IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2021

C O R A M

THE HON'BLE MR. JUSTICE KRISHNAN RAMASAMY

S.A.NOS.1022, 1055 OF 2019, 160, 161 OF 2021
AND
CROSS APPEAL NO.54 OF 2020
AND
C.M.P.NOS.21997 & 22772 OF 2019

Deenadayalan ...Appellant in S.A.No.1022 of 2019

Vs.

1.N.Sathish Kumar
Rep by his General Power of Attorney,
N.Ashok Kumar

2.S.Dinesh

3.S.Umesh

4.L.Nagaraj

5.Bank of India,
Coonoor, Nilgiris District,
Rep. by its Branch Manager,
Coonoor, Nilgiris.

6.The Recovery Officer,
Debt Recovery Tribunal, Coimbatore. ...Respondents in S.A.No.1022 of 2019

Deenadayalan ...Appellant in S.A.No.1055 of 2019

Vs.

1.S.Umesh

2.N.Sathish Kumar
Rep by his General Power of Attorney,
N.Ashok Kumar

3.S.Dinesh

4.L.Nagaraj

5.Bank of India,
Coonoor, Nilgiris District,
Rep. by its Branch Manager,
Coonoor, Nilgiris.

6.The Recovery Officer,
Debt Recovery Tribunal, Coimbatore. ...Respondents in S.A.No.1055 of 2019

Bank of India,
No.27, Mount Road,
Coonoor,
Tamil Nadu - 643 102. ...Appellant in S.A.No.160 of 2021

Vs.

1.S.Umesh

2.N.Sathish Kumar
Rep by his General Power of Attorney,
N.Ashok Kumar

3.Dinesh

4.L.Nagaraj

5.Deenadayalan

6.The Recovery Officer,
Debt Recovery Tribunal,
Coimbatore. ...Respondents in S.A.No.160 of 2021

Bank of India,
No.27, Mount Road,
Coonoor,
Tamil Nadu - 643 102. ...Appellant in S.A.No.161 of 2021

Vs.

1.N.Sathish Kumar
Rep by his General Power of Attorney,
N.Ashok Kumar

2.Dinesh

3.S.Umesh

4.L.Nagaraj

5.Deenadayalan

6.The Recovery Officer,
Debt Recovery Tribunal,
Coimbatore. ...Respondents in S.A.No.161 of 2021

N.Sathish Kumar
Rep by his General Power of Attorney,
N.Ashok Kumar ...Appellant in Cross Appeal No.54 of 2020

Vs.

1.Deenadayalan

2.S.Dinesh

3.S.Umesh

4.L.Nagaraj

5.Bank of India,
Coonoor, Nilgiris District,
Rep. by its Branch Manager,
Coonoor, Nilgiris.

6.The Recovery Officer,
Debt Recovery Tribunal, Coimbatore. ...Respondents in Cross Appeal No.54 of 2020

Prayer in S.A.No.1022 of 2019 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 11.04.2018 made in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris reversing the judgment and decree dated 09.11.2016 made in O.S.No.35 of 2010 on the file of the Subordinate Judge, Udhagamandalam.

Prayer in S.A.No.1055 of 2019 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 11.04.2018 made in Cross Appeal No.5 of 2017 in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris reversing the judgment and decree dated 09.11.2016 made in O.S.No.35 of 2010 on the file of the Subordinate Judge, Udhagamandalam.

Prayer in S.A.No.160 of 2021 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 11.04.2018 made in Cross Appeal No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris in allwoing the appeal and reversing the judgment and decree dated 09.11.2016 made in O.S.No.35 of 2010 on the file of the Subordinate Judge, Udhagamandalam.

Prayer in S.A.No.161 of 2021 : Second Appeal filed under Section 100 of the Code of Civil Procedure, against the judgment and decree dated 11.04.2018 made in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris and reversing the judgment and decree dated 09.11.2016 made in O.S.No.35 of 2010 on the file of the Subordinate Judge, Udhagamandalam.

