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

Date of Decision: February 01,2017

\+ LPA 221/2016 & CM Nos.12231, 12232/2016

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD (HUDCO) ..... Appellant

Versus

SGS CONSTRUCTION AND DEVELOPERS PVT LTD & ORS. .... Respondents

\+ LPA 223/2016 & CM Nos.12347, 12348, 12351, 12352, 12353/2016

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD (HUDCO) ..... Appellant

Versus

K M REALCON PVT LTD & ORS .... Respondents

\+ LPA 225/2016 & CM Nos.12401, 12403/2016

SGS CONSTRUCTION & DEVELOPERS PVT LTD. ..... Appellant

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD. & ORS. .... Respondents

\+ LPA 248/2016 & CM Nos.13926-28/2016

MAHARAJI EDUCATION TRUST ..... Appellant

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD. & ORS. .... Respondents

\+ LPA 249/2016 & CM Nos.13931-32, 15107-08/2016

MAHARAJI EDUCATION TRUST ..... Appellant

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD & ORS. .... Respondents

\+ W.P.(C) 2604/2013

M/S K.M. REALCON PVT. LTD. & ANR ..... Petitioners

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD & ORS. .... Respondents

\+ W.P.(C) 4412/2013 & CM Nos.10213/2013, 12143/2013 & 13323/2013

MAHARAJI EDUCATION TRUST ..... Petitioner

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD & ORS. .... Respondents

\+ W.P.(C) 7261/2015 & CM Nos.29428/2015, 31482/2015, 6095/2016

SGS CONSTRUCTIONS & DEVELOPERS PVT. LTD. ..... Petitioner

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD & ORS. .... Respondents

\+ W.P.(C) 3047/2016 & CM Nos.12862, 12864/2016

SGS CONSTRUCTIONS & DEVELOPERS PVT. LTD. ..... Petitioner

Versus

HOUSING AND URBAN DEVELOPMENT CORPORATION LTD & ORS. .... Respondents

<u>Present</u>: Mr.Parag P.Tripathi, Sr.Adv., Mr.Jayant Bhushan, Sr.Adv. with Mr.Ashutosh Khaitan, Mr.N.S. Ahluwalia, Mr.K.V. Shahi, Mr.Deepak Chawla, Mr.Adhish Sharma, Mr.Rajiv Singh & Ms.Anasuya Choudhary, Ads. for Maharaji Education Trust.
Mr.Sudhir Nandrajog, Sr.Adv. with Mr.Pallav Saxena, Ms.Omita Unnarkar and Ms.Bindu Das, Advs. for SGS Constructions.
Mr.Sanjay Jain, ASG with Mr.Sonal Kumar Singh, Ms.Bani Dikshit, Ms.Rhea Verma, Mr.Vidur Mohan and Ms.Shivangi Agarwal, Advs. for HUDCO.
Mr.Vishwajit Singh with Mr.Pankaj Singh, Ms.Ridhima Singh, Mr.Gaurav Singh, Advs. for U.P. Avas Vikas Parishad in LPA No.249/2016 and W.P.(C) NO.7261/2015.
Mr.Satinder Singh, Adv. with Mr.Avinash Detha, Adv. for K.M. Realcon Pvt. Ltd.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE P.S. TEJI

<u>J U D G M E N T</u>

: **<u>Ms.G.ROHINI, Chief Justice</u>**

1. These five LPAs and four writ petitions being interlinked are heard together and being disposed of by this common judgment.

2. It may, at the outset, be stated that all the LPAs arose out of the interim orders passed pending W.P.(C) No.2604/2013 and W.P.(C) No.7261/2015. When the said appeals were listed before us, we thought that it would be appropriate to hear and decide the main writ petitions as well. Thus with the consent of the learned counsels for both the parties, the said writ petitions as

well as two other connected petitions being W.Ps.(C) No.4412/2013 and 3047/2016 were tagged on to the LPAs and all the matters were heard together.

3. The facts in brief are as under.

4. Maharaji Educational Trust (hereinafter referred to as 'the Trust') which has been running medical colleges and charitable hospitals at various places, possessed several properties including the buildings wherein its colleges, hospitals, staff quarters, etc. are located. The Trust had taken a loan from Housing and Urban Development Corporation (HUDCO) in the year 1995 by mortgaging its immovable properties numbering six, out of which properties No.1 to 5 comprising of the medical colleges, charitable hospitals, staff quarters, etc. of the Trust are broadly non-contiguous. Property No.6 is a vacant land measuring 63.45 acres situated in villages Akbarpur, Behrampur, Mirzapur, Pargana Loni of Ghaziabad District, State of Uttar Pradesh.

5. Alleging that the Trust committed default in payment of the loan amount, HUDCO initiated proceedings before the Debt Recovery Tribunal, Delhi, constituted under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short 'RDDBFI' Act) vide O.A. No.160/2002 for recovery of outstanding loan amount together with interest.

6. During the pendency of the said proceedings, the Trust had entered into an Exchange Deed dated 04.05.2007 with U.P. Housing & Development Board/Avas Evam Vikas Parishad (for short 'AEVP') whereby the Trust received the land belonging to AEVP situated in villages Shahbad, Mithapur

and Akbarpur in exchange of 21 acres of its land out of 63.45 acres of vacant land comprised in property No.6. The Trust claims that pursuant to the said Exchange Deed, property No.6 has become a contiguous piece of vacant land.

