing counter and typed set of documents by the respondent.

1.Sr.No.of Application : 7155
2.Proceeding No. : SA.204/17
3.Name of the applicant : A.Periyasamy
4.Date of presentation of application : 4/9/17
5.Date given to collect copy :
6.Number of Pages : one
7.Copying --charged :100
8.Date on which copy is ready : 11/9/17
9.Date of delivery : 12/9/17

Signature of SO/AR/Registrar"

19. Thereafter, on 04.10.2017, Debts Recovery Tribunal-III, Chennai, has dismissed S.A.No.204 of 2017 and the same is extracted hereunder :

"DEBTS RECOVERY TRIBUNAL - III, CHENNAI
S.A.NO: 204 / 2017

(1). V.N.Ashok Kumar, Krishnagiri District
Applicant

VS

Respondent...
(1). Tata CApital Housing Finance Limited, Bangalore 560 025
(2). S.Adisesha Shetty, Krishnagiri District
(3). B.A.Sridhar, Krishnagiri District

TRUE EXTRACT OF THE PROCEEDINGS 04.10.2017

SA No.204/2017 04.10.2017

Learned counsel for the appellant, Learned counsel for R-1 institution and learned counsel for R-3 are present. This SA is filed by third party appellant challenging the Possession Notice dated 13.06.2017 issued by the respondent financial institution for recovery of sum of Rs.2,59,74,262/-.

Heard Learned counsel for the respective parties. It is the case of the appellant that he is a third party to the proceedings being a purported agreement holder with the principal borrower / mortgagor as well as the joint owner of the property, who is arrayed as 3rd respondent herein. Learned counsel for R-3 admit that R-2, who is none other than his father is missing, however submits that he does not know the date as to when his father is missing and sought to take the said information from the learned counsel appearing for the appellant as they are having the record as well as the FIR copy, who then admits that his father was found missing since 13.07.2016 instance.

Whereas it is the case of the appellant that consequent to said missing, he had entered into a memorandum of understanding with the 3rd respondent herein as well as the legal representatives of second respondent to uphold their sale agreement. It is also further admitted by the learned counsel appearing for the appellant that it is one of the terms of their agreement that the appellant has to remit the installment due to the first respondent financial institution herein which however was defaulted by the appellant herein ever since October, 2016.

Learned counsel appearing for the first respondent financial institution submits that it had followed all the procedures as warranted under law. During the course of hearing it is observed that appellant is alleging to have deposited a sum of Rs.2.39 crores with the first respondent but does not seem to have furnished any information to any of the respondent. The officials from the first respondent financial institution who are three in number are present in the Court hall and admit to receipt of Rs.1 crore only and submit that they have to cross check the details that are made available only today morning and that too for Rs.2.25 crores to ensure whether the representations of the appellant are true to what is being stated.

From the foregone, it is observed that the appellant has nothing to do with the course adopted by the respondent and that he is not an aggrieved person but only alleged agreement holder who has to determine his rights before appropriate Civil Court and not by way of this securitization appeal before this Tribunal. Even otherwise, taking into fact that the appellant is willing to redeem the property from the first respondent in terms of his agreement of sale, there are no merits in the present appeal and the same is liable to be dismissed.

Accordingly, this SA stands dismissed, however without costs. Notwithstanding the orders of this Tribunal, parties are permitted to relegate to a negotiated amicable settlement amongst them for settlement and declaration of their respective rights and obligations interse.

Sd/
PO

1.Sr.No.of application : 7932
2.Proceeding No. : S.A.204/17
3.Name of the applicant : R.Baskar
4.Date of presentation of application : 04/10/17
5.Date given in collect copy :
6.Number of pages : one
7.Copying for charges :100
8.Date on which copy is ready : 06/10/17
9.Date of delivery : 10/10/17

Signature of SO/AR/Registrar"

20. Reading of the proceedings dated 04.10.2017 shows that though the applicant therein/writ petitioner has submitted that he has deposited a sum of Rs.2.39 Crores with Tata Capital Housing Finance Ltd., Bangalore, the same was not substantiated. Officials of Tata Capital Housing Finance Ltd., Bangalore, present in Tribunal have admitted receipt of Rupees One Crore only and further submitted that they have to cross check the details available with them. Observing that the petitioner is only an agreement holder, whose rights have to be determined before the appropriate Civil Court and not by way of securitisation application and further observing that there are no merits in the application, S.A.No.204 of 2017 has been dismissed.

