Reserved on	15/11/2019
Delivered on	19/11/2019

A No.8576 of 2019 &
O.A.No.954 of 2019 in
C.S.No.612 of 2019

K.KALYANASUNDARAM., J

M/s.Sridevi Hospital has instituted the suit in C.S.No.612 of 2019 for the following reliefs:-

(i) Declaring that the assignment deed dated 31.08.2010 and the broad terms and conditions dated 02.09.2010 as null and void and has no evidentiary value and non-est in the eye of law and it will not ensure any right in favour of the first defendant to proceed against the suit schedule properties either under Section 13(4) of SARFAESI Act or by enforcing any other provisions by bringing the property for sale since it is not a secured asset.

(ii) Permanent injunction restraining the first defendant from proceeding against the suit schedule properties either by way of sale by public auction or e-auction.

(iii) Mandatory injunction directing the first defendant to accept the One Time Settlement offer given by the plaintiff and return the original documents of the suit schedule properties and for costs.

2. The case of the plaintiff is that it is a proprietary concern and the sole proprietor is Dr.Senthilnathan. The plaintiff availed cash credit facilities from Indian Overseas Bank / the third defendant for Rs.16.5 Crores to put up a hospital at Bangalore. At that time, the original documents of the suit properties at Chennai and Bangalore were produced as securities. The plaintiff has not created any registered / equitable mortgage in favour of the third defendant. The plaintiff would state that due to unforeseen circumstances prevailed in Bangalore in view of Kauvery and Hogenakkal issues, the plaintiff was not in a position to develop the property, as a hospital, however it was developed as residential flat, after considerable time. In the meanwhile, the accounts were declared as Non Performing Asset and without the knowledge and consent of the plaintiff, assigned the loan in favour of the defendants 1 and 2, by a registered assignment deed, dated 31.08.2010, in which, the plaintiff is not a party.

3. It is the case of the plaintiff that pursuant to the amendment to the Registration Act in Tamil Nadu and the law in Karnataka, the documents should be registered, where the property is situated. But, the assignment deed dated 31.08.2010 was registered in Chennai for the property situated in Bangalore in violation of the laws. Further, the plaintiff was mislead to sign broad statement of terms of agreement dated 27.09.2010. The Sub Registrar, Bangalore impounded the document, by an order dated 28.02.2015. The assignment agreement dated 31.08.2010 was also cancelled by a deed, dated 03.10.2016. The first defendant challenged those orders in W.P.No.28962 of 2015 and W.P.No.9193 of 2017 before the Karnataka High Court and when those Writ Petitions are pending, the first defendant brings the suit properties for auction by invoking the provisions of the SARFAESI Act.

4. The present suit has been filed alleging fraud and the following instances are stated as acts of fraud indulged by the first defendant:-

(i) The first defendant is not a secured creditor under Section 2(1) (zd) (iii) of the SARFAESI Act, as no assignment deed was executed by the third defendant in favour of the first defendant. Further, the assignment agreement dated 31.08.2010 was cancelled by a deed of cancellation of assignment, dated 03.10.2016. Though the Karnataka High Court in W.P.No.9193 of 2017 has order notice of motion, no stay was granted. Similarly, the broad settlement terms of agreement, dated 27.09.2010 has been impounded by the Registering Authority and an order of impounding was challenged by the first defendant in W.P.No.28962 of 2015. However, the first defendant suppressing those facts, is bring the property for auction.

(ii) By virtue of amendment of Section 28 of Registration Act by the Tamil Nadu Act 19 of 1997, the assignment agreement dated 31.08.2010, is a void document.

(iii) The plaintiff repaid Rs.9,33,55,967/- in Rs.13.50 Crore loan. Out of Rs.16.5 Crore loan sanctioned for Bangalore Project, the plaintiff repaid Rs.12,07,35,718/- and also subsequently paid Rs.3.96 Crores, in total, the plaintiff paid Rs.16.29 crores, but the first defendant now claims Rs.120 Crores, charging exorbitant interest of 88%.