Prayer in Cross Appeal No.54 of 2020 : Cross Appeal filed under Order 41, Rule 22 of the Code of Civil Procedure, against the judgment and decree dated 11.04.2018 made in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris in restraining the suit claim of the plaintiff to 2/3rd and in modifying the judgment and decree dated 09.11.2016 made in O.S.No.35 of 2010 on the file of the Subordinate Judge, Udhagamandalam.

In S.A.No.1022 of 2019

For Appellant : Mr.K.V.Sanjeev Kumar

For R1 : Mr.V.Raghavachari
For R2, R4 & R6: No Appearance
For R3 : Mr.G.K.Muthukumar
For R5 : Mr.F.B.Benjamin George

In S.A.No.1055 of 2019

For Appellant : Mr.K.V.Sanjeev Kumar

For R1 : Mr.G.K.Muthukumar
For R2 : Mr.V.Raghavachari
For R3, R4 & R6: No Appearance
For R5 : Mr.F.B.Benjamin George

In S.A.No.160 of 2021

For Appellant : Mr.F.B.Benjamin George

For R3 : Mr.G.K.Muthukumar
For R1, R4 & R6: Service due
For R2 : Mr.V.Raghavachari
For R5 : Mr.K.V.Sanjeev Kumar

In S.A.No.161 of 2021

For Appellant : Mr.F.B.Benjamin George

For R1 : Mr.V.Raghavachari
For R2 : Mr.G.K.Muthukumar
For R3, R4 & R6: Service due
For R5 : Mr.K.V.Sanjeev Kumar

In Cross Appeal No.54 of 2020

For Appellant : Mr.V.Raghavachari

For R1 : Mr.K.V.Sanjeev Kumar
For R2 : Mr.G.K.Muthukumar
For R5 : Mr.F.B.Benjamin George

COMMON JUDGEMENT

S.A.No.1022 of 2019 has been filed by the 4th defendant/Auction Purchaser in the suit challenging the common judgment and decree dated 11.04.2018 made in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris.

2.The plaintiff in the suit has filed the Cross Appeal No.54 of 2020 in S.A.No.1022 of 2019 challenging the common judgment and decree dated 11.04.2018 made in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris, in restricting the suit claim of the plaintiff to 2/3rd and in modifying the judgment and decree dated 09.11.2016 made in O.S.35 of 2010 on the file of the Sub-Judge, Udhagamandalam.

3.S.A.No.1055 of 2019 has been filed by the 4th defendant challenging the common judgment and decree dated 11.04.2018 made in the Cross Appeal No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris.

4.S.A.Nos.160 & 161 of 2021 has been filed by the 5th defendant in the suit challenging the common judgment and decree dated 11.04.2018 made in Cross Appeal No.5 of 2017 and in A.S.No.5 of 2017 on the file of the District Judge, Udhagamandalam, The Nilgiris.

5.There are four appeals and one cross appeal have been filed by either of the parties to the suit against the common judgment and decree passed in A.S.No.5 of 2017 and Cross Appeal No.5 of 2017 by the District Judge, Udhagamandalam. Therefore, this Court would like to take up S.A.No.1022 of 2018 and Cross Appeal No.54 of 2020 first and dispose of the same.

6.The appellant in S.A.No.1022 of 2019 and S.A.No.1055 of 2019 would be referred herein after as appellant or 4th defendant. The cross objector in Cross Appeal No.54 of 2020 would be referred herein after as plaintiff or cross objector.

7.The appellant in S.A.Nos. 160 & 161 of 2021, would be referred herein after as 5th defendant or the 5th respondent or the Bank. All other parties to these second appeals would be referred with the same status as referred in the suit before the Trial Court.

