

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT: HYDERABAD**

Coram :

*** The Honourable Mr. Justice V.RAMASUBRAMANIAN
and
The Honourable Mr. Justice P. KESHA VA RAO**

+ WRIT PETITION Nos.43027 OF 2019

% Delivered on: 03-06-2019

Between:

Andhra Pradesh State Financial Corporation,
Mahabubnagar Brnach, Rep. by its Senior Branch Manager,
Mettuguda, Mahabubnagar District.

... Petitioner

v.

Kotak Mahindra Bank, rep. by its Manager,
Raj Bhavan Road, Somajiguda, Hyderabad and others.

.. Respondents

! For Petitioner : Mr. Surdarshan Malugari

^ For Respondent No.1 : Mr. Rahul Sarella
For Respondent No.2 : Mr. Rusheek Reddy K.V.
For Respondent No.4 : Mr. M. Srikanth Reddy
For Respondent No.5 : Mr. Srinivas Chitturu

<Gist :

>Head Note :

? Cases referred :

- 1) (2006) 10 SCC 452
- 2) 2010 (8) SCC 110
- 3) 2011 (2) SCC 782
- 4) 2018 (3) SCC 85

HONOURABLE SRI JUSTICE V. RAMASUBRAMANIAN

AND

HONOURABLE SRI JUSTICE P. KESHA VA RAO

WRIT PETITION No.43027 OF 2018

ORDER: *(Per Hon'ble Sri Justice V. Ramasubramanian)*

The Andhra Pradesh State Financial Corporation has come up with the above writ petition challenging the action of the Kotak Mahindra Bank (the first respondent herein) in invoking the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') against the borrower (3rd respondent herein), without their consent.

2. Heard Mr. Sudarshan Malugari, learned counsel for the petitioner, Mr. Rahul Sarella, learned counsel for the 1st respondent (Kotak Mahindra Bank), Mr. Rusheek Reddy K.V., learned counsel for the 2nd respondent (Jammu & Kashmir Bank), Mr. M. Srikanth Reddy, learned counsel for the 4th respondent (State Bank of India), and Mr. Srinivas Chitturu, learned counsel for the 5th respondent (IDBI Bank).

3. The petitioner is a State Financial Corporation established under the provisions of the State Financial Corporations Act, 1951. It is the case of the petitioner that the 3rd respondent company (M/s. Ameya Laboratories Limited formerly known as M/s. Anu's Laboratories Limited) availed credit facilities from the petitioner Corporation and the 2nd respondent bank (J & K Bank) and created a *pari-passu* charge in favour of both of them, over certain immovable properties. A *pari-passu* agreement was entered between the petitioner Corporation and the 2nd

respondent bank on 24.11.2006. After sometime, the 3rd respondent borrower closed its loan account with the 2nd respondent bank and hence the 2nd respondent forwarded all original documents to the petitioner Corporation, thereby making the petitioner Corporation the exclusive first charge holder.

4. The 3rd respondent borrower also borrowed term loan and working capital facilities from the ING Vysya Bank, which later got merged with the Kotak Mahindra Bank, which is the 1st respondent herein. Apart from ING Vysya Bank, the 3rd respondent also availed working capital loans from the State Bank of India, IDBI Bank and Karur Vysya Bank. At the time of sanction of the working capital loans, the petitioner was requested to issue a No-objection Certificate for the creation of a second charge in favour of the banks which advanced working capital facilities, including the 1st respondent bank.

5. It appears that during the period May, 2010 to July, 2010, a series of correspondence took place between the petitioner and the 1st respondent, requesting the petitioner to cede *pari-passu* charge over the immovable properties for the term loans advanced by the ING Vysya Bank and a second charge for the working capital advanced by them. According to the petitioner, they agreed in-principle (i) to cede *pari-passu* charge for the term loan and (ii) to allow the creation of second charge to secure the working capital, but it did not actually materialise. However, the 2nd respondent (J & K Bank) entered into a Memorandum of Entry of Record of deposit of title deeds on 15.12.2010. The case of the petitioner is that this Memorandum was executed without the

consent and knowledge of the petitioner. Therefore, on the basis of the said Memorandum, the 1st respondent (Kotak Mahindra Bank) sought the permission of the petitioner to proceed against the borrower, on the ground that their account has become a Non-Performing Asset. But, the petitioner sent a reply denying the creation of a *pari-passu* charge in favour of the 1st respondent.