(iv) In short, it is the primary contention of the plaintiff that the first defendant has no right or authorize to take recovery proceedings against the plaintiff, however by playing fraud, the first defendant has initiated recovery proceeding to knock down the property of the plaintiffs.

5. O.A.No.954 of 2019 has been filed along with the plaint praying for an order of ad-interim injunction, restraining the respondents or their men or agents from bringing the suit properties for auction. The first defendant in the suit has filed the application No.8576 of 2019 under Order VII Rule 11 to reject the plaint.

6. According to the first defendant, it is a company incorporated under the Companies Act and is registered as a securitization and reconstruction company in terms of Section 3 of SARFAESI Act. The first defendant is recognized as a financial institution. The present suit is barred by Section 34 of SARFAESI Act.

7. It is the case of the first defendant that the third defendant vide assignment agreement, dated 31.08.2010 had assigned the loans disbursed under the loan documents together with all its rights, title and interest in the loan documents. Through the said assignment agreement, the first defendant acquired loans of the plaintiff together with security interest and all available rights against the borrowers for recovery of outstanding loans under Section 5(2) and (3) of SARFAESI Act. The said process of assignment being one of the measures taken under Section 13(4) of the SARFAESI Act and the remedy of the plaintiff is to file a securitization appeal under Section 17(1) of SARFAESI Act.

8. It is further stated that the plaintiff has already filed a suit in O.S.No.6418 of 2015 before the City Civil Court, Bangalore and the same is pending adjudication and therefore, the present suit is barred by resjudicata. The plaintiff became aware of the assignment agreement, dated 31.08.2010 in the year 2010 itself and hence, the suit is barred by limitation. O.A.No.288 of 2014 filed by the first defendant before DRT was ordered on 31.10.2017, rejecting all the contentions raised by the plaintiff.

9. A counter affidavit has been filed by the plaintiff contending that the application under Order VII Rule 11 of C.P.C is not maintainable as the conditions prescribed under the provision is not in existence in this case. Since the applicant / first defendant is not a secured creditor, the suit is not barred under Section 34 of SARFAESI Act. It is further stated that the suit filed before the City Civil Court, Bangalore is not adjudicated till date and hence, the question of *res judicata* does not arise. The suit has been filed within three years from the date of bringing the property from the last auction, hence, the suit is not barred by limitation. Moreover, the question of limitation is a mixed question of fact and law and the plaint cannot be rejected at the threshold itself on the question of limitation without going into the trial and the suit is maintainable, in view of the decision of the Apex Court in the case of ***Mardia Chemicals*** *[(2004) 4 SCC 311].*

10. When the injunction application came up for hearing on 22.10.2019, this Court ordered notice to the respondents to enable them to file a counter. Immediately, the first defendant has filed the application under Order VII Rule 11 of CPC and hence, this application is taken up for

adjudication.

11. Mr.Chetan Sagar, learned counsel for the first defendant has made the following submissions:-

- The plaintiff availed financial assistance from the third defendant from the year 2004 and for the default committed in repaying the loan amount, account of the plaintiff became Non Performing Asset and the third defendant by assignment agreement, dated 31.08.2010 assigned the loans disbursed in favour of the plaintiff together with security interest and other rights available against the borrower for recovery of the outstanding. In pursuance of the said agreement, the first defendant had stepped into the shoes of the third defendant as its assignee and the secured creditor of the first respondent / plaintiff. Since it is a measure comes under Section 13 (4) of SARFAESI Act, and if the plaintiff is aggrieved, he has to go before the Tribunal under Section 17 of the Act and hence, the suit is barred under Section 34 of the SARFAESI Act.
- The plaintiff was declared as insolvent by the order of this Court in I.P.No.55 of 2013 and in pursuance of the order, the entire property of the plaintiff shall vest with the Official Assignee, hence the

plaintiff has no right to challenge the action of the first defendant.