21. When the applicant therein filed AIR (SA) No.700 of 2017, on payment of Court fee under Rule 13 (2) (1) (a) & (b) of SARFAESI Rules, vide proceedings dated 21.11.2007, the Debts Recovery Appellate Tribunal, Chennai, has declined to accept the same and directed the petitioner to pay the deficit Court fee

and produce the copy of the notice as pointed out by the Registry.

22. Though, Mr.G.M.Ananthakumar, learned counsel contended that the petitioner, is neither a borrower nor a guarantor and that therefore, he is not required to pay Court fee as per the Rule 13(2)(1)(a) to (d) and suffice to pay Court fee under Rule 13 (2) (1) (c) & (d) of SARFAESI Rules, as a third party, we are not inclined to accept the said contentions, for the reason, that the petitioner had entered into an agreement for purchase of the property mortgaged with Tata Capital Housing Finance Ltd., Bangalore and even according to him, paid a sum of Rs.15 lakhs to the Tata Capital Housing Finance Ltd., Bangalore, towards monthly installments from July 2016 to November 2016. Besides, even in S.A.No.204 of 2017, he had contended that towards the discharge of the loan amount, he has deposited a sum of Rs.2.39 Crores, but the officials of Tata Capital Housing Finance Ltd., Bangalore, present in the Tribunal at the time of hearing had admitted receipt of Rupees One Crore.

23. From the above, it could be deduced that by stepping into the shoes of the original borrowers viz., S.Adisesha Shetty and B.A.Sridhar, respondents 2 and 3 respectively, petitioner has paid monies to Tata Capital Housing Finance Ltd., Bangalore.

24. As per Section 2(1)(f) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in this Act, unless the context otherwise requires, borrower means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or else raised funds.

25. Petitioner has entered into an memorandum of understanding with the sons, daughter and wife of the borrower S.Adisesha Shetty and on the basis of a registered sale agreement has applied for loan from Tata Capital Housing Finance Ltd., Bangalore. Sons, daughter and wife of the S.Adisesha Shetty, have also requested the petitioner to make equated monthly installments to Tata Capital Housing Finance Ltd., Bangalore, and that he has also paid payments as stated supra. Reading of the memorandum of understanding, makes it clear that the petitioner, has stepped into the shoes of the borrower.

26. Contention of the petitioner that, Debts Recovery Tribunal-III, Chennai, has entertained S.A.No.204 of 2017, only on payment of Court fee under Rule 13 (2) (1) (a) & (b) of SARFAESI Rules and therefore, Debts Recovery Appellate Tribunal,

Chennai, cannot insist on payment of Court fee under Rules 13(2)(1)(c) & (d), cannot be accepted.

27. Merely because Debts Recovery Tribunal-III, Chennai has entertained S.A.No.204 of 2017. It is not automatic that the appeal should be entertained on payment of Court fee under Rule 13(2)(1)(a) and (b) of the SARFAESI Rules. Admittedly, by virtue of sale agreement and memorandum of understanding, the petitioner has undertaken to discharge the loan and liability on behalf of the borrower and that be the case, it is not open to him to contend that he is neither a borrower nor a guarantor and solely on the basis of agreement of sale, he should be permitted to challenge the action Tata Capital Housing Finance Limited, Bangalore, without payment of appropriate Court fee. Though the Debts Recovery Appellate Tribunal, (DRAT), Chennai may be right in directing the petitioner to pay the deficit Court fee, we are not inclined to subscribe to the direction of the Debts Recovery Appellate Tribunal, (DRAT), Chennai, directing the petitioner to produce the copy of the notice issued under Section 13(2) of the SARFAESI Act, pointed out by Registry. When possession notice dated 13.06.2017 is challenged, there is no need for any such direction.

28. With the above observations, impugned proceedings dated 21.11.2017 of the Debts Recovery Appellate Tribunal, (DRAT), Chennai, is sustained. Writ Petition is dismissed. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True copy//

Sub Assistant Registrar

dm/ars

TO
The Debt Recovery Appellate Tribunal,
Chennai.

+2cc to Mr.G,M.Ananthakumar, Advocate SR.No.87491

W.P.No.31874 of 2017
and
W.M.P.No.35024 of 2014

GN(09/01/2018)