8.Before dealing with the main issue, it would be appropriate to narrate the fact of the case, briefly as follows:

8.1.Originally the suit schedule property was owned by one Lakkay Gowder. The said Lakkay Gowder died intestate. Long after the demise of C.Lakkay Gowder, in the year 1968, his legal heirs entered into an oral partition and they were in possession and enjoyment of their respective shares obtained through the said partition. Thereafter, the terms and conditions of the oral partition was drawn up in writing among the legal heirs by virtue of an Unregistered Family Arrangement dated 11.10.1999. By virtue of the said family arrangement, Thiru L.Srikantiah, one of the son of Lakkay Gowder was alloted with the suit schedule mentioned property as his share.

8.2.On 17.10.2002, the plaintiff entered into a sale agreement with L.Srikantiah and his two sons to purchase 1.05 acres of agricultural land out of the 1.16 ¼ acres. On 21.10.2002, L.Srikantiah along with his two son delivered the possession of the said land to the plaintiff. Subsequently, they have also executed a sale deed dated 17.02.2003, in favour of the plaintiff. Thereafter, L.Srikantiah along with his sons, defendants 1 and 2 sold 4 ¾ cent of land to the 3rd defendant and L.Srikantiah retained the balance 6.5 cents with himself.

8.3.After the purchase of the suit schedule property, the plaintiff has been cultivating the land continuously. The plaintiff used to cultivate, carrot, potato, beetroot etc.

8.4.When the matter stand thus, the 4th defendant in the suit who is an utter stranger to the property had come to Adasholai on 28.02.2010 claiming to have purchased the suit 2nd schedule property by virtue of the public auction sale conducted by the 6th defendant, Recovery Officer. According to the 4th defendant, the auction was conducted by the 6th defendant and through the said auction, the 2nd suit schedule property was purchased by the 4th defendant. Thus, he claimed the right over the property and requested the plaintiff to handover the property. It is the case of the plaintiff that the 6th defendant conducted the auction sale of the suit schedule property without title and cannot bind the plaintiff.

8.5.It is the further case of the plaintiff that fraud has been played as if the Shri L.Srikantiah deposited the title deed with the intention to provide security to the loan of a third party. There was no such mortgage was created by virtue of deposit of title deed to the third party by L.Srikantiah. Therefore, the plaintiff filed the suit to declare the sale made by the Recovery Officer as null and void and for other relief as sought in the plaint.

8.6.The case of the 5th defendant/Bank was that one Mahadevan obtained IMFL loan for which, the L.Srikantiah, father of defendants 1 and 2 and one Pappanna Gowder created the mortgage by way deposit of title deed as security for the said loan. Since, the said Mahadevan failed to repay the loan, the 5th defendant filed O.A.Nos.47 & 49 of 2003 before the 6th defendant, Debt Recovery Tribunal, Coimbatore.

8.7.The further case of the Bank was that summons were served in the above two O.As. After receipt of the summons, L.Srikantiah entered appearance through counsel and thereafter, filed a detailed counter admitting the entire loan and creation of deposit of title deeds. Due to non appearance in both the O.As, L.Srikantiah was set exparte and the DRT passed exparte decreetal order on 24.04.2007. Subsequently, it was brought into the knowledge that L.Srikantiah was passed away, therefore, the legal heirs were impleaded themselves, they entered appearance through their counsel, however they have failed to appear before the DRT. Therefore, they were set exparte and the ex-parte order which was passed on 24.04.2007 was confirmed against the Mahadevan, Pappanna Gowder and L.Srikantiah. Thereafter, proclamation of sale was issued on 28.11.2008. Subsequently, the recovery certificate dated 26.12.2008 was issued to the defendants 1 and 2 and there was no contest made by the them. Therefore, the Recovery Officer auctioned property and the same was sold to the 4th defendant. Further, they submitted that the mortgage was created by L.Srikantiah by virtue of deposit of title deed of Unregistered Family Arrangement with the Bank on 06.05.2000. Sale deed was executed in favour of the plaintiff only in the year 2003. Hence, the sale of property to the plaintiff is not valid and the plaintiff has no authority to the question the auction sale conducted by the 6th defendant/Recovery Officer.