- The applicant / first defendant filed a case before the Debt Recovery Tribunal in O.A.No.288 of 2014 against the plaintiff and the application was allowed on 31.10.2017 and to recover the amount, the first defendant is bring the property for sale under Section 13 (4) of SARFAESI Act.

- The applicant is a secured creditor within the meaning of Section 2(1) Z(d) III of SARFAESI Act. There is no specific plea with regard to fraud alleged to have been committed by the defendants and mere allegation of fraud would not entitle the plaintiff to maintain the suit.

12. In support of the above contentions, the learned counsel has relied upon the following decisions:-

(i) In ***ICICI BANK LTD. v. APS STAR INDUSTRIES LTD.***, [*(2010) 10 SCC 1]*, an issue came up for consideration before the Hon'ble Apex Court for assignment of debts / NPA, between the banker *inter se*, the Hon'ble Apex

Court in paragraph No.45 of the judgment has held as follows:-

" Invocation of Section 130 of TP Act, 1882

45. In the alternative, since the borrower(s) has relied on Section 130 of the said TP Act, one needs to analyse the contentions raised in that regard. According to the borrower(s) assignment of Financial Instruments in possession of ICICI Bank Ltd. to Kotak Mahindra Bank Ltd. transfers not merely the right to recover the debt but also transfers the obligations under the Financial Instruments "as if they were executed by the clients of ICICI Bank in favour of the assignee", i.e., Kotak Mahindra Bank Ltd. According to the borrower(s), an assignment of a debt can never carry with it the assignment of the obligations of the assignor unless there is a novation of the contract by all parties. Therefore, according to the borrower(s), the impugned Deed of Assignment is legally unsustainable without novation of original contract between ICICI Bank Ltd. (assignor) and the borrower(s) (assignee). We find no merit in the above arguments.

(ii) In **JAGDISH SINGH v. HEERALAL** [*(2014) 1 SCC 479]*, the Hon'ble Apex Court has held that "any person" aggrieved against the measures provided under Section 13(4) of SARFAESI Act, can approach D.R.T. or Appellate Tribunal and not the Civil Court.

(iii) This Court, in ***Sumathi v. Sengottaiyan*** [*2010 (3) CTC 53]* confirmed the order of the trial Court and the appellate Court, wherein, the application filed by the plaintiff for injunction was rejected.

(iv) The Bombay High Court in ***Nikhil Amod Buchke v. Bank of Maharashtra*** [*2017 SCC Online Bom 3337],* relying on the decision in ***Jagdish Singh*** (*supra*), confirmed the order of the trial Court, rejecting the plaint on the application filed by the Banker.

(v) The Division Bench of Bombay High Court in ***State Bank of India vs. Jigishaben B. Sanghavi and Ors.*** [*MANU/MH/1745/2010]* held that the borrower or third party cannot be permitted to defeat or render nugatory provision of relevant Acts, merely by stray reference to an allegation of fraud. In that case, even before a measure was taken under Section 13(4) of SARFAESI Act, a suit came to be filed for declaration and permanent injunction, restraining the officers of the Bank from the possession of the plaintiff.

(vi). ***V.Thulasi v. Indian Overseas Bank*** *[2011 (3) CTC 801]*

The plaintiff in that case filed a suit within the exception provided in the case of ***Mardia Chemicals***. It was alleged in that case that the first defendant-Bank along with other bankers grossly misused the Trust reposed on them and misused the documents executed by the plaintiff for the purpose of availing loan. Considering the above allegations, the Division Bench of this Court in paragraph Nos.31 to 33 has held as follows:-