6. According to the petitioner, they independently initiated measures under the SARFAESI Act by issuing a demand notice on 16.01.2017 under Section 13 (2) followed by the taking over of symbolic possession on 19.05.2017. The petitioner claims that they also informed all the Banks about the steps taken by them.

7. However, the 1st respondent filed an application under Section 14 before the Chief Metropolitan Magistrate and secured an order. Immediately upon coming to know of the order of possession granted by the Chief Metropolitan Magistrate under Section 14, the petitioner has come up with the above writ petition contending that the 1st respondent does not hold a first charge over the immovable properties and that therefore without the consent of the petitioner, they are not entitled to invoke the provisions of the SARFAESI Act.

8. The 1st respondent has filed a counter affidavit contending *inter alia* that the writ petition is not maintainable in view of the availability of an alternative remedy under Section 17 of the SARFAESI Act; that the ING Vysya Bank merged with the 1st respondent pursuant to a scheme of amalgamation sanctioned by the Reserve Bank of India on 31.03.2013; that INK Vysya Bank had sanctioned a term loan as well as

working capital facility to the 3rd respondent on 30.12.2009; that as security for the repayment of the term loan, the borrower mortgaged the factory land and premises together with the fixtures, fittings and other installations including plant and machinery in favour of ING Vysya Bank; that a first *pari-passu* charge was created in favour of ING Vysya Bank under a Memorandum of Entry, dated 15.12.2010, executed by the 2nd respondent (J & K Bank); that the 2nd respondent (J & K Bank) was the custodian of all original title deeds of the secured asset; that even the petitioner gave no objection by their letter, dated 26.07.2010 to ING Vysya Bank for the creation of first *pari-passu* charge; that the 2nd respondent also gave no-objection by their letter, dated 12.10.2010, for ceding *pari-passu* charge; that the 2nd respondent, acting for itself as well as on behalf of other four (4) banks (which are respondent Nos.4 to 6) also created a Memorandum of Entry of Record of deposit of title deeds, dated 15.12.2010, recording the creation of first *pari-passu* charge; that the Memorandum of Entry shows that the petitioner, the 2nd respondent and the 1st respondent alone are the Term Loan Lenders; that the 3rd respondent borrower also filed Form - 8 with the Registrar of Companies, pursuant to which a charge under Section 125 of the Companies Act, 1956 was duly registered on 10.01.2011; that after the borrower committed default in repayment of the loans, the 1st respondent issued a demand notice under Section 13 (2) on 28.01.2013, followed by a possession notice under Section 13 (4) on 12.08.2015; that the 1st respondent also filed an application before the Chief Judicial Magistrate, Mahaboobnagar under Section 14 of the SARFAESI Act

and secured an order on 07.09.2018; that the Advocate Commissioner appointed by the Court also delivered physical possession on 17.11.2018 to the 1st respondent; that the total outstanding dues payable to the 1st respondent under the term loan facility as on 30.09.2018 is more than Rs.37.00 Crores, while the total outstanding dues to the petitioner Corporation is only Rs.1,74,59,000/- as on 30.09.2018; that there are also dues under the working capital facility payable to the 1st respondent to the tune of more than Rs.38.00 Crores; and that in such circumstances, the 1st respondent had taken the consent of other banks in terms of Section 13 (9) of the SARFAESI Act to proceed with the auction and hence no exception can be taken to the measures taken by the 1st respondent.

9. The 5th respondent (IDBI Bank) has filed a counter affidavit stating that the immovable properties belonging to the borrower were mortgaged with the petitioner and the 2nd respondent (J & K bank) with first *pari-passu* charge for both of them, in respect of the term loans sanctioned by them; that a second charge was ceded in favour of ING Vysya Bank as well as respondent Nos.4 to 6 in respect of working capital facilities offered by them; that after the discharge of the liability to J & K Bank, the first charge continued only with the petitioner Corporation; that to the knowledge of the 5th respondent, the first charge continues only with the petitioner; and that the 5th respondent gave consent to the first respondent for the enforcement of the security and for realization of the amount for distribution in accordance with the nature of the charge held by them.

