* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Decided on: 21.04.2017.**

\+ CS(OS) 131/2017, I.A. 3393/2017 (O 39 R 1 & 2), I.A. 3394/2017 (Exemption)

SHRI PARMOD KUMAR GUPTA & OTHERS ..... Plaintiffs

Through: Mr Sameer Dewan, Adv.

versus

SMT VIDYA DEVI & OTHERS ..... Defendants

Through: Mr Ashish Rana and Mr Shaveer Ahmed, Advs. for D-3

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The notice in the case was issued to the defendants. Shri Ashish Rana accepted the notice on behalf of defendant No.3-Bank and raised the objection to the jurisdiction of this Court alleging that the same is barred under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and the jurisdiction lies with Debt Recovery Tribunal (DRT).

2. This Court, therefore, heard the arguments of the parties on these objections treating it as preliminary issue.

3. This suit has been filed by the plaintiffs for partition for declaring the Release Deed dated 12.10.1998 and conveyance deed dated 23.12.2002 as null and void and for permanent injunction against the defendant No.3-Bank and for restraining the defendant No.3-Bank and their officers, agents, etc. to proceed in any way against the 50% undivided share of the plaintiffs in property bearing plot No. 21, measuring 199.07 square yards in block G, Paschim Vihar earlier known as Industrial Worker, CHBS Limited, 66, Najafgarh Road, New Delhi (suit property) scheduled to be e-auctioned on 22.03.2017.

4. The plaintiffs have set out a case in the plaint to the effect that the suit property was allotted by Delhi Development Authority (DDA) to their father by way of perpetual sub-lease deed which was a registered document registered as Document No. 2564 in additional book No.1, Volume No. 3078 on pages 153 to 165 dated 23.05.1978 in the office of Sub-Registrar-II, New Delhi. As per the plaintiffs, their father executed a registered gift deed dated 28.05.1985 and pursuant to this gift deed, gifted 50% undivided share in the said plot to the defendant Nos.1 and 2, who are sisters of their deceased father. The remaining 50% share in the said plot was kept by their father for himself. He died intestate on 18.11.2006 and thereafter the

plaintiffs have become the owner of 50% undivided share of that plot. During the lifetime of their father, the constructions were raised on the said plot. The defendant No.2 vide a registered release deed registered as document No. 65111 in additional book No. 1, Volume No. 9108 on pages 120-123 dated 14.10.1998 in the office of Sub-Registrar, released her half share in the said plot in favour of the defendant No.1 and the plaintiffs have also challenged the said Release deed seeking declaration that the said Release Deed is a null and void document on the ground that the defendant No.2 had no right to release her half share of the said plot in favour of the defendant No.1 because she was only given 50% undivided share in the said plot along with her sister and both of them were the joint owners of 50% undivided share of the said plot. Various other grounds have also been raised while challenging the said Release Deed. It is further contended that the defendant No. 1 had also wrongly obtained a registered conveyance deed dated 23.12.2002 in her favour from the office of DDA, New Delhi. The transfer of said plot in favour of the defendant No. 1 on the basis of Release Deed was wrong and it was obtained by submitting forged and fabricated documents and on the basis of misstatements and misrepresentations. It is alleged that both the defendants had wrongly claimed themselves the full owners of the plot while under the gift deed they both together were owners of 50% undivided share in the said plot. It is further contended that defendant No. 1 had created an equitable mortgage by way of deposit of title deeds of above plot with the defendant No.3 against loan taken by her son-in-law in the name of M/s Packman Enterprise with Account No. 606330110000006, as a guarantor. The defendant No. 1 and her son-in-law defaulted in repayment of the loan and their liability is to the extent of Rs.1 crore 90 lakhs. The defendant No.1 had given her consent to defendant No.3 to sell the property and adjust the same proceeds against their dues and to transfer the balance amount in the account of M/s Packman Enterprises. Defendant No. 3, thereafter, initiated the proceedings under the SARFAESI Act against the defendant No.1. Notice under Section 13(2) of the Act was served upon the defendant No. 1. Defendant No. 3 had taken symbolic possession of the suit property as well. It is submitted that the actual physical possession of the property is with the plaintiffs and the defendant No.1. It is submitted that the defendant No.3 is going to conduct e-auction on 23.03.2017 and notice to this effect had been published in the newspapers. The plaintiffs learnt of all these things on 10.03.2017 and immediately sent their representation on the same date to defendant No.3