> *31. As held by the Supreme Court, the pleadings in an action for restraining a sale by a mortgagee must "clearly disclose a fraud or irregularity on the basis of which the relief is sought. The observations of the Supreme Court in Mardia Chemicals Ltd. v. Union of India MANU/SC/0323/2004 : (2004) 4 SCC 311 emphasized that the exception, which is carved out is a limited exception. Like all exceptions, the exception carved out by the Supreme Court has to be strictly construed. A borrower or a third party cannot be permitted to defeat the provisions of the Act merely by alleging the "gross misuse of the trust reposed" and "misuse of the documents executed by the Plaintiff. The above expressions used in the plaint cannot be compartmentalised and read in isolation. The plaint has to be read as a whole along with the documents produced by the Plaintiff. Considering the plaint*

averments, we are of the view that the learned single Judge rightly held that in view of the specific bar under Section 34 of SARFAESI Act, the Civil Suit filed by the Plaintiff is barred.

32. As pointed out earlier, on 7.2.2006, Bank issued the notice under SARFAESI Act and the suit came to be filed on 27.3.2006. As rightly pointed out by the learned Counsel for the Bank, the Plaintiff has not chosen to send any reply to the said notice dated 7.2.2006. On the other hand, the Plaintiff has produced a copy of the complaint purported to have been lodged with the Commissioner of Police on 23.1.2006.

33. Even though the Plaintiff has produced a copy of the plaint dated 23.1.2006, there is no material to show that the same has been lodged with the Commissioner of Police on 23.1.2006. If it is the case of the Plaintiff that he has never given his property as security for the loan availed by the 1st Defendant and that the Defendants 1 to 3 and 5 to 7 colluded together to misuse the documents, nothing prevented the Plaintiff from issuing suitable reply to the said notice dated 7.2.2006. But that was not to be so. In the absence of any contemporaneous denial from the Plaintiff, going by the plaint averments and the documents, in our considered view, the suit is barred under Section 34 of the SARFAESI Act."

13. *Per contra* Mr.S.Sundaresan, learned counsel for the first respondent / plaintiff has made the following submissions:-

- The assignment agreement deed dated 31.08.2010 does not create any right in favour of the first defendant and unless, the assignment deed is registered, the first defendant has no right to initiate proceedings against the plaintiff. The first defendant has also got a Power of Attorney from the third defendant, which shows the assignment agreement deed does not create absolute right in favour of the applicant / first defendant.

- The assignment deed dated 31.08.2010 was cancelled by the plaintiff by a Deed of Cancellation on 03.10.2016 and the same was communicated by the Sub Registrar, Peenya to the District Registrar (Administration) Royapettah, on 03.11.2016.

- The broad settlement terms of agreement was impounded by the Sub Registrar, Peenya in Karnataka on 28.02.2015. Though the applicant

/ first defendant challenged the orders before the Karnataka High Court in W.P.Nos.28962 of 2015 & 9193 of 2017, without leave of the Karnataka High Court, the applicant / first defendant bring the property of the plaintiff for auction.

- Mere deposit of title deeds to create equitable mortgage does not require registration, but in the instant case, the third defendant has assigned the right in favour of the first defendant, which requires registration under Section 17(1)(c) of the Registration Act.

- 'C' schedule property, which is situated in the State of Karnataka, cannot be registered in Sub Registrar Office, Anna Nagar and hence the assignment agreement is null and void in view of Section 28(b) of the Registration Act.

- Each and every time when the properties were brought for auction, challenge was made before D.R.T raising similar grounds, but no adjudication was made and no finding was given on the contentious issues, but they came to be closed based on the statement of the defendants that the property was not sold.