7. O.A. No.160/2002 was allowed by the Debt Recovery Tribunal-II (DRT) in favour of HUDCO by order dated 03.06.2008 and in terms thereof, Recovery Certificate No.039/2011 was issued to the Recovery Officer attached to DRT-II, Delhi for recovery of Rs.148.08 crores due from the Trust. Against the order of the DRT dated 03.06.2008, the Trust preferred an appeal being Appeal No.120/2008 before the Debt Recovery Appellate Tribunal (DRAT), Delhi which was dismissed by order dated 06.10.2010.

8. During the pendency of the appeal before the DRAT, the Trust had entered into an agreement of sale dated 26.08.2010 with M/s SGS Construction and Development (P) Ltd. (for short 'SGS Constructions') for sale of 63.45 acres of land comprised in property No.6 including the 21 acres of land that was exchanged by the Trust with the AEVP vide Exchange Deed dated 04.05.2007, for a sale consideration of Rs.154 crores. SGS Constructions claims that a sum of Rs.9.01 crores was also paid to the Trust towards part payment.

9. After dismissal of Appeal No.120/2008 by DRAT by order dated 06.10.2010, the Recovery Officer attached to DRT-II, Delhi initiated steps for recovery of the amount specified in the Recovery Certificate by sale of the mortgaged properties.

10. In May, 2011, SGS Constructions filed objections before the Recovery Officer qua property No.6 on the basis of the Agreement of Sale dated 26.08.2010 executed by the Trust in its favour. The objections included that the dispute between the parties to the Agreement of Sale is the subject matter of proceedings pending before the sole Arbitrator and that on an application filed by it under Section 17 of the Arbitration and Conciliation Act, 1996 seeking interim protection, it was undertaken by the Chairman and Managing Trustee of the Trust that the disputed land measuring 63.45 acres would not be alienated pending the arbitration proceedings. It was also contended that the DRT, Delhi had no territorial jurisdiction to conduct the proceedings since the property No.6 is situated in the State of Uttar Pradesh. The Recovery Officer passed an interim order dated 06.09.2011 deferring the sale proclamation in respect of property No.6 till the objections raised by SGS Constructions are decided.

11. SGS Constructions had also filed W.P. No.11669/2011 before the High Court of Allahabad, Lucknow Bench claiming that out of 63.45 acres of property No.6, an extent of 42.45 acres was only mortgaged to HUDCO and that the 21 acres of land, which has been received by the Trust from AEVP under the Exchange Deed dated 04.05.2007 is not mortgaged to HUDCO. Thus, a direction was sought to AEVP to demarcate the 42.45 acres of land out of 63.45 acres, mortgaged to HUDCO to enable identification of the mortgaged property. A further direction to the Recovery Officer, DRT was also sought to implement the interim order dated 06.09.2011 in a time-bound manner,

preferably within a period of three months, in order to sell property Nos.1 to 5. The High Court of Allahabad by order dated 25.09.2013 allowed the writ petition and directed demarcation of the mortgaged land and un-encumbered land out of 63.45 acres of property No.6 with the help of the Revenue Authorities concerned. There was also a direction that the parties shall maintain status quo qua 21 acres of land out of property No.6 and that the same shall not be alienated or transferred in any manner till the exercise of demarcation is carried out in accordance with law.

12. Aggrieved by the said order of the High Court of Allahabad dated 25.09.2013, the Trust filed Civil Appeal No.4494/2015; U.P. Avas Evam Vikas Parishad (AEVP) filed Civil Appeal No.4495/2015 and HUDCO filed Civil Appeal No.4496/2015. All the said appeals were allowed by the Supreme Court by common judgment dated 15.05.2015 thereby setting aside the order of the High Court of Allahabad dated 25.09.2013. Apart from holding that no part of cause of action had arisen at Lucknow and that the writ petition was not maintainable at Lucknow Bench, on merits it was held that in case of dispute *inter se* between SGS Constructions and the Trust based upon the Agreement of Sale of the year 2010, no right was available to SGS Constructions to ask AEVP to demarcate the land which it had already given to the Trust. It was also held that the disputed questions with respect to the properties *inter se* between SGS Constructions and the Trust as to demarcation, writ petition could not be said to be an appropriate remedy.

13. HUDCO had also initiated proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') by enforcement of the interest created in its favour in respect of the properties mortgaged by the Trust. Possession notice under Section 13(4) of the SARFAESI Act was issued by the HUDCO on 22.11.2011 followed by sale notice dated 12.01.2012 for sale of the properties under mortgage. At that stage, the Trust preferred a Securitization Application under Section 17 of the SARFAESI Act and pursuant thereto stay of sale, to the extent of property No.6, was granted by the Debt Recovery Tribunal (DRT), New Delhi on 25.01.2012. Against the said order of stay, HUDCO filed an appeal before the Debt Recovery Appellate Tribunal (DRAT) and the same was disposed of by order dated 25.06.2013 holding that instead of proceeding against property Nos.1 to 5, it would be appropriate to proceed to sell property No.6, in the first instance, in accordance with the provisions of the SARFAESI Act and the Rules made thereunder. Recording the statement of the Trust/respondents therein that they have a buyer who is ready to purchase property No.6 for Rs.395 crores, the DRAT directed HUDCO to consider to sell property No.6 by private treaty in accordance with Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 before resorting to other modes of sale under Rule 8(5). It was also added that in case the entire liability of the Trust does not liquidate by the sale of property No.6, then the secured assets may be proceeded against for the recovery of the remaining amount of the debt. The order of DRT dated 25.01.2012 was modified accordingly.