and apprised them of all the true facts. No reply however was received from them. The action of defendant No.3 to e-auction the property is challenged on the ground that the bank has no right to sell 50% undivided share in the said plot which is owned by the plaintiffs and which had been mortgaged by the defendant No.1 without their permission, consent, knowledge and which will result into irreparable loss and injury to the plaintiffs.

5. It is argued by learned counsel for the plaintiffs on the issue of jurisdiction that there is an element of fraud which has been played upon the plaintiffs since they being the owners of 50% undivided share in the said plot, their plot cannot be put to sale and that defendant No.1 has in connivance with several authorities, got the documents executed with the sole intention to defraud the plaintiffs. It is submitted that in the circumstance of the case where the fraud has been played upon the plaintiffs, this Court has the jurisdiction to deal with the matter and the jurisdiction of the Civil Court cannot be said to be barred under Section 34 of the SARFAESI Act.

6. Reliance is placed upon on ***Suhrid Singh @ Sardool Singh vs. Randhir Singh and Ors.*** *AIR 2010 SC 2807*, and the findings of Rajasthan High Court of Jaipur Bench in ***Mohan Lal and Anr. vs. Dwarka Prasad and***

Ors. *AIR 2007 Rajasthan 129*, stating that in this case the Court has clearly held that the SARFAESI Act does not bar jurisdiction of Civil Courts and Civil Courts retains the jurisdiction to decide inter se rights between third parties, including borrowers in the case of partition, cancellation or sale deed, gift deeds, etc. Plaintiffs have also relied on the findings of Karnataka High Court in ***Krishna vs. Kedarnath & Ors.*** *AIR 2006 Karnataka 21*, and has argued that in this case, the Court has reiterated the principle that the right to seek partition of the properties is a civil right and parties cannot be stopped from filing the suits for partition of the joint family properties even if such properties are also included into the properties mortgaged to the bank and the jurisdiction of the Civil Court is not barred. Reliance is also placed on ***Mardia Chemicals Ltd. etc. vs. Union of India and Ors.*** *AIR 2004 SC 2371*, and it is submitted that the three-Judges Bench of the Supreme Court has observed in para 51 and held that the jurisdiction of the Civil Court is not completely barred and can be invoked in the cases where the action of the secured creditor is alleged to be fraudulent or where the claim is so absurd and untenable which may not require any probe. The plaintiffs have also relied upon the findings of the Madras High Court in ***M/s Consolidated Construction Consortium Ltd. vs. M/s Indian Bank*** *AIR 2010 Madras 68,* and argued that the Madras High Court has also very clearly held that there is no absolute bar to the jurisdiction of the Civil Court and the suit can be instituted. Reliance is also placed on the findings of this Court in ***Gurdeep Singh vs. Punjab and Sindh Bank and Ors.***, *W.P.(C) No. 4570/2014*, decided on 16.01.2015.

7. On the other hand, the learned counsel for defendant No.3-Bank has relied upon the findings in the cases of ***Jagdish Singh vs. Heeralal & Ors.*** *(2014) 1 SCC 479* and of this Court in ***Neha Aggarwal vs. PNB Housing Finance Ltd. and Ors.*** *(2016) 158 DRJ 286* and has argued that in the present case since no fraud has been alleged against secured creditor, i.e., Bank/defendant No.3, the jurisdiction of the Civil Court is completely barred and the remedy lies before Debt Recovery Tribunal. It is further argued that Section 17 of the SARFAESI Act clearly envisages that any person (including the borrower), who is aggrieved by any of the measures taken under Section 13(4) by the secured creditor has a right to appeal to DRT and, therefore, the remedy of the plaintiffs lies before DRT and DRT is fully competent to decide the issue.