14. In this regard, the learned counsel has cited the following decisions in support of his contentions:-

(i) ***Mardia Chemicals Ltd., & Others vs. Union of India & Others*** *[CDJ 2004 SC 504]*

> *" 51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V.Narasimhachariar (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 22:*
>
> > *"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale*

> *with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: 'Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol. II, Fourth Edn., page 784).'*

(ii) ***STATE OF HARYANA V. NARVIR SINGH*** *[(2014) 1 SCC 105]*

11. Mortgage inter alia means transfer of interest in the specific immovable property for the purpose of securing the money advanced by way of loan. Section 17(1)(c) of the Registration Act provides that a non-testamentary instrument which acknowledges the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extension of any such right, title or interest, requires compulsory registration. Mortgage by deposit of title-deeds in terms of Section 58(f) of the Transfer of Property Act surely acknowledges the receipt and transfer of interest and, therefore, one may contend that its *registration is compulsory. However, Section 59 of the Transfer of Property Act mandates that every mortgage other than a mortgage by deposit of title-deeds can be effected only by a registered instrument. In the face of it, in our opinion, when the debtor deposits with the creditor title-deeds of the property for the purpose of security, it becomes mortgage in terms of Section 58(f) of the Transfer of Property Act and no registered instrument is required Under Section 59 thereof as in other classes of mortgage. The essence of mortgage by deposit of title-deeds is handing over by a borrower to the creditor title-deeds of immovable property with the intention that those documents shall constitute security, enabling the creditor to recover the money lent. After the deposit of the title-deeds the creditor and borrower may record the transaction in a memorandum but such a memorandum would not be an instrument of mortgage. A memorandum reducing other terms and conditions with regard to the deposit in the form of a document, however, shall require registration Under Section 17(1)(c) of the Registration Act, but in a case in which such a document does not incorporate any term and condition, it is merely evidential and does not require registration.*

12. 15. This Court had the occasion to consider this question in the case of Rachpal v. Bhagwandas MANU/SC/0046/1950 : AIR 1950 SC 272, and the statement of *law made therein supports the view we have taken, which would be evident from the following passage of the judgment:*

> *'4. A mortgage by deposit of title-deeds is a form of mortgage recognized by Section 58(f), T.P. Act, which provides that it may be effected in certain towns (including Calcutta) by a person "delivering to his creditor or his agent documents of title to immovable property with intent to create a security thereon." That is to say, when the debtor deposits with the creditor the title-deeds of his property with intent to create a security, the law implies a contract between the parties to create a mortgage, and no registered instrument is required Under Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration Under Section 17, Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. The time factor is not decisive. The document may be handed over to the creditor along with the title-deeds and yet may not be registrable.'*

13. This Court while relying on the aforesaid judgment in the case of United Bank of India v. Lekharam Sonaram and Co. MANU/SC/0370/1965 : AIR 1965 SC 1591 reiterated as follows:

> *7....It is essential to bear in mind that the essence of a mortgage by deposit of title-deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties choose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case the document which constitutes the bargain regarding security requires registration Under Section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such property is one hundred rupees and upwards. If a document of this character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either"*

(iii) Union of India, Ennore Branch vs. S.Pval [MANU/TN0724/1991]

23. The learned Counsel Mr. Subramanian, has then relied on another case law reported in The United Bank of India Ltd. v. Lekharam Sona Ram and Company and Ors. (1965) 2 S.C.J. 91, and the head note of which is as follows:

> *A mortgage by deposit of title deeds is a form of mortgage recognized by Section 58(f) of the Transfer of Property Act which provides that it may be effected in certain towns where a person 'delivers to a creditor or his agent documents of title to immovable property with intent to create a security thereon.' In other words, when the debtor deposits with the creditor, title deeds of his property with an intent to create a security, the law implies a contract between the parties to create a mortgage and no registered instrument is required under Section 59 as in other classes of mortgage. The essence of a mortgage by deposit of title deeds, is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent. But if the parties chose to reduce the contract to writing, this implication of law is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case, the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. It follows that in such a case, the document which constitutes the bargain regarding security requires registration under Section 17 of*

the Registration Act, 1908, as a non-testamentary instrument creating an interest in immovable property, where the value of such properly is one hundred rupees and upwards. If a document of this character is not registered, it cannot be used in evidence at all and the transaction itself cannot be proved by oral evidence either.