10. From the pleadings, it is clear that the core dispute is between the petitioner Corporation and the 1st respondent bank, on the question as to whether a first *pari-passu* charge has been ceded to the 1st respondent bank or not, for the term loan sanctioned by them. There is no dispute about the fact (i) that the petitioner Corporation and the 2nd respondent Bank (J & K Bank) had a first *pari-passu* charge on the immovable properties of the borrower, by virtue of an agreement, dated 24.11.2016; (ii) that the petitioner Corporation ceded a second charge on the mortgaged property, in favour of IDBI Bank, State Bank of India and other banks, by virtue of no-objection letter, dated 09.04.2009; (iii) that by a letter, dated 28.05.2010, ING Vysya Bank (predecessor-in-interest of the 1st respondent bank) requested the petitioner to cede the first *pari-passu* charge for the term-loan granted by them and a second charge for the working capital loan extended by them; and (iv) that by a reply, dated 26.07.2010, the petitioner Corporation agreed in-principle to cede a first *pari-passu* charge for the term loan extended by ING Vysya Bank and a second charge for the working capital facilities extended by them.

11. But, the contention of the petitioner Corporation is that though they expressed no objection to cede a second charge, they did not actually cede a first *pari-passu* charge.

12. In other words, the one and only dispute that needs to be resolved in this writ petition is as to whether the petitioner Corporation actually ceded a first *pari-passu* charge to the 1st respondent bank or not. In order to find an answer to this question, we may have to take note of

the contents of the letters exchanged between the petitioner and the 1st respondent and the contents of the minutes of the joint lenders meeting.

13. By a letter dated 28.05.2010 addressed to the first *pari-passu* charge holders, viz., the Andhra Pradesh State Financial Corporation (which is the writ petitioner herein), J & K Bank Limited (which is the 2nd respondent herein), the ING Vysya Bank (predecessor-in-interest of the 1st respondent), actually sought the creation of the first charge over all fixed assets of the Company and a second charge on all current assets of the Company in respect of the term loan and a second charge on all fixed assets in respect of the working capital. But, this letter contained very strange wordings that indicated a presumption about the creation of *pari-passu* charge. It would be useful to extract the letter, dated 28.05.2010, issued by the 1st respondent's predecessor, in entirety, so that the misgiving with which the letter was issued can be appreciated properly. Hence, the letter is extracted as follows:

"1. Notwithstanding anything to the contrary contained in or by virtue of hypothecation charges and/or mortgage charges created/to be created by *M/s Anu's Laboratories Limited* having its Registered office at A-49, Madhura Nagar, Vengalrao Nagar, Hyderabad- 500038 (Hereinafter referred to as "the company") in your favour and also in our favour on the following securities

Term Loan:

- a) **Exclusive** charge on Vizag Plant of the Company including land and other movable assets. (Primary)
- b) **First** charge on all fixed assets of the Company both present & future excluding Vizag Plan & Machinery (Primary)
- c) **Second** Charge on all Current Assets of the Company both present & future including, in particular, all stocks/inventories of stores and consumable items/stocks in transit or whenever it is situated and all receivables/book-debts/bills/monies (Collateral)

Working Capital

- a) **First** Charge on all Current Assets of the Company both present & future including, in particular, all stocks/inventories of stores and consumable items/stocks in transit or wherever it is situated and all receivables/book-debts/bills/monies (Primary)
- b) **Second** charge on all fixed assets of the Company both present & future excluding Vizag Plant & Machinery (Collateral)

To secure the aggregate credit facilities of Rs.52.50 crore (Rupees fifty two crore fifty lakhs only) (fund based and non-fund based) together with interest at the respective rates, compound/penal interest in case of default, commission and other charges/expenses and other monies payable by the company to us under the respective loan agreements/sanction letters and charges as aforesaid created by the company/to be created by the company in favour of ING Vysya Bank Limited shall in all respects rank pari-passu with charges created/to be created by the company in your favour for the working capital credit facilities sanctioned by you to the company to the extent mentioned herein below.