8.8.The case of the 4th defendant/Auction Purchaser was that the 5th defendant/Bank made a tender sale notice on 28.11.2008 with regard to the sale of the property through public auction. On seeing the same, the auction purchaser examined the document and participated in the auction sale. The presiding officer of DRT, Coimbatore issued Recovery certificate on 03.08.2007 against L.Srikantiah. Notice of demand was issued on 14.12.2007. The 6th defendant, Recovery Officer has passed the order of attachment on 13.05.2008 and notice for drawing proclamation of sale was issued on 02.06.2008 and proclamation of sale was also issued on 28.11.2008. Since, there was no contest, the Recovery Officer auctioned the property on 31.12.2008, the auction purchaser participated and paid the entire amount. The property was auctioned by the 6th defendant, after duly complying all the legal provisions as applicable, therefore, he submitted that there is no fraud has been committed as contended by the plaintiff in selling the property by the Recovery Officer to the 4th defendant. Hence he prayed to set aside the judgment and decree passed by the District Judge, Udhagamandalam in A.S.No.5 of 2017 and restore the judgment and decree passed by the Trial Court in A.S.No.35 of 2010.

8.9.As far as the 1st defendant is concerned, he was set ex-parte before the Trial Court. The case the 2nd defendant was that the property is the joint family property and he admitted the fact that there was an oral partition on 11.10.1999 between his father and his father's brothers. The suit schedule property was allotted through the said partition to his father. Thus, the property is a joint family property. The 2nd defendant further stated that his father had not created any mortgage as stated by the Bank for securing the loan of the 3rd party. If at all, his father intent to provide security, he can mortgage his share alone. Since it is the joint family property, beyond L.Srikantiah's share, he is not entitled to mortgage any of the shares of the defendants 1 and 2. The O.A.No.47 of 2003 was filed in June 2003 before DRT, Coimbatore after the death of his father Shri L.Srikantiah. Subsequent to the death of his father, the O.A was filed and decree was obtained. Thus, all other execution proceedings subsequent to the decree were initiated against dead person. No proceedings can be initiated and no decree can be passed against a dead person. Thus, the sale of the suit schedule property is null and void and the same is liable to be set aside.

8.10.The case of the 3rd defendant was that, he purchased a portion of the suit schedule property to the extent of 4¾ cents. Therefore, he is entitled for 4¾ cents. He also stated that no mortgage was created by depositing the title deed of the suit schedule property by L.Srikantiah. The 6th defendant, Recovery Officer without any proper title to secure the loan, has sold the same through public auction. Thus the auction sale conducted by the Recovery Officer is void and liable to be set aside.

9.Before the Trial Court, on behalf of the plaintiff, P.W.1 and P.W.2 were examined and Ex.A1 to A21 were marked. On behalf of the 4th defendant, D.W.1 to D.W.3 were examined and Ex.B1 to Ex.B14 were marked. Ex.B15 has been filed and marked before this Court in S.A.No.160 of 2021 by the 5th defendant, Bank.

10.After hearing both the parties, the Trial Court dismissed the suit holding that there was a valid deposit of title deed by virtue of Ex.B2 and B11. The Trial Court also held that by virtue of Ex.B12, recovery certificate dated 26.12.2008, which was issued to the legal heirs of the L.Srikantiah, i.e defendants 1 and 2, against which the defendants 1 and 2 have not preferred any appeal thus, the Recovery Officer, 6th defendant, sold the suit property to the 4th defendant, with proper title. Accordingly, Trial Court dismissed the suit.