14. It is relevant to note that the representation made by the Trust before DRAT was with reference to the offer made by M/s K.M. Realcon Private Ltd. vide letter dated 15.03.2013 to purchase property No.6 by way of a private treaty on an "as is where is basis" for an amount of Rs.395 crores in accordance with the provisions of the SARFAESI Act.

15. Alleging that HUDCO failed to respond to its offer dated 15.03.2013, M/s K.M. Realcon Pvt. Ltd. filed W.P.(C) No.2604/2013 in this Court seeking a direction to HUDCO to exercise its statutory power and sell property No.6 to it for a total sale consideration of Rs.395 crores. HUDCO contested the writ petition contending *inter alia* that the auction can be held only under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

16. SGS Constructions had also filed supplementary objections dated 15.07.2013 before the Recovery Officer contending that the exchanged land of 21 acres out of property No.6 vide Exchange Deed dated 04.05.2007 has not been mortgaged with HUDCO as per its own pleading in the Special Leave Petition filed before the Supreme Court; that the arbitration proceedings between the Trust and SGS Constructions are still pending before the Sole Arbitrator; that the other mortgaged property i.e. properties 1 to 5 of Recovery Certificate are sufficient to liquidate the entire dues as per the valuation done by HUDCO itself; that in compliance with the order of the Assistant Commissioner, Stamps, Ghaziabad dated 19.10.2012 to deposit insufficient stamp duty on the Agreement of Sale dated 26.08.2010, it had deposited

Rs.3,07,9,900/- towards the deficit stamp duty together with Rs.1,47,183,520/- towards interest and penalty and pursuant thereto, the Agreement of Sale dated 26.08.2010 was duly registered under the provisions of the Uttar Pradesh Stamp and Registration Act; that the Securitization Application No.82/2011 filed by it challenging the proceedings initiated under SARFAESI Act qua property No.6 are pending before DRT-II, Delhi and that as per Section 56 of Transfer of Property Act, 1882 HUDCO has to proceed against the property Nos.1 to 5 for recovery of the amounts due to it from the Trust. To bring a quietus to the whole dispute, SGS Constructions had also expressed its willingness to clear the entire liability of the Trust by making a payment of Rs.145 crores towards sale consideration for property Nos.1 to 5, (which are not agricultural lands) by way of private treaty under Security Interest (Enforcement) Rules, 2002. To show its bona fides, SGS Constructions made Fixed Deposits dated 23.04.2013 in favour of HUDCO for Rs.14.5 crores and Rs.25.5 crores i.e. 10% of the amount offered by it.

17. On 30.06.2015, SGS Constructions filed three applications before the Recovery Officer, i.e., (i) seeking permission to amend its objections by incorporating that property No.6 includes 21 acres of unencumbered land as specified in para 6 of the said application; (ii) to recall the earlier order of the Recovery Officer dated 21.05.2015 thereby fixing 01.07.2015 as the date for final arguments on the objections, and (iii) to implement the order of the Recovery Officer dated 06.09.2011 directing sale of properties 1 to 5 for recovery of the entire amounts dues as per the Recovery Certificate since the

said properties are not the subject matter of the objections. All the said applications were dismissed by the Recovery Officer by order dated 01.07.2015 holding that the proposed amendment is irrelevant as there is no dispute regarding the demarcation and the Khasra number of the mortgaged property. It was also held that the applicant/SGS Constructions, which is a mere third party objector in respect of property No.6 has no say to seek a direction for sale of the properties 1 to 5 since the said properties are not the subject matter of his objections. It was further held that since there is no requirement to file the evidence as per the provisions of the Second Schedule to Income Tax Act, 1961, there is no need to recall the order dated 21.05.2015. The appeal preferred by SGS Constructions against the said order of the Recovery Officer dated 01.07.2015 was dismissed by DRT by order dated 10.07.2015 and the further appeal to DRAT was also dismissed by order dated 20.07.2015 holding that the applications are nothing but an attempt to reopen the issues that were already decided by the Supreme Court and thus to stall the recovery proceedings. Aggrieved by the abovesaid order passed by the Recovery Officer dated 01.07.2015 as confirmed by DRT and DRAT by orders dated 10.07.2015 and 20.07.2015 respectively, SGS Constructions filed W.P.(C) No.3047/2016 praying for quashing all the said orders.

18. In the meanwhile, SGS Constructions also filed W.P.(C) No.7261/2015 seeking a direction to HUDCO to consider its proposal for purchase of all the properties so as to put a quietus to the whole dispute.

19. It may also be mentioned that after initiating the proceedings under the SARFAESI Act, the Trust approached this Court by filing W.P.(C) No.4412/2013 seeking a direction to HUDCO to take all the necessary steps for sale of property No.6 by exercising its statutory power under the provisions of the SARFAESI Act alleging that though there is no legal impediment whatsoever for sale of property No.6 by obtaining quotations from the persons interested in buying such assets or by entering into a private treaty as provided under Rule 8(5)(a) and (d) of the Security Interest (Enforcement) Rules, 2002 and there is also a direction by DRAT dated 25.06.2013 to proceed with the sale of property No.6 in the first instance in accordance with the provisions of the SARFAESI Act, HUDCO failed to do so.

Writ Petitions:

20. For the sake of convenience, the reliefs sought in the four writ petitions may be noted hereunder:

(i) W.P.(C) No.2604/2013 has been filed by M/s KM Realcon Pvt. Ltd. with a prayer to direct HUDCO to exercise its statutory power of sale in relation to Property No.6 and sell the same to the petitioner / M/s KM Realcon Pvt. Ltd. for a total sale consideration of Rs.395 Crores offered by it on 15.03.2013.