(Rs.in crore)

Name of the Bank/FI	Term Loan	Working Capital (Fund)	Working Capital (Non-fund)	Total
Andhra Pradesh State Financial Corporation	14.40	0.000	0.00	14.40
Jammu and Kashmir Bank Limited	8.17	0.000	0.00	8.17
ING Vysya Bank Limited	40.00	7.50	5.00	52.50

- c) Your Bank can make a mention of the pari-passu charge on the assets of the company referred above in favour our Bank and/or your bank in the form of particulars of charge that may be filed by you/the company with the Registrar of Companies pursuant to the provisions of the Companies Act, 1956/any other provisions of law.
- d) We further agree undertake and confirm that we shall enter into pari-passu agreement with you defining the rights and obligations of the parties inter-se and that securities created-to be created by the company and the charge shall rank pari-passu for all purposes and to all intents and without preference or priority of one over the other,/others including therein, the specific provisions regarding custody of title deeds

of the securities etc, application and realization of sale proceeds of the securities etc, in such a form and such manner as may be mutually agreed upon. Upon the execution by us of such an agreement, the agreement will supercede this letter of confirmation. Until execution of such agreement this letter evidences a complete and binding agreement between us (your Bank and our Bank)

- e) This letter of ceding *pari-passu* charge inclusive of the above terms shall be effective and in force subject to your Bank issuing a similar letter to our Bank conceding and confirming to ceding of *pari-passu* charge in respect of above credit facilities in favour of our Bank on the movable and immovable assets of the Company charged to your Bank and on the same terms and conditions referred above.”

14. **Clause (b) of the letter extracted above indicated that a *pari-passu* agreement will be separately entered into. But, at the same time, the letter claimed it to be an evidence of a complete and binding agreement.** Clause (e) of the letter extracted above, made it clear that the terms contained therein shall be effective subject to the petitioner and the 2nd respondent bank issuing a similar letter to their bank. Thus, there was a great confusion in the letter, dated 28.05.2010, issued by the ING Vysya Bank Limited.

15. The borrower also wrote a letter to the petitioner Corporation on 23.07.2010 requesting them to issue an NOC for ceding *pari-passu* charge. In response to the letter, dated 28.05.2010, issued by the ING Vysya bank and also in response to the letter, dated 23.07.2010, issued by the borrower, the Petitioner Corporation issued a reply, dated 26.07.2010, which reads as follows:

“In the above matter we wish to inform you that we have no objection to cede *Pari-Pasu* charge on fixed assets of the captioned company in favour of M/s. ING Vysya Bank Ltd., for the sanctioned term loan

and second charge for working capital loan subject to consent of other Term loan lender and other II charge holders.”

16. After gap of three years, ING Vysya Bank issued a letter dated 15.07.2013 to the petitioner Corporation advising the petitioner either to initiate steps under Section 29 of the State Financial Corporations Act, 1951 or to accord consent for the 1st respondent bank to proceed under the SARFAESI Act. In this letter, ING Vysya Bank made a claim that the immovable properties constituting Unit No.I of the borrower company were under first *pari-passu* charge in favour of the petitioner Corporation and the 1st respondent.

17. But, by a letter, dated 18.07.2013, the petitioner Corporation denied the claim of the ING Vysya Bank that they were holding first *pari-passu* charge. Immediately, ING Vysya Bank sent a reply, dated 25.07.2013, citing the letter, dated 26.07.2010, of the petitioner Corporation giving NOC for *pari-passu* charge. But, the petitioner Corporation reiterated their stand, by their letter dated 24.09.2013, which reads as follows:

“With reference to the above, we write to inform you that the Corporation has First Charge ranking *pari passu* in charge with Jammu & Kashmir Bank on the fixed assets of the unit situated at Sy.No.17, Chilkamarri village, Farooqnagar Mandal, Mahaboobnagar Dist. The unit vide their letter 1st cited above represented the Corporation that they intend to avail Term Loan of Rs.40.00 Crores and Working Capital loan of Rs.12.50 Crores for their unit situated at Vizag Pharma City and requested to issue No Objection to cede *pari-passu* charge.