8. The issue in controversy before this Court is whether in the circumstances of this case, the jurisdiction of this Court is barred under the SARFAESI Act.

9. There is no dispute that in the present case, the bank, i.e., defendant No.3 is the secured creditor and defendant No.1 had created a security interest in the suit property. The bank is within its right to enforce the security interest in terms of Chapter III, Section 13 and 15 of the SARFAESI Act. It is also apparent that Section 17 of the SARFAESI Act permits any person aggrieved by the measures taken under Section 13(4) to file an appeal before Debt Recovery Tribunal. Section 17 reads as under:-

> *"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 along with 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 measures had been taken:*
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> *[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]*
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> *(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 sub-section (1) of 17]

10. The validity of the Act was challenged before the Supreme Court in the case of ***Mardia Chemicals Ltd. etc.*** *(supra)*, wherein the Court while upholding the validity of the Act has dealt with the question whether there is an absolute bar of any remedy to the borrower before an action is taken under sub-section (4) of Section 13 of the Act in view of the non-obstante clause under sub-section (1) of section 13 and the bar of jurisdiction of the Civil Court under Section 34 of the Act. The Court while upholding the validity of SARFAESI Act held that the jurisdiction of the Civil Court can be invoked only to a very limited extent where for example the action of 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 case of English mortgages.

In the present case, the plaintiffs have not alleged any fraud by the secured creditor, i.e., the bank-defendant No.3. The case of the plaintiffs are not covered under exception chartered out by the Supreme Court in ***Mardia Chemicals Ltd. etc.*** *(supra)*.

11. The Court in the case of ***Suhrid Singh @ Sardool Singh*** *(supra)* has dealt with the issue of Court fee.

12. In ***Mohan Lal*** *(supra)* and ***Krishna*** *(supra)*, the property involved was Hindu Undivided Family, in which the plaintiffs claimed right and moved the Court for suit for partition.

In the present case, there is no contention in the plaint that the said plot was a Hindu Undivided Family property. Their claim is that the property belonged to their father which was leased out to him by DDA. The findings in these cases, therefore, are of no help to the plaintiffs.

13. In the case of ***M/s Consolidated Construction Consortium Ltd.*** *(supra)*, the issue before the Civil Court was whether the bank, i.e., the secured creditor had committed a fraud and the proceedings were challenged on the ground of fraud and it was on the facts of that case that the Court had said that a civil suit was maintainable.

From the contentions in the plaint, it is apparent that the plaintiffs have not contended that any fraud was committed by the bank rather they had alleged that the fraud was committed by defendants No.1 and 2, and they forged the documents and obtained conveyance deed dated 23.12.2002 from DDA on the basis of void Release Deed dated 12.10.1998 executed by defendant No.2 in favour of defendant No.1. Therefore, the findings in ***M/s Consolidated Construction Consortium Ltd.*** *(supra)* are not applicable on the facts of this case.

14. In the case ***Gurdeep Singh*** *(supra),* the petitioner had invoked the writ jurisdiction of the Court and the Court had given findings in exercise of its writ jurisdiction under Article 226 of the Constitution. Thus, the findings in that case also have no relevance to the present case where the jurisdiction of a Civil Court is invoked by filing this civil suit. It, therefore, is clear that the findings in none of the case laws relied upon by the plaintiffs has no application on the facts of this case.

15. It is argued by the defendant No.3 that the Supreme Court in ***Jagdish Singh*** *(supra)* had clearly discussed the scope of the expression "any person" used in Section 17 and thereafter held that this expression has a wide import. In ***Jagdish Singh*** *(supra)*, the facts clearly show that the appellant was the auction purchaser of the suit property therein which was brought to sale for recovery of loan amounts under the provisions of the SARFAESI Act. The auction was confirmed by the bank and the appellant deposited the half of the bid amount and the remaining was to be deposited within 15 days in terms of the auction. The appellant was not put in

possession of the property in question even though the auction was confirmed. The auction purchaser, i.e., the appellant came to know that respondent Nos.1 to 5 had filed a Civil Suit No. 16A/2007 in the Court of District Judge, Barwani District for declaration of title, partition and permanent injunction against respondent Nos. 7 and 9 and others in which the appellant and the bank were also made party. The Supreme Court has noted that in the Civil Suit, the following reliefs were sought:-