The letters written by the mortgagors to the mortgagee in the instant case were not intended by the parties to be an integral part of the transaction of the mortgage by deposit of title deeds and did not, by themselves, operate to create an interest in the immovable properties mortgaged and so they did not require registration under Section 17 of the Registration Act....

24. One another case reported in L. Ah. N. Alagappan v. Kalyanasundaram Iyer and Ors. I.L.R. 1977 Mad. 178, was relied on by the counsel for the plaintiff ,in support of his contention. In the saiding, a Bench of this Court has held as follows:

"If there is evidence, either extrovert or introvert which would compel a court to hold that under a single bargain the borrowing and the deposit of title deeds were effected and that the intention is made clearer and public only in a contemporaneous transaction, then a memorandum evidencing such a bargain needs registration. It may be that the memorandum contains a recital as to the quantum of the amount borrowed. That would not make the memorandum any the less a

> *non registerable one, provided it is an independent transaction and not the sole bargain to evidence the deposit of title deeds. The only important feature on which the court should pay its concentrated attention is that the deposit of title deeds should have taken place earlier than the time of the writing of the memorandum. If such a dissociation is point of time is apparent from the memorandum itself, or if it would be discovered from the totality of the facts and appreciation of the surrounding circumstances, then the plaintiff can successfully pilot his case, on the foot of an equitable mortgage and obtain a mortgage decree."*

15. Heard the rival submissions and perused the materials available on record.

16. It is settled law that the plaint cannot be rejected on the basis of the allegations made by the defendant in his written statement or in an application filed for rejection of plaint. The averment in the plaint has to be read as a whole to find out whether the plaint discloses a cause of action. Cause of action is a question of fact, which have to be gathered on the basis of the averments made in the plaint in its entirety. [*see (2006) 3 SCC 100, AIR 2015 SC 2485*]

17. This application has been filed on the basis that the first defendant is a secured creditor under the provisions of SARFAESI Act. According to the applicant / first defendant, by the assignment agreement, dated 31.08.2010, the applicant acquired loans of the plaintiff together with security interest and all the rights available as a borrower for recovery of the outstanding loan.

18. On the other hand, it is the categorical case of the plaintiff that the assignment agreement does not confer any right on the first defendant. The learned counsel for the first respondent / plaintiff has drawn attention of this Court to Section 54 of the Transfer of Property Act, which reads as follows:-

> *54. **Sale defined**.- 'Sale' as a transfer of ownership in exchange for a price Paid or promised or part paid and part promised'*
>
> ***Sale how made**.- Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.*

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.

Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

***Contract for sale**.- A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between the parties.*

It does not, of itself, create any interest in or charge on such property."

19. A plain reading of the above Section would show that mere agreement of sale does not create any right over the property. It is evident from the assignment agreement, dated 31.08.2010, the first defendant has agreed to purchase movable and immovable properties for a sale consideration of Rs.15,45,07,125/-. It is relevant to note that the first defendant claims the right of the secured creditor not based on any other document, except the assignment agreement, dated 31.08.2010.

20. For ready reference, Sections 17 and 28 of the Registration Act are extracted hereunder:-

*"**17. Documents of which registration is compulsory.**—*

(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

...

...

..."

28. Place for registering documents relating to land.- *Save as in this Part otherwise provided,*

"(a) every document mentioned in [Clauses (a), (b), (c), (d), (e), (f), (g), (h) and (i) of sub-section (1) and sub-section (2) of Section 17 in so far as such document affects immovable property and in clauses (a), (b), (c), and (cc) of Section 18, shall be presented for registration in the Office of a Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates is situate in the State of Tamil Nadu:

Provided that every document mentioned in clause (h) of sub-section (1) of Section 17 may also be presented for registration in the office of the Sub-Registrar within whose jurisdiction the principal ordinarily resides; and

(b) any document registered outside the State of Tamil Nadu in contravention of the provisions of clause (a) shall be deemed to be null and void."