Our Corporation issued letter Dt.26.07.2010 informing our No Objection subject to consent of other term loan lenders and second charge holders. Thereafter, the unit and your Bank has not followed up the matter by furnishing necessary information

regarding the scheme of the project pertaining to Pharma City, Vizag and consent from other participating institutions enabling us to forward the proposal for detailed appraisal by the competent authority at our Head Office.

As such the matter has not been proceeded, further thereafter as above and there is no exchange of in-principle letters ceding pari-passu charge among the participating institutions followed by execution of pari-passu arrangement among the institutions. Modification of charge has to be filed only after execution of pari-passu agreement between participating institutions.

Hence, as there is no exchange of in-principle letters and pari-passu arrangement, your claim for pari-passu charge on the assets situated at Chilkamarri Vg., Farooqnagar Mandal, Mahaboobnagar Dist., cannot be considered.”

18. It appears that a joint meeting was convened between all the lenders on 26.05.2015. The meeting was attended by the representatives of the petitioner Corporation, the 1st respondent bank, the IDBI Bank, the Karur Vysya Bank and the State Bank of India. Even in the said meeting, the question whether first charge was ceded to ING Vysya Bank for the term loan, became a contentious issue. This is seen from the concluding remarks and action points extracted in the minutes of the said meeting dated 26.05.2015. They read as follows:

“Conclusion remarks:

- Lenders have to jointly proceed on the company under recovery process with due authorization/consent to IDBI Bank and Kotak Bank/DCB for Current Assets and Fixed Assets respectively, under SARFAESI Act.
- Company’s action of approaching BIFR is to be contended immediately collectively upon receiving the notice.
- Efforts can be made to settle the small liability of APSFC. Kotak Bank to explore possibility to take over the same.

Action Points:

- IDBI Bank to contact DCB and to make them align with the conclusions drawn in the Lenders Meet.
- Kotak Bank to give an authorization/consent to IDBI Bank to proceed on current assets under SARFAESI.
- All other lenders - IDBI Bank, SBI, Karur Vysya Bank, DCB and APSFC – to give authorization to Kotak Bank to initiate recovery action on Fixed Assets, under SARFAESI.
- If APSFC is not willing for this arrangement, their exposure may be settled with discount for which, Kotak Bank will take responsibility for this.
- All the lenders to revert with indicative discount at which they can assign their debt to ARC.
- If AOD to ARC is an agreeable proposition, lenders to explore the same.
- It was decided to hold one more lenders' meet in the next 10 days for which Kotak Bank will bring their Legal Head to have a better clarity and set timelines on the legal issues involved and on the way forward. The meeting ended with vote of thanks.”

19. A second meeting of the lenders was convened on 08.06.2015.

But, the petitioner Corporation did not send representatives for this meeting.

20. After the question of the 1st respondent holding a first *pari-passu* charge became a contentious issue, the 1st respondent bank sought the consent of the other lenders in terms of Section 13 (9) of the SARFAESI Act. All of them gave consent, as the other lenders did not claim a first charge. Since the Petitioner Corporation did not give their consent, the 1st respondent bank wrote a letter, dated 02.06.2017, not only reiterating their claim of first *pari-passu* charge, but agreeing to pay the total dues of the petitioner Corporation, after the sale of Unit

No.I (Shadnagar). The contents of the letter, dated 02.06.2017, issued by the 1st respondent read as follows:

“We wish to inform that Kotak Mahindra Bank Limited is a term lender to Ameya Laboratories Limited and has first pari passu charge on the fixed assets of the company including Shadnagar Unit (without NOC from APSFC). Kotak Mahindra Bank along with SBI, IDBI Bank and Karur Vysya Bank has working capital exposure to Ameya Laboratories Limited and also has second charge on the fixed assets of the company.

We understand that APSFC has already initiated recovery proceedings on the company under SARFAESI Act being the primary charge holder of Shadnagar unit. We would like to inform that we have the residual claim in the capacity of term lenders on the recovery proceeds of the Shadnagar unit post recovery of APSFC's claim.

We wish to inform that we had initiated SARFAESI Action on the Vizag Unit of Ameya Laboratories and sold the unit under SARFAESI Action in June 2016 successfully. Based on the residual charge and to maximize the recovery, we are willing to take up SARFAESI Action on the Shadnagar Unit for and on behalf of all the Banks including APSFC.