11.Against the dismissal of the said suit, the plaintiff preferred appeal in A.S.No.5 of 2017 and the 2nd defendant filed the Cross Appeal No.5 of 2017 before the District Court, Udhagamandalam,

12.The First Appellate Court, after analysing both the documentary as well as the oral evidences, it held that there was a valid mortgage by way of deposit of title deed by L.Srikantiah, through Ex.B2 and B11. It has also held that L.Srikantiah was passed away on 15.04.2003. The suit was filed subsequent to the death of L.Srikantiah. All the proceedings in D.R.C.No.220 of 2007 and in O.S.No.47 of 2003 was initiated against the dead person. The Recovery Certificate, Public notice etc., have been issued in the name of L.Srikantiah. Therefore, the auction sale was conducted against the dead person. Thus, the First Appellate Court held that the decree and consequent auction proceeding to recover the debt from the guarantor, against the dead person is void. Ex.A17, final order of DRT dated 24.04.2007 was also passed against a dead person. However, the First Appellate Court held that the suit schedule property is the joint family property, therefore, the defendants 1 and 2 and his father L.Srikantiah are co-parcener, thus, if at all there is any claim by the 5th defendant Bank, they can conduct auction against the share of the L.Srikantiah alone. As there are three co-parcener, L.Srikantiah is entitled to 1/3rd share alone. The 1/3rd share alone can be considered as a valid mortgage and for remaining 2/3rd share there was no valid mortgage against the share of the defendants 1 and 2. Therefore, the First Appellate Court confirmed that the sale of the 2nd suit schedule property to the extent of 1/3rd share is valid.

13.Challenging the said common judgment and decree passed by the First Appellate Court, the 4th defendant preferred Second

Appeal in S.A.Nos.1022 & 1055 of 2018. The 5th defendant/Bank preferred Second Appeal in S.A.Nos.160 & 161 of 2021 and the plaintiff preferred the Cross Appeal No.54 of 2020 before this Court.

14.This Court admitted the Second Appeals in S.A.Nos.1022 & 1055 of 2018 and Cross Appeal No.54 of 2020 on 18.12.2020 and framed the following substantial questions of law:

> "S.A.Nos.1022 & 1055 of 2018
>
> i)Whether the suit as framed is maintainable in view of the Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993?
>
> ii)Whether the mere deposit of copy of the title deed by L.Srikantiah would create a valid equitable mortgage in the absence of any document evidencing such deposit is with intention to create an equitable mortgage?
>
> Cross Appeal No.54 of 2020
>
> i)Whether the Appellate Court was right in granting a decree for partition in favour of the appellant having held that the sale itself is bad?
>
> ii)When the plaintiff had purchased the property on 17.03.2003 and the alleged auction sale took place latter in point of time and that too, against the dead person (L.Srikantiah died on 13.04.2002) is the Lower Appellate Court right in recognising the auction sale alleged to have been held on 31.12.2008 under Exhibit B4?"

15.On 04.03.2021, this Court admitted the Second Appeals in S.A.Nos.160 & 161 of 2021 on the following substantial question of law:

> "Whether a valid mortgage by deposit of title deed can be created by depositing Xerox copy of the documents when the original is not available with the depositor/mortgagor?"

16.In addition to the Substantial Questions of Law already framed by this Court dated 18.12.2020, in the Cross Objection No.54 of 2020, this Court framed the following additional Substantial Questions of Law on 11.03.2021:

> "i. Whether the Courts below are right in restricting the suit claim to 2/3rd especially after holding the auction sale dated 03.12.2008 and the same certificate under Exhibit B6 are null and void?
>
> ii. Whether the mere deposit of copy of the title deed by Srikantiaya would create a valid equitable mortgage in the absence of any document evidencing

such deposit is with intention to create an equitable mortgage?”

Thereafter on 19.03.2021, the additional substantial questions of law framed in Cross Appeal No.54 of 2020 on 11.03.2021 was recasted as follows:

> i)Whether the Court below are right in restricting the suit claim to 2/3rd especially after holding the auction sale deed 03.12.2008 and the possession certificate under Exhibit B6 are null and void?
>
> ii)Whether the mere deposit copy of the title deed by L.Srikantiah would create a valid equitable mortgage in the absence of any document evidencing such deposit is with intention to create an equitable mortgage?
>
> iii)Whether a valid mortgage by deposit of title deed can be created by depositing Xerox Copy of the documents when the original is not available with the depositor/mortgagor?”