> *"(A) Decree may be passed in favour of the plaintiff and against the defendants for declaration of title to this effect that one acre land in survey No.104/3 and 105/2 described in plaint para 4 (a) is undivided joint family property of plaintiff and defendants No.1 to 4 and the defendants have no right to mortgage it or attachment and auction of the same against any loan recovery by defendant No.5 and if defendants No.1 to 5 might have created any charge on the said land then it is not binding on the plaintiff.*
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> *(B) Decree of partition may be passed in favour of the plaintiffs and against the defendants for division of the suit land by metes and bounds and decree may be passed for separating the land of title of the plaintiffs and mutation effected in revenue papers.*
>
> *(C) Decree of permanent injunction may be passed in favour of the plaintiffs against the defendant that the defendants shall not, directly or indirectly, transfer, auction or interfere over the suit land of the plaintiff in any manner.*
>
> *(D) Costs of the suit may be awarded against the defendants.*
>
> *(E) Other relief which the Hon'ble Court may deem proper may be granted to the plaintiff against the defendants."*

16. The facts of the case further show that respondents Nos. 7 and 9 filed an application before DRT under Section 17 of the SARFAESI Act

challenging the sale notice and the application was opposed by the bank and the same was dismissed by DRT vide order dated 21.07.2006. In the Civil Suit, respondents No. 6 and 7 (the Bank) took a preliminary objection that the jurisdiction of the Civil Court was barred in view of Section 13 read with Section 34 of the SARFAESI Act. The Civil Court framed the issued to this effect. The Civil Court passed an order on 18.01.2008 holding that the suit was not maintainable. The said order was challenged by respondent Nos. 1 and 5 before the High Court. The High Court allowed the appeal. The operative portion of the order of the High Court has been reproduced in the said judgment as follows:-

> *"I have perused the contents of the plaint from the record of the case. A bare perusal of the plaint indicates that the plaintiffs have raised the question of title, on the basis of Joint Hindu Family property and they being the members of the Joint Hindu Family, it has been pleaded by them that the property in question had been acquired through the earnings of the joint family property. On that basis, it has been maintained by them that the property in question was liable to be treated as Joint Hindu Family property, and not the exclusive property of the defendants. In these circumstances, on the bare perusal of the contents of the plaint, it cannot be suggested at all that the civil suit, filed by the plaintiffs, is barred under any provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2000, or that civil court has no jurisdiction in the matter."*

17. The said order was challenged before the Supreme Court in this case and the Court discussed the facts of the case which were undisputed. The Court had noted that in the Civil Suit, the respondent Nos. 1 to 5 had alleged that family members of respondent Nos.1 to 9 (sons and grandsons of deceased Premji) constituted an HUF engaged in agriculture and the suit properties were purchased in the names of respondent Nos. 7 to 9 out of funds of HUF and House No.41/1, 42/3 and 42/2 were also purchased in the names of respondent Nos. 6 to 8 respectively, out of the funds of HUF and, therefore, the properties of HUF. The Court, however, found that the facts indicated that the properties referred to above were purchased by respondents 6 to 8 in their individual names, long after the death of Premji and that too by registered sale deeds and no claim was ever made at any stage by any member of HUF that the suit land was an HUF property and not an individual property. Respondent Nos.7 to 9 had purchased those lands vide sale deed dated 14.09.1999 and the 6th respondent had also purchased in his individual name House No.42/1 on 31.03.1998 vide registered sale deed and similarly, Respondent No.7 had also purchased House No.42/3 in his individual name and at no stage any member of the family raised any objection to contention that properties and buildings were HUF properties

and not individual properties of respondent Nos. 6 to 8. The Court further noted that the bank had advanced loan on the strength of above said documents. It stood in the names of respondents 6 to 9 and due to non-payment of the loan amount, bank can always proceed against the secured assets. Discussing the provisions of Section 2 (zc) of the SARFAESI Act, Section 69 or 69A of the Transfer of Property Act and Section 13 of the SARFAESI Act dealing with an enforcement of security interest and also under Section 17 of SARFAESI Act which confers right to appeal to any person, including borrower, the Court had proceeded to discuss the import of expression "any person". The Court has held as under:-