In this context, we seek your consent and authorization in favour of Kotak Mahindra Bank for initiating action under Section 13 of SARFAESI Act, 2002. We confirm that on the completion of sale of the Shadnagar unit, we will first pay the total dues of APSFC in Ameya Laboratories account and recover the residual amounts towards our dues.

Kindly give us the authorization and also let us know on the total dues of Ameya Laboratories Limited to APSFC.

Please confirm on the above.”

21. The 1st respondent also went one step further by their next letter dated 11.07.2017, offering to acquire the debt from the petitioner Corporation together with underlying securities.

22. The contents of the correspondence exchanged between the petitioner and ING Vysya Bank (predecessor-in-interest of the 1st

respondent) reveal that the petitioner had in fact expressed an intention by their letter, dated 26.07.2010, to allow the creation of the first *pari-passu* charge in favour of the 1st respondent bank, for the term loan extended by them. But, according to the petitioner, something more had to be done for the actual creation of the first *pari-passu* charge and that the same was never done.

23. However, according to the 1st respondent, the no-objection certification issued by the petitioner vide their letter, dated 26.07.2010, was sufficient to create a first *pari-passu* charge and that therefore necessary entries had also been made with the Registrar of Companies in Form No.8.

24. Therefore, in the light of the rival claims, it is necessary for us to find out whether the letter, dated 26.07.2010, issued by the petitioner Corporation was sufficient to create a first *pari-passu* charge in favour of the 1st respondent.

25. What the parties to the writ petition refer to as charge, is actually the creation of a mortgage by deposit of title deeds by the 3rd respondent borrower in favour of the petitioner-corporation and J&K Bank (2nd respondent). Admittedly, a mortgage by deposit of title deeds was created by the 3rd respondent (borrower) in favour of the petitioner Corporation as well as the Jammu and Kashmir Bank (2nd respondent) way-back in the year 2006. An agreement, dated 24.11.2006, came into existence between the petitioner Corporation and the 2nd respondent bank with respect to the *pari-passu* agreement as between them. At that time, ING Vysya Bank was nowhere in the picture. Keeping these

admitted facts in mind, let us now look at the Transfer of Property Act, 1882.

25. Section 58 of the Transfer of Property Act, 1882, defines the expressions “mortgage”, “mortgagor”, “mortgagee”, “mortgage-money” and “mortgage-deed”. Section 58 also defines the characteristics of certain types of mortgages, such as “simple mortgage”, “mortgage by conditional sale”, “*usufructuary* mortgage”, “English mortgage”, “mortgage by deposit of title deeds”, and “anomalous mortgage”.

26. Section 65 of the Transfer of Property Act, 1882, speaks of implied contracts by the mortgagor. One such implied contract is that where the mortgage is a second or subsequent encumbrance on the property, the mortgagor will pay the interest from time to time accruing due on each prior encumbrance as and when it becomes due and that he will at the proper time discharge the principal money due on such prior encumbrance.

27. Under certain circumstances, the payment to the prior mortgagee may get postponed. Section 78 speaks of such a contingency. Under Section 78, if any person has been induced, through fraud, misrepresentation or gross neglect of prior mortgagee to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee.

28. Section 81 speaks of marshalling. Under this provision, if the owner of a property mortgages the same to one person and then mortgages it to another person, the subsequent mortgagee is entitled to have the prior mortgaged debt satisfied out of the properties not

mortgaged to him, but not so as to prejudice the rights of the prior mortgagee. However, this is subject to a contract to the contrary.

29. Section 82 also speaks of contribution. Under this Section, if a person, who owns two properties, first mortgages one to secure one debt and then mortgages both to secure another debt, and the former debt is paid out of the former property, each property is liable to contribute rateably to the later debt. This is also subject to a contract to the contrary.

39. Under Section 93 of the Transfer of Property Act, 1882, a mortgagee paying off a prior mortgage, with or without notice of an intermediate mortgage may not acquire any priority in respect of his original security. Section 96 of the Transfer of Property Act makes it clear that the provisions contained in the preceding Sections shall apply to a mortgage by deposit of title deeds also.