21. Section 17 deals with documents which are compulsorily registrable. Section 17 (b) and 17(c) mandate registration of non-testamentary instruments which create, assign, any right, title or interest whether in the present or in future of the value of one hundred rupees and

upwards, to or in immovable property and the non-testamentary instruments which acknowledge receipt or payment of any consideration on account of the creation, declaration, assignment of any right, title or interest.

22. Section 28 states that the every document of such nature shall be presented for registration of a Sub-Registrar within whose jurisdiction, the whole or some portion of the property is situated in the State of Tamil Nadu. Section 28 (b) declares that any document registered outside the State of Tamil Nadu in contravention of the proviso of Clause (a) shall be deemed to be null and void.

23. It is represented that similar amendment has been made to the Registration Act by the State of Karnataka, under which, the document registered outside the State of Karnataka is declared as null and void. It is not disputed that the assignment agreement was registered in the Sub Registrar Office, Anna Nagar, Chennai for the property situated in Bangalore.

24. It is not the case of the applicant / first defendant that apart from the assignment agreement, dated 31.08.2010, a deed of convenience has been made in favour of the first defendant. The Hon'ble Apex Court in the decisions relied upon by the learned counsel for the respondent / plaintiff referred supra has held consistently that mere deposit of title deeds for creating mortgage does not require registration and if the instrument in question is constructive of transaction i.e., the memo creates rights and liabilities or extinguishes them with regard to the Mortgage by deposit of title deeds (MDTD), the registration of such constitutive memorandum / instrument is compulsory. In the matter on hand, it is not the case of the first defendant assignment agreement, dated 31.08.2010 is mere deposit of title deeds. As stated supra, apart from mentioning the sale consideration, under the document the rights of the assignor has been transferred to the assignee. Hence, registration of the document is mandatory. But, admittedly, no assignment deed has been executed in favour of the first defendant in pursuance of the assignment agreement and it was not registered in accordance with law. So, in my considered opinion, the assignment agreement does not convey any right on the first defendant

to take action against the plaintiff under the SARFAESI Act.

25. It is not disputed that when two of the properties in Chennai and a property in Bangalore were brought for sale, the plaintiff approached the Debt Recovery Tribunal, challenging the sale, of-course, making similar allegations against the defendants. It is informed that since the sale did not take place, the applications filed by the plaintiff came to be dismissed, except one application is pending before the Debt Recovery Tribunal, Bangalore. It is not disputed that challenging the broad terms and conditions, the plaintiff filed a suit before the City Civil Court, Bangalore and the same is pending disposal. Insofar as the recovery proceedings initiated by the defendant before the Debt Recovery Tribunal in O.A.No.288 of 2014, an order was passed on 31.10.2017 by the DRT - I, Chennai. Indisputably, with regard to allegations of fraud pleaded by the plaintiff, no finding has been given by any competent Court of law.

26. It is the contention of the plaintiff that aggrieved over the decision in O.A.No.288 of 2014, an appeal has been preferred before the Appellate Authority. In the exemption application sought for by the

plaintiff, a conditional order was passed and the same is challenged in C.R.P. before the High Court and no finality is reached on O.A.No.288 of 2014.

27. With regard to insolvency proceedings, the learned counsel for the first respondent / plaintiff would argue that at the instigation of the first defendant, 110 Civil Suits were filed before the City Civil Court, Madras on the strength of forged promissory notes and unconditional leave sought for was rejected and ex-parte decree came to be passed. The exparte decree passed in 55 cases have been set aside by this Court in C.R.P.No.2383 of 2015 etc., batch and the plaintiff has been granted an unconditional leave to contest the matter. The insolvency petitions were filed based on ex-parte Decree and out of six cases, 5 cases have already been settled and in I.P.No.55 of 2013, an application to set-aside the order is pending adjudication.