(ii) W.P.(C) No. 4412/2013 has been filed by Maharaji Educational Trust with a prayer to direct HUDCO to take all necessary steps for sale of Property No.6 by exercising its statutory power under the provisions of SARFAESI Act and further to declare that no interest is payable to HUDCO on the decretal amount w.e.f. 15.03.2013, i.e. the date on which M/s KM Realcon Pvt. Ltd. offered to buy Property No.6 for a total sale consideration of Rs.395 Crores.

(iii) W.P.(C) No. 7261/2015 has been filed by SGS Constructions with a prayer to direct HUDCO to consider the proposal of the Petitioner / SGS Constructions to pay the entire amounts due to HUDCO from the Trust as per the time schedule specified therein towards consideration for sale of the Property Nos. 1 to 5 by private treaty under SARFAESI Act and that the Trust and SGS Constructions would get their *inter se* disputes in relation to Property No.6 adjudicated upon by the Arbitral Tribunal. A further direction to the Trust has also been sought to give consent to the above-said proposal made by the Petitioner/SGS Constructions.

(iv) W.P.(C) No. 3047/2016 has also been filed by SGS Constructions with a prayer to set aside the order dated 20.07.2015 passed by DRAT in Appeal No.217/2015, order dated 10.07.2015 passed by DRT-II, Delhi as well as the order of the Recovery Officer dated 01.07.2015 in RC No.39/2011.

21. Before proceeding further, we may also refer to the interim orders passed by the learned Single Judge out of which the five LPAs arose.

Letters Patent Appeals:

22. In W.P.(C) No.2604/2013 filed by M/s K.M. Realcon Pvt. Ltd., the learned Single Judge by order dated 20.05.2015 while recording the contention on behalf of HUDCO/respondent No.1 that auction can only be held under RDDBFI Act, 1993, directed to list the writ petition for hearing on 17.09.2015. The respondent No.3/SGS Constructions filed CM No.11785/2015 on 04.07.2015 to advance the hearing contending that the writ petition, being not maintainable is liable to be dismissed *in limine*. The said application for advancing the hearing was heard and adjourned to 30.07.2015 by the learned Single Judge by order dated 13.07.2015 with a direction to the parties to complete the pleadings. By the said order, the learned Single Judge had also directed that the Recovery Officer shall dispose of the objections raised by SGS Constructions as directed by this Court in LPA No.385 of 2015 and the observations of the Supreme Court in Special Leave Petition No.34115/2013.

23. On 21.07.2015, SGS Constructions/respondent No.3 moved another application being CM No.12626/2015 alleging that in spite of the order dated 13.07.2015, no fair opportunity was afforded by the Recovery Officer for addressing the objections raised by it and further by order dated 17.07.2015 its application to receive additional documents was dismissed and accordingly seeking a direction to the Recovery Officer to afford sufficient opportunity to SGS Constructions and to decide all the objections raised by it. While directing to re-notify the said application on 30.07.2015 for the response of the non-applicants, the learned Single Judge passed an order on 21.07.2015

directing the Recovery Officer not to pass any order on the objection application filed by SGS Constructions.

24. Aggrieved by the said order dated 21.07.2015, the Trust filed LPA No.223/2016. The Trust also filed LPA No.249/2016 assailing the order dated 21.07.2015 as well as the order dated 13.07.2015 passed by the learned Single Judge.

25. In W.P.(C) No.7261/2015 filed by SGS Constructions seeking a direction to HUDCO to consider its proposal for purchase of property Nos.1 to 5 by private treaty under SARFAESI Act, SGS Constructions/writ petitioner filed CM No.6095/2016 with a prayer to appoint a Court Receiver to take possession of the property No.6 and to protect the same. A further direction was also sought to restrain HUDCO from taking measures under Section 13(4) of the SARFAESI Act qua property No.6. By order dated 19.02.2016, the learned Single Judge passed an order on the said application restraining HUDCO from proceeding further qua property No.6 in any manner whatsoever.

26. The said order dated 19.02.2016 in CM No.6095/2016 in W.P.(C) No.7261/2015 has been challenged by way of two separate appeals, i.e., LPA No.221/2016 and LPA No.248/2016 by the HUDCO and the Trust respectively. SGS Constructions also filed an appeal being LPA No.225/2016 aggrieved by the said order dated 19.02.2016 in CM No.6095/2016 to the extent of deferment of its prayer for appointment of Receiver.

Contentions on behalf of the parties:

27. Shri Parag P. Tripathi, the learned Senior Counsel appearing on behalf of the Trust contended that since the order of DRAT dated 25.06.2013 directing that property No.6 be sold first has attained finality and even the Supreme Court held that where the sale of one property is sufficient to clear the debts then that property must be sold, it is not open to SGS Constructions to contend that property Nos.1 to 5 should be first sold for liquidating the liability of the Trust.

28. While submitting that property No.6 is governed by Section 54 of the Transfer of Property Act as amended by the State of U.P. which mandates that any agreement of sale for an immovable property in the State of U.P. has to be compulsorily registered and Section 17 of the Registration Act which also mandates the registration of an agreement of sale, it is contended that SGS Constructions cannot claim any right or title based on the unregistered agreement of sale dated 26.08.2010. In support of the said contention, the learned Senior Counsel relied upon ***Raheja Universal Ltd. v. NRC Ltd. & Ors.*, (2012) 4 SCC 148**. It is also sought to be contended that in view of Section 49 of the Registration Act as amended by the State of U.P. which makes clear that any agreement of sale qua an immovable property in the State of U.P. if not registered cannot be used for specific performance, no right or title can be claimed by SGS Constructions over property No.6.