49. Section 100 of the Transfer of Property Act, 1882, speaks about “charges”. It reads as follows:

“Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust, 2[and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge.”

Therefore, wherever a mortgage by deposit of title deeds is created, then the provisions of Sections 58 to 95 would apply to the same, by virtue of Section 96. Wherever an immovable property is made security either by act of parties or by operation of law and the transaction does not amount to a mortgage, then the same is referred to as the creation of 'charge' on the property. Even in such cases, the provisions of Sections 58 to 95 would apply, by virtue of Section-100.

50. It will be clear from the scheme of Sections 58 to 100 of the Transfer of Property Act, 1882, (i) that in principle, a distinction is maintained between a 'mortgage' and a 'charge'; (ii) that however the provisions of Section 58 onwards are made applicable even to charges and (iii) that the Act does not expressly deal with the creation of a '*pari-passu* charge'. The Act recognizes a first mortgage and a second and subsequent mortgage. There is no reference in the Act to a *pari-passu* charge. This is an invention of the Banking industry. The expression "*pari-passu*" is a Latin expression, meaning "equal footing".

51. Though there is no reference directly in the Transfer of Property Act to a *pari-passu* charge, Courts have taken a clue from Section 48 of the Act, which deals with priority of rights created by transfer. As per Section 48, every right created later in point of time, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

52. There is no dispute about the fact that a mortgage by deposit of title deeds was created by the borrower in favour of the petitioner Corporation as well as Jammu and Kashmir Bank Limited (2nd

respondent herein) way-back in the year 2006. Admittedly, the petitioner Corporation and the 2nd respondent (J & K Bank) had a *pari-passu* agreement executed as between themselves on 24.11.2006. This agreement constituted a special contract between the petitioner and the 2nd respondent. There is also no dispute about the fact that after the liabilities of the 2nd respondent Bank were cleared, the petitioner Corporation became the sole mortgagee. Therefore, the question to be answered is as to whether the very valuable right that the petitioner Corporation had over the property, as the sole mortgagee (after the 2nd respondent got discharged) could be said to have been divested by the letter, dated 26.07.2010.

53. While dealing with the *inter-se* rights of priorities between two sets of secured creditors under Section 529A of the Companies Act, the Supreme Court held in **ICICI Bank Ltd., v. SIDCO Leathers Ltd.**¹ that under Section - 48 of the Transfer of Property Act, the claim of the first charge holder will prevail over the claim of the second charge holder. The Court went on to point out that such a valuable right, having regard to the legal position as obtaining in common law as also under the provisions of the Transfer of Property Act, could not be taken away even by the provisions of the Companies Act. The Court pointed out that the deprivation of a legal right existing in favour of a person cannot be presumed even while construing a statute. Therefore, the expression of a willingness, by their letter dated 26.07.2010 to cede a first *pari-passu* charge over the properties, will not automatically result in the creation

¹. (2006) 10 SCC 452

of the *pari-passu* charge for the 1st respondent along with the petitioner. Just as the petitioner has had a *pari-passu* agreement with the 2nd respondent bank, executed on 24.11.2006, there must have been an agreement constituting a special contract between the petitioner and the 1st respondent, for creating a first *pari-passu* charge in favour of the petitioner. Admittedly, no *pari-passu* agreement was entered into between the petitioner and the 1st respondent, as was done between the petitioner and the 2nd respondent bank. Therefore, the mere execution of a Memorandum of Entry by the borrower or the 2nd respondent in favour of the 1st respondent or a mere expression of no-objection by the petitioner vide their letter, dated 27.06.2010, is not sufficient to create a first *pari-passu* charge in favour of the 1st respondent. The registration of the charge with the Registrar of Companies under Section 125 of the Companies Act, 1956 is actually a formality that follows the creation of the first *pari-passu* charge. The filing of Form No.8 and the registration of a charge, is a procedural formality that follows the actual creation of a charge. The entry in the Register of Charges may evidence the creation of a charge. But, if on admitted facts there was merely a no-objection but not the actual creation of a first *pari-passu* charge in terms of any special contract, then the 1st respondent cannot rely upon the entry in the Register of Charges.