> *"17. The expression 'any person' used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in Satyavati Tondon's case (supra).*
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> *18. Therefore, the expression 'any person' referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, 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) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.*
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> *19. Section 34 of the Securitisation Act ousts the civil court jurisdiction. For easy reference, we may extract Section 34 of the Securitisation Act, which is as follow:*

> *"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)."*

18. The Supreme Court in this case had also relied upon the findings of ***Mardia Chemicals Ltd. etc.*** *(supra)*. While discussing the scope of Section 34 of the Act, the Court had further held as under:-

> *"20. The scope of Section 34 came up for consideration before this Court in Mardia Chemicals Ltd. (supra) and this court held as follow:*
>
>> *"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub- section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in*

pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13."

21. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.

22. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in respect of any matter' referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower *under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.*

23. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub- section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal to determine as to whether there has been any illegality in the "measures" taken.

19. In ***Jagdish Singh*** *(supra),* the Supreme Court has clearly held that where the bank had acted on the basis of the documents which were never challenged at any stage and had taken measures under the SARFAESI Act then the jurisdiction of the Civil Court is barred and if any person is aggrieved, he can approach the concerned authorities under Section 17 and 18 of the SARFAESI Act and in such a circumstance, the provisions of Section 34 of the SARFAESI Act clearly bars the jurisdiction of this Court.

In the present case, it is apparent from the pleadings that the property was owned by the father of the plaintiffs, which was allotted to him by DDA. He subsequently vide gift deed dated 28.05.1985 gifted this property to his two sisters. The copy of the gift deed is placed on record by the plaintiffs wherein the deed records as under:-

> *"And whereas the donees are the sisters of the donor, the lessor of the plot in question and out of love and affection the donor hereby conveys unto the donee Smt Vidya Devi & Smt Krishna Gupta underlined lease hold share in the said plot with all right, title, interest so as to make the donee as joint of the said plot."*

20. The plain language of this Gift Deed shows that he gifted 'the plot' to defendant Nos. 1 and 2 and made them the joint owners of 'the plot'.

21. Subsequent to this gift deed, one of the sisters, i.e. defendant No.2 executed the Release Deed dated 12.10.1998 in favour of defendant No.1 whereby she had released her half undivided portion in the said plot in favour of defendant No.1. It is apparent that Release Deed was executed during the lifetime of the father of the plaintiffs who left for heavenly abode on 18.11.2006. Thereafter, defendant No.1 applied to DDA for the issuance of the Conveyance Deed and such Conveyance Deed dated 23.12.2002 was executed in her favour by DDA. It is also noteworthy that at the time this document was issued by DDA, the father of the plaintiffs was alive. There is nothing on record to show that father of the plaintiffs has ever raised any objection to any of these documents at any stage. Also, it is to be noted that till the time the property was put to auction, none of the plaintiffs had raised

any objections to these documents. The bank had acted on the basis of these documents. The facts of this case are, therefore, akin to the case of ***Jagdish Singh*** *(supra)* and the findings of this case squarely cover the present case. Section 34 of the SARFAESI Act clearly bars the jurisdiction. However, the plaintiffs are not remediless. They can approach DRT/Appellate Tribunal under the provisions of Sections 17 and 18 of the SARFAESI Act.

22. In view of the above discussion, it is apparent that jurisdiction of this Court is clearly barred. The suit is not maintainable and is dismissed as such with no order as to costs.

The pending applications also stand disposed of.

DEEPA SHARMA
(JUDGE)

APRIL 21, 2017
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