29. The further contention is that W.P.(C) No.7261/2015 filed by SGS Constructions seeking a direction that property Nos.1 to 5 be sold in its favour is misconceived since no writ petition can be maintained seeking a direction to a private party to sell its land pursuant to a private treaty. Pointing out that W.P.(C) No.2604/2013 filed by KM Realcon is still pending, it is also contended that all the subsequent writ petitions filed by SGS Constructions along with frivolous applications are nothing but abuse of process of law.

30. Disputing the claim of SGS Constructions that property No.6 is an agricultural land, it is contended by the learned Senior Counsel that there is a clear recital in the agreement itself that the said land is situated in a residential zone and that the U.P. Housing Board has also clarified by its letter dated 26.02.2016 that the said land is a residential land.

31. Shri Sanjay Jain, the learned ASG appearing for HUDCO, while reiterating the contention that the claim of SGS Constructions that property No.6 is an agricultural land is without any basis in the light of the specific recital in the agreement of sale itself, further submitted that the letter dated 12.12.2011 of AEVP also makes it clear that property No.6 is a residential land. Placing reliance upon ***Transcore v. Union of India & Anr.;*** **<u>(2008) 1 SCC 125</u>**, it is further contended by the learned ASG that the order passed by the learned Single Judge dated 19.02.2016 which is the subject matter of LPA No.221/2016 filed by HUDCO, is erroneous since the same runs contrary to the settled principle of law that a financial institution can take recourse to

SARFAESI Act even when the recovery proceedings are pending before the Recovery Officer.

32. The other contentions advanced by the learned ASG are mainly with regard to the correctness of the orders passed by the learned Single Judge in the Miscellaneous Applications in W.P.(C) Nos.7261/2015 and 2604/2013.

33. On behalf of M/s K.M. Realcon Pvt. Ltd., it is contended by Sh.Satinder Singh, the learned counsel appearing for the petitioner that the inaction on the part of the HUDCO in not accepting the offer of M/s K.M. Realcon Pvt. Ltd. to purchase property No.6 on "as is where is" basis for Rs.395 Crores which is higher than the amount due from the Trust is arbitrary and illegal. It is also contended that there is no legal impediment for the sale of property No.6 accepting the offer made by M/s K.M. Realcon Pvt. Ltd. in the light of the specific provisions under Rule 8(5)(a) and (d) of the Security Interest (Enforcement) Rules, 2002. The further contention is that the objections raised by SGS Constructions on the basis of an unregistered and insufficiently stamped agreement of sale being untenable, HUDCO shall be directed to accept the offer made by M/s K.M. Realcon Pvt. Ltd. qua property No.6 and finalize the sale in its favour.

34. Rebutting the abovesaid contentions, it is submitted by Shri Sudhir Nandrajog, the learned Senior Counsel appearing for SGS Constructions that the objections preferred by SGS Constructions with regard to 21 acres of land covered by the Exchange Deed have to be adjudicated upon by the Recovery

Officer in terms of the directions of the Supreme Court. According to the learned Senior Counsel, there is no basis for the contention of the Trust that 21 acres of land covered by the Exchange Deed dated 04.05.2007 is also under mortgage with HUDCO and forms part of the proceedings before the Recovery Officer. It is pointed out by the learned Senior Counsel that neither the Trust nor the HUDCO had ever brought to the notice of DRT the Exchange Deed and thus the order dated 03.06.2008 passed by DRT cannot be held to be conclusive in respect of the said 21 acres of land. It is also submitted by the learned Senior Counsel that the said 21 acres of land does not form part of the execution proceedings before the Recovery Officer and that the same being an un-encumbered piece of land was not even attached nor intended to be proceeded against for recovery of the loan amount.

35. Disputing the claim of HUDCO that the original Exchange Deed had been deposited with it on 27.07.2011, it is contended by the learned Senior Counsel that even assuming that it is true, the same is immaterial and of no consequence since no new contract could have come into being after filing of O.A. No.160/2002 for recovery of the loan amount which had culminated in the Recovery Certificate dated 03.06.2008. In support of the said submission, the learned Senior Counsel relied upon ***Somdev v. Rati Ram;*** **(2006) 10 SCC 788**.

36. It is further contended that W.P.(C) No.3047/2016 having been filed for ensuring implementation of the order of the Supreme Court dated 15.05.2015 holding that the issue relating to the nature of 21 acres of land covered by the Exchange Deed would be adjudicated upon by the Recovery Officer, it would

be proper and appropriate to allow the writ petition as prayed for directing the Recovery Officer to effectively adjudicate the issues relating to the nature and character of 21 acres of land.

37. It is also submitted by the learned Senior Counsel that in view of the interim order passed by the Arbitral Tribunal dated 15.01.2011 directing the parties to maintain status quo on the basis of an undertaking given by the Trust which is still in operation, the objection raised by the Trust and HUDCO about the *locus standi* of SGS Constructions is untenable. Placing reliance upon ***CWT v. Arvind Narottam;*** **(1998) 173 ITR 479 SC**, it is also contended that the contractual option and payment of consideration constituted an interest in favour of SGS Constructions and created a right to seek completion of sale and perfection of its title.