28. In the instant case, though the applicant had obtained an order before the Debt Recovery Tribunal in O.A.No.288 of 2014 against the plaintiff, in the present plaint, the very right of the first defendant to

initiate action against the plaintiff has been taken and it is alleged that suppressing the material facts, the proceedings have been initiated as if the assignment deed has been issued in favour of the first defendant, by playing fraud.

29. It is to be further noted that by the assignment agreement, dated 31.08.2010, the first defendant was assigned the rights of receivables under the loan documents in favour of the applicant / first defendant for a sale consideration of Rs.15,45,07,125/-. On the basis of the assignment agreement, O.A.No.288 of 2014 was filed before the Debt Recovery Tribunal-I, Chennai for recovery of Rs.33,74,74,361/-. Admittedly, for recovering the amount, a sale notice dated 01.10.2018 was issued under Section 13(4) of the SARFAESI Act for recovery of outstanding of Rs.74,41,38,503/-. In June 2019, the outstanding was increased to Rs.87,59,48,253/- and in the sale notice, dated 30.10.2019, it is mentioned as Rs.120,19,80,634/-. According to the plaintiff, the first defendant has charged 88% interest. In fact, the exorbitant demand shocks the conscience of this Court.

30. It is settled principle that an issue of fraud can be raised at any stage of the proceedings and an order obtained by playing fraud is a nullity. In ***(2007) 4 SCC 221 (A.V. Papayya Sastry and others v. Government of Andhra Pradesh and others)***, the Hon'ble Supreme Court has held as follows:

> *"22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. Such a judgment, decree or order--by the first Court or by the final Court-- has to be treated as nullity by every Court, superior or inferior. It can be challenged in any Court, at any time, in appeal, revision, writ or even in collateral proceedings.*
>
> *39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is nonexistent and non est and can not be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by fraud has to be treated as nullity, whether by the court of first in stance or by the final court. And it has to be treated as non est by every Court, superior or inferior."*

31. In this case what is to be seen whether the first defendant is having any authority to initiate proceedings against the plaintiff, which goes to the root of the matter and that requires appreciation of evidence to be adduced by the parties. In the considered opinion of this Court, the principles stated in the decision ***Mardia Chemicals*** *(supra),* is squarely applicable to the case and hence, the suit maintainable.

32. In the light of the above discussion, the first defendant is not a secured creditor and hence the suit is not barred under Section 34 of SARFAESI Act. The applicant has not made out any grounds for rejection of plaint under Order VII Rule 11 of C.P.C. I respectfully agree with the dictum laid down in the decisions cited by the learned counsel for the applicant / first defendant, but they do not help the case of the applicant, as they are factually distinguishable. In such view of the matter, Application No.8576 of 2019 is dismissed as devoid of merits.

33. It is brought to the knowledge of this Court that an action was taken to bring one of the suit schedule properties for auction to be held on

20.11.2019. So, unless interim order is granted, third party interest will also be involved.

34. Taking holistic view of the material on record and after deep consideration, I am of the considered view that the plaintiff has established a *prima facie* case for grant of interim injunction and balance of convenience is also in favour of the plaintiff. Therefore, there shall be an order of interim injunction restraining the respondents or their men or agents claiming rights from or through them brining the suit properties for auction or taking or enforcing any measures under Sections 13 and 14 of SARFAESI Act. Accordingly, the O.A.No.954 of 2019 is ordered.

19 / 11 / 2019

Index :Yes

Speaking order

Note: Issue order copy on 21.11.2019

r n s

A No.8576 of 2019 &
O.A.No.954 of 2019 in
C.S.No.612 of 2019

K.KALYANASUNDARAM., J

r n s

**A No.8576 of 2019 &
O.A.No.954 of 2019 in
C.S.No.612 of 2019**

19 /11/ 2019