Substantial Question of Law (i) in S.A.Nos.1022 & 1055 of 2018 - Whether the suit as framed is maintainable in view of the Section 18 of the recovery of Debts Due to Banks and Financial Institutions Act, 1993?

17.The learned counsel for the appellant/Auction Purchaser as well as the 5th respondent, Bank raised the issue that there is a bar for the present suit under Section 18 of the Recovery of Debt dues to Banks and Financial Institution Act, 1993, (herein after referred as 'the Act').

17.1.For better appreciation, it would be apposite to extract the provision of Sections 17 & 18 of the Act, which reads as follows:

......

> 17. Jurisdiction, powers and authority of Tribunals.— (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
>
> (2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act. 1
>
> [17A. Power of Chairperson of Appellate Tribunal.—(1) The Chairperson of an Appellate Tribunal shall exercise general power of superintendence and control over the Tribunals

under his jurisdiction including the power of appraising the work and recording the annual confidential reports of Presiding Officers. (2) The Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own motion after notice to the parties and after hearing them, transfer any case from one Tribunal for disposal to any other Tribunal.]

"18. Bar of Jurisdiction. On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17:

1[Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative Bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 (1 of 2013) under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.]"

17.2.A perusal of Section 18 of the Act would reveal that no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in section 17 alone.

17.3.In the present case, the plaintiff filed the suit to declare the sale of the 1st suit schedule property by the 6th defendant through the public auction as null and void and not binding on the plaintiff. The plaintiff also sought for the partition of the 1st suit schedule property. Apart from the above, the plaintiff also alleged fraud against the 5th defendant Bank. A plea also made in the suit with regard to the authority of the mortgagor to mortgage the entire suit schedule property, for the third party loan. Obviously all these issue are not the matters as specified in Section 17 of the Act, thus the same cannot be adjudicated by DRT.

17.4.Though the issue with regard to the jurisdiction has been framed by this Court, the learned counsel for the appellant/Auction Purchaser as well as the 5th respondent Bank, have fairly submitted that the issue of jurisdiction of the Civil

Court has already been decided by this Court in C.R.P.No.941 of 2011. Further, they have stated that I.A.No.153 of 2010 in O.S.No.35 of 2010 was filed to reject the plaint on the ground suit is barred under Section 18 of the Recovery of Debt dues to Banks and Financial Institution Act, 1993. The said application was dismissed by the Court below. Against which, the Civil Revision Petition was preferred before this Court. The said Civil Revision Petition was also dismissed. It would be appropriate to extract the relevant portion of the order of this Court in C.R.P.No. 941 of 2011, which is reproduced hereunder:

> "21. I have already pointed out while discussing the facts of the case that the respondent/plaintiff has filed the present suit for declaration that the sale of the first schedule to the suit properties, in public auction by the sixth defendant to the fourth defendant, is null and void, unenforceable and not binding on the plaintiff. Apart from the said relief, the plaintiff is also seeking the reliefs of injunction and partition. It is the categorical case of the plaintiff that the entire proceedings before the DRT were made against a dead person, namely the said L.Srikantiah and that the plaintiff was not a party to the said proceedings before the DRT. It is also specifically stated in the plaint that the sale conducted was a fraudulent one and the fifth defendant-Bank has not disclosed the earlier sale of the property in favour of the plaintiff in the proclamation of sale. Thus, it is the case of the plaintiff that the auction sale is illegal and tainted by fraud and malafide, inasmuch as the conveyance executed in favour of the plaintiff was very much anterior in point of time, which was suppressed in the proclamation of sale. It is also not in dispute that the plaintiff is neither a borrower nor a party to the proceedings before the DRT. Thus, it is evident from a reading of the plaint that the plaintiff has made allegations of fraud, mala-fide and suppression of material facts and further claimed that the entire proceedings before the DRT were against a dead person. Further, the plaintiff claims that the suit property was the joint family property consisting of the said L.Srikantiah and his two sons and therefore, the surety said to have been executed by the said L.Srikantiah will not bind the sons.
>
> 22. When the above allegations are made in the plaint with the prayers as stated supra, can it still be said that the Civil Court has no jurisdiction to go into the matter and that its jurisdiction is ousted, in view of Section 18 of the