38. With regard to order dated 25.06.2013 of DRAT, it is contended that since SGS Constructions was not a party to the said order, the same is not binding on it. The learned Senior Counsel sought to distinguish the decision in ***Transcore v. Union of India (supra)*** contending that the issue whether proceedings under SARFAESI Act, 2002 can be taken recourse to during the pendency of recovery proceedings under RDDBFI Act was not in issue before the Supreme Court. It is further contended that on a conjoint reading of the provisions of the SARFAESI Act and Sections 2(1)(g) and 19 of RDDBFI Act, 1993, it is clear that during pendency of recovery proceedings under RDDBFI Act, recourse to SARFAESI proceedings is impermissible.

39. Regarding the nature of property No.6, it is submitted by the learned Senior Counsel that as is evident from the recitals in the Agreement of Sale, it is an agricultural land and the stand taken by HUDCO and the Trust that it is a residential land is without any basis.

Consideration

40. We have given our thoughtful consideration to the rival submissions made on behalf of all the parties.

41. The debt amount recoverable from the Trust has been quantified by the order of DRT dated 03.06.2008 as confirmed by DRAT by order dated 06.10.2010. The same has attained finality and in terms thereof, Recovery Certificate No.39/2011 was issued as provided under Section 19(22) of RDDBFI Act, 1993 for recovery of the amount of debt specified in the Certificate. As per Section 29 of the RDDBFI Act, 1993, the provisions of the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962 are applicable to the proceedings before the Recovery Officer. In terms thereof, the Recovery Officer is bound to consider and decide the objections raised by the Claimant/Objector before issuing the sale proclamation in respect of the properties specified in the Recovery Certificate. Admittedly, property No.6 is one of the items shown in the Recovery Certificate dated 03.06.2008. According to the Trust, property No.6 is a vacant land and the entire land of 63.45 acres was mortgaged to HUDCO. The specific case of the Trust as well as HUDCO is that property

No.6, being vacant land, shall be sold first and the same would be sufficient to clear the entire loan amount due to HUDCO. It is also the specific case of the Trust and HUDCO that HUDCO is entitled to take recourse to the proceedings under SARFAESI Act notwithstanding the pendency of the recovery proceedings under RDDBFI Act, 1993 and that there cannot be any objection to sell property No.6 to M/s KM Realcon Pvt. Ltd. by private treaty in accordance with Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 particularly in view of the order of DRAT dated 25.06.2013, which attained finality.

42. Though the Trust does not dispute the fact that it had entered into the agreement of sale dated 26.08.2010 with SGS Constructions for sale of the entire 63.45 acres of land comprised in property No.6, it is contended by the Trust that no right or title can be claimed by SGS Constructions over the said land and it is not open to SGS Constructions to raise any objection for sale of property No.6 in terms of order of DRAT dated 25.06.2013 for the following reasons:

(a) The agreement of sale dated 25.06.2013, being an unregistered agreement, did not confer any right or title over SGS Constructions in view of Section 54 of the Transfer of Property Act and Section 49 of the Registration Act as amended by State of U.P. according to which any agreement of sale qua an immovable property in the State of U.P., if not registered, cannot be used for specific performance.

(b) Though SGS Constructions got the said agreement of sale duly stamped subsequently and also got a declaration to that effect under Section 42 of the Stamp Act vide order of the Chief Controlling Revenue Authority, Allahabad dated 01.07.2013, the Trust challenged the said declaration by filing W.P. No.39596/2013 which is still pending on the file of the High Court of Allahabad and an interim order staying the operation of the order dated 01.07.2013 has been in operation.

(c) SGS Constructions being a mere agreement holder without possession has no *locus standi* to oppose the proceedings either under RDDBFI Act or under SARFAESI Act. SGS Constructions cannot also maintain a writ petition seeking a direction to a private party to sell its land in terms of the agreement of sale.

43. On the other hand, the specific case of SGS Constructions is that -

(i) By virtue of the Exchange Deed dated 04.05.2007 executed between the Trust and AEVP, the Trust received 21 acres of land belonging to AEVP situated in Villages Shahbad, Mithapur and Akbarpur in exchange of 21 acres of its land out of 63.45 acres of vacant land comprised in property No.6 and thus the 21 acres of land so received by the Trust under the Exchange Deed dated 04.5.2007 was not mortgaged to HUDCO and remained unencumbered. Hence, the same cannot form part of the recovery proceedings either under RDDBFI Act, 1993 pending before the Recovery Officer, or under SARFAESI Act.

(ii) Since the deficit stamp duty together with interest and penalty as determined by the Assistant Commissioner (Stamp), Ghaziabad dated 19.12.2010 had already been paid and pursuant thereto the Agreement of Sale dated 26.08.2010 executed by the Trust in its favour qua property No.6 was duly registered under the provisions of Uttar Pradesh Stamps and Registration Act, it has acquired right and title over the said property.

(iii) At any rate, so far as 21 acres of unencumbered land covered by the Exchange Deed is concerned, neither the Trust nor HUDCO is entitled to make any claim.

(iv) The said 21 acres of land, therefore, needs to be demarcated since it does not form part of the properties specified in the recovery certificate dated 03.06.2008.

(v) Property No.6 being an agricultural land, the provisions of SARFAESI Act are not applicable as per Section 31(i) of SARFAESI Act and therefore the question of selling property No.6 by private treaty under Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 does not arise.

(vi) Since the dispute between the Trust and SGS Constructions has already been referred for arbitration in terms of the arbitration clause provided under the Agreement of Sale dated 28.06.2010 and the proceedings are pending before the Arbitrator in which the Trust has also participated and undertook to maintain status quo unless and until the right and title acquired by SGS Constructions qua property No.6 is adjudicated by the Arbitrator, HUDCO cannot claim any right over Property No.6.