54. It is true that under Section 13 (9) of the SARFAESI Act, a secured creditor is entitled to proceed with the enforcement of security, if secured creditors representing not less than three-fourth in value of the amount outstanding give consent. But, a creditor who had not obtained a

first *pari-passu* charge and who holds only a second charge, cannot invoke the Section 13 (9). **Therefore, we are of the considered view that the 1st respondent cannot claim to be the holder of a first *pari-passu* charge along with the petitioner Corporation, in the absence of a special contract to the contrary in terms of Section 48 of the Transfer of Property Act, 1882.** Hence, the impugned action of the 1st respondent is liable to be set aside.

55. We are conscious of the fact that as against the measures initiated by the 1st respondent under the SARFAESI Act, the petitioner could have gone to the Debts Recovery Tribunal by way of an appeal under Section 17 of the SARFAESI Act. In fact, the learned counsel for the 1st respondent pressed into service, the decisions of the Supreme Court in **United Bank of India v. Satyawati Tandon²**, **Kanaiyalal Lalchand Sachdev v. State of Maharashtra³** and **Authorized Officer, State Bank of Travancore v. Mathew K.C.⁴**, to drive home the point that the petitioner has an effective alternative remedy before the Tribunal. But, we have ventured to entertain the writ petition, in view of the fact that a State Financial Corporation, constituted under the State Financial Corporation Act, 1951 is pitted against a scheduled bank, on a very interesting question of fact and law. This is not a case where the borrower or guarantor has come up with a writ petition bypassing the alternative remedy of appeal, to secure interim protective orders. This is a case where the State Financial Corporation has exercised its powers

² 2010 (8) SCC 110

³ 2011 (2) SCC 782

⁴ 2018 (3) SCC 85

under Section 29 of the State Financial Corporation Act, 1951 and also initiated measures under the SARFAESI Act, 2002 and taken symbolic possession. Therefore, driving the petitioner to the Debts Recovery Tribunal without throwing light on a subtle issue of law, will serve nobody's purpose.

56. It is seen from the counter affidavit of the 1st respondent that as on 30.09.2018, the dues payable by the 3rd respondent to the petitioner Corporation was Rs.1,74,59,000/-. The dues payable by the borrower to the 1st respondent bank in respect of the term loan, for which the 1st respondent claims a first *pari-passu* charge, was Rs.37,31,57,305/- as on 30.09.2018. Considering the fact that the amounts recoverable by them is at least twenty times more than the amounts recoverable by the petitioner, the 1st respondent had actually offered in a meeting of the Joint Lenders held on 26.05.2015 and in their letter dated 02.06.2017, to settle the dues of the petitioner Corporation so that they acquire exclusive first charge. Therefore, the 1st respondent is obliged at least to honour this commitment, as they cannot be taken to have a first *pari-passu* charge along with the petitioner corporation, in view of the detailed discussion given above.

57. Therefore, in view of the above, the Writ petition is allowed to the following effect:

(i) The 1st respondent (Kotak Mahindra Bank) shall not proceed further with the measures initiated under the SARFAESI Act, 2002, without obtaining the consent of the petitioner Corporation.

(ii) Alternatively, the 1st respondent shall deposit with the petitioner Corporation, the amounts due by the 3rd respondent borrower to the petitioner Corporation, as on date, as undertaken by the 1st respondent, in the meeting of the Joint Lenders, dated 26.05.2015 and in their letter dated 02.06.2017.

(iii) Upon such deposit being made, the first charge that the petitioner Corporation has, over the immovable properties of the 3rd respondent borrower shall stand automatically released and the 1st respondent will be free to proceed further with the measures initiated under the SARFAESI Act. In case, the 1st respondent has any dispute about the amounts due from the 3rd respondent borrower to the petitioner Corporation as claimed by them, it may be open to the 1st respondent to approach the Debts Recovery Tribunal, in spite of making payment and getting the properties released from security from the petitioner Corporation.

However, in the circumstances of the case, there shall be no order as to costs.

V. RAMASUBRAMANIAN, J

P. KESHAVA RAO, J

June 03, 2019

Mgr/KTL

Note:

L.R. copy to be marked

B/O.KTL