44. As per the law laid down by the Supreme Court in ***Transcore v. Union of India*** (supra), there can be no dispute that HUDCO is entitled to invoke the provisions of the SARFAESI Act for enforcing the interest created in the mortgaged properties during the pendency of the proceedings before the Recovery Officer under RDDBFI Act. However, sub-section (2) of Section 17 SARFAESI Act casts a duty on the Debts Recovery Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the SARFAESI Act and the Rules made thereunder. If DRT after examining the facts and circumstances of the case and evidence produced by the parties comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore possession of the secured assets to the borrower.

45. As is evident from the material available on record, SGS Constructions made a claim in the year 2011 itself before DRT-II, Delhi by making an application under Section 17 of SARFAESI Act. A specific claim was made that it acquired right and title in respect of property No.6 by virtue of the agreement of sale dated 26.08.2010 and more particularly that property No.6

being an agricultural land, falls beyond the purview of SARFAESI Act by virtue of Section 31(i). The offer by K.M. Realcon Pvt. Ltd. to purchase property No.6 by way of private treaty appears to have been made in March, 2013 which was taken note of by DRT by order dated 05.04.2013 during the enquiry in the Securitization Application filed by SGS Constructions.

46. It is relevant to note that sub-section (5) of Section 17 mandates that any application made under sub-section (1) by any person aggrieved by any of the measures under Section 13(4) shall be disposed of by DRT within 60 days from the date of such application. Even the extension of the said period under the proviso shall not exceed four months from the date of making of such application. That being the statutory time frame, it is un-understandable as to how the claims made by the aggrieved persons in respect of property No.6 have not been adjudicated till date. We have observed that though at one stage the parties carried the matter up to Supreme Court, there has never been stay of adjudication of applications under Section 17(1) of SARFAESI Act. The order dated 25.06.2013 passed by DRAT, Delhi upon which the learned counsels appearing for HUDCO and the Trust placed much reliance does not create any impediment for DRT to proceed with the enquiry and adjudicate the claims made by the third parties under Section 17(1) of the SARFAESI Act. In fact, the order dated 25.06.2013 directing sale of property No.6 in the first instance appears to be contrary to the very scheme and object of SARFAESI Act, more particularly the protection granted under Section 17(1) of the SARFAESI Act

to the aggrieved parties. The said order virtually renders the Securitization Applications pending on the file of the DRT redundant.

47. Coming to the proceedings pending before the Recovery Officer under the RDDBFI Act, the question that needs consideration is whether the allegation that SGS Constructions was not afforded proper opportunity to address its objections is established and whether the order passed by the Recovery Officer dated 01.07.2015 as confirmed by DRT and DRAT by orders dated 10.07.2015 and 20.07.2015 respectively are sustainable under law.

48. Admittedly, SGS Constructions filed its objections before the Recovery Officer in the year 2011 and the supplementary objections were filed in the year 2013. During the pendency of the said proceedings, the appeals preferred by the parties against the order of the High Court of Allahabad dated 25.09.2013 in W.P.(C) No.11669/2011 were decided by the Supreme Court by judgment dated 15.05.2015 [***Maharaji Educational Trust v. SGS Construction & Development Pvt. Ltd. & Ors.***, **(2015) 7 SCC 130**]. The said judgment came to be passed after taking into consideration the fact that SGS Constructions is an agreement holder qua property No.6; that out of property No.6 admeasuring 63.45 acres mortgaged to HUDCO, 21 acres had been exchanged by the Trust with AEVP; that the recovery proceedings are pending before the Recovery Officer in which SGS Constructions had filed objections in respect of Property No.6 and that steps initiated by HUDCO for sale of mortgaged property under the SARFAESI Act are also pending.

49. While setting aside the order of the High Court of Allahabad dated 25.09.2013 in W.P.(C) No.11669/2011, the Supreme Court held that the writ petition filed for a direction to AEVP to demarcate the 42.45 acres of encumbered land was not maintainable since the rights between private parties cannot be made subject matter of writ jurisdiction. It was also observed by the Supreme Court:

> "11. Though, there is serious dispute between the parties to the lis whether the said land is unencumbered, finding has been given by the High Court that 21 acres of land is unencumbered. The High Court could not have treated 21 acres of land as unencumbered one out of 63.45 acres. It was not open to the High Court to enter into the aforesaid arena, which of the property is encumbered and to be sold in realisation of debt is the outlook of the Recovery Officer, DRT, Delhi, where the recovery proceedings are pending, including the objections preferred by the builder.
>
> 12. In our opinion, it was not open to the builder to file a writ application for the aforesaid reliefs. Though the second relief had been abandoned at the time of final arguments but the first relief could not have been granted without going into the said question. The High Court in writ jurisdiction has made a declaration that the property 21 acres of land is unencumbered. The High Court could not have adjudicated on the property rights under the guise of directing the Avas Evam Vikas Parishad to demarcate the land and give finding that it was unencumbered land. The High Court has erred in law in giving a finding on merits on effect of exchange and that Section 70 of the TP Act is not applicable. It was not the function of the High Court to decide these questions under writ jurisdiction.

> 13. Section 70 of the TP Act is extracted hereunder:
>
> > "**70.Accession to mortgaged property**.—If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession."
>
> 14. We could have decided the aforesaid question finally. However, we refrain from doing so as, in our opinion, it was not open to the High Court to take up these questions under writ jurisdiction and to declare the properties as unencumbered. It was for the parties to agitate the questions before the DRT where the recovery proceedings are pending at the instance of Hudco with whom the property had been mortgaged by the Trust."

50. As per Section 29 of RDDBFI Act, 1993, the Recovery Officer is bound to make the inquiry in the manner laid down in the Second and Third Schedule to the Income Tax Act, 1961 and the Rules made thereunder by giving an opportunity of being heard to all the objectors. The objections raised by SGS Constructions claiming right and title on the basis of the Agreement of Sale dated 26.08.2010 executed by the Trust have already been entertained by the Recovery Officer and the same are yet to be decided. It is also relevant to note that execution of the Exchange Deed is not in dispute. In the circumstances, we are of the view that SGS Constructions was justified in seeking amendment of its objections by incorporating that Property No.6 includes 21 acres of unencumbered land. It is no doubt true that this Court in exercise of writ jurisdiction cannot take up such issues and cannot declare the properties as unencumbered, however, certainly it is an issue which needs consideration by

the Recovery Officer as has been observed by the Supreme Court in ***Maharaji Educational Trust v. SGS Construction & Development Pvt. Ltd. & Ors.*** (supra).

51. It is also relevant to note that against an interim order dated 20.05.2015 passed by the learned Single Judge in W.P.(C) No.2604/2013, SGS Constructions had earlier filed LPA No.385/2015 contending that by virtue of the Agreement of Sale dated 26.08.2010, it is entitled to purchase the property No.6 and that the said land being an agricultural land the provisions of SARFAESI Act are not applicable. The said appeal was disposed of by the Division Bench by order dated 01.07.2015 leaving it open to the Recovery Officer to decide all the objections raised by the parties in accordance with law uninfluenced by the observations made by the learned Single Judge. It was a consent order and all the parties to the proceedings agreed that their respective objections would be decided by the Recovery Officer in accordance with law uninfluenced by any of the observations made by this Court. It is, therefore, not open to HUDCO or to the Trust to pre-empt consideration of objections of SGS Constructions by the Recovery Officer, more particularly, in the light of the directions of the Supreme Court in the judgment dated 15.05.2015.

52. It may be added that the SGS Constructions filed objections before the Recovery Officer in the year 2011 and the supplementary objections were filed in the year 2013. By that time, the writ petitions were pending before the High Court of Allahabad, which were ultimately decided by the Supreme Court by judgment dated 15.05.2015. The applications filed by SGS Constructions

before the Recovery Officer to bring on record the subsequent events by seeking amendment of objections and to receive additional documents cannot therefore be held to be an attempt to delay the proceedings. We have already observed that Rule 11(3) of Schedule II to Income Tax Act, 1961 entitles the claimant or objector to adduce evidence to establish that he had some interest in the property in question. Therefore, in our considered opinion, the order passed by the Recovery Officer dated 01.07.2015 as confirmed by DRT and DRAT by orders dated 10.07.2015 and 20.07.2015 respectively are contrary to law and unwarranted. Hence the said orders which are the subject matter of W.P.(C) No.3047/2016 are liable to be set aside.

53. Coming to the other writ petitions, we found that the reliefs sought therein and the issues involved arise out of the disputes *inter se* M/s K.M. Realcon Pvt. Ltd. and HUDCO, the Trust and HUDCO and SGS Constructions and HUDCO with regard to the mortgaged properties. Since no such issues deserve consideration by this Court in exercise of the writ jurisdiction under Article 226 of the Constitution of India, we decline to express any opinion with regard to the respective claims made by the parties.

54. For the aforesaid reasons, we hold that all the contentious issues between the parties in respect of the properties in question shall be decided by the Recovery Officer following due process of law. We make it clear that all the interim orders passed by this Court during the pendency of W.P.(C) Nos. 2604/2013 and 7261/2015 shall stand vacated and that the same shall not come

in the way of adjudication of the objections by the Recovery Officer or by DRT under SARFAESI Act.

55. Accordingly, we direct that:

(i) The Recovery Officer attached to DRT-II, Delhi shall consider and decide the objections raised by SGS Constructions as well as other objectors, if any, with regard to Property No.6 specified in the Recovery Certificate dated 30.06.2008 and pass an appropriate order in accordance with law within 3 months from today.

(ii) The consideration of the objections by the Recovery Officer shall be in accordance with the procedure prescribed under the Second and Third Schedules to the Income Tax Act, 1961 and the Income Tax (Certificate Proceedings) Rules, 1962.

(iii) The order of the Recovery Officer dated 01.07.2015 as confirmed by DRT by order dated 10.07.2015 and by DRAT by order dated 20.07.2015 is hereby set aside and the application of SGS Constructions for amendment of its objections shall stand allowed as prayed for.

(iv) So far as the proceedings initiated by HUDCO under the provisions of SARFAESI Act are concerned, the DRT shall decide all the Applications under Section 17(1) pending on its file including the claim of SGS Constructions that Property No.6 being an agricultural land is beyond the purview of the SARFAESI Act and pass an appropriate order in accordance with law within three months from today.

(v) Till appropriate orders are passed by the Recovery Officer and DRT in terms of the above directions, status quo obtaining as on today with regard to Property Nos. 1 to 6 shall be maintained in all respects.

56. As a result, W.P.(C) No.3047/2016 is allowed. The other writ petitions and LPAs shall stand disposed of in terms of the above directions.

CHIEF JUSTICE

P.S. TEJI, J.

FEBRUARY 01, 2017
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