Act? The answer to the said question would be in negative and this view is in fact justified by a decision of a Division Bench of this Court in almost an identical matter, reported in 2008 (1) CTC 471 (Subramaniam.S.V. Vs. Cypress Semiconductor Technology India Private Ltd)

23. In the abovesaid case also, the plaintiff therein was not a party before the DRT and has alleged fraud played by the parties to obtain orders from the DRT. The suit filed therein also is to declare the order passed by the DRT and the Sale Certificate issued by the same, as null and void and not binding on the plaintiff and for permanent injunction. Thus, from the above decision of the Division Bench of this Court, it is clear that if the allegations of fraud, misrepresentation and mala-fide are made, coupled with the further allegation of not following due procedures, the Civil Court can entertain the suit, more particularly at the instance of a person who is not a party in the DRT proceedings. Further, in this case, the plaintiff questions the right of the said L.Srikantiah to execute the surety for the entire property by claiming that the property is joint family property.

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25. In my considered view, the scope of Section 34 of the SARFAESI Act and Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, is not one and the same or similar in its application. While Section 34 of the SARFAESI Act contemplates ouster of Civil Court's jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or the Appellate Tribunal is empowered to determine under the SARFAESI Act, Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act contemplates the bar of jurisdiction only in relation to the matters specified under Section 17 of the Act therein. This aspect has already been discussed in the earlier paragraph of this order. Therefore, the above decision of the Apex Court, which was rendered while considering the scope of Section 34 of the SARFAESI Act, will not help the petitioner/fourth defendant, as I find that the scope of the relevant provisions of the SARFAESI Act and the Recovery of Debts Due to Banks and Financial

Institutions Act, as discussed supra, is not one and the same. Even otherwise, a perusal of the factual aspects of the matter before the Honourable Supreme Court in the Jagdish Singh's case (cited supra) would show that there was no plea of fraud or misrepresentation or failure to follow due procedures. Therefore, I consider that the said decision in Jagdish Singh's case (cited supra) is also factually distinguishable.”

....

31.It is well settled that for considering the application under Order 7 Rule 11 CPC, only the plaint averments as such, have to be taken into consideration to find out as to whether the plaint is liable to be rejected for the grounds referred to in the application under Order 7 Rule 11 CPC. As the plaint in this case has referred to fraud, suppression of facts and invalid proceedings before the DRT, as though they were initiated against a dead person etc., it is for the plaintiff to establish the same before the Trial Court, and therefore, whether there was any fraud or not, etc., as alleged by the plaintiff, is not for this Court to consider the same at this stage and decide based on the counter allegations made by the petitioner/fourth defendant. Therefore, other decisions relied on by the learned Senior Counsel appearing for the petitioner in respect of all these contentions, are not relevant to be referred to at this stage.

32.Considering all the above aspects, I am of the view that the Trial Court is justified in rejecting the application filed by the petitioner/fourth defendant for rejection of the plaint. Accordingly, C.R.P(PD).No.2496 of 2011 fails and the same is dismissed.”

17.5.In view of the above finding in the C.R.P(PD).No.2496 of 2011, the learned counsel for the respondents 4 and 5 as well as the appellant fairly submitted that the SLP filed against the order of the Court is also dismissed. Therefore, the issue of jurisdiction attained finality and the issue of jurisdiction of Civil Court to entertain the present suit is no more res integra, as far as present case is concerned.

17.6.Further, this Court pressed into service of a recent judgment of High Court of Bombay at Nagpur Bench, in the case of Bank of Baroda vs. Gopal Shriram Panda, wherein it was held as follows:

"22.3. A security interest may at times also involve the common law rights of a citizen, who is not a party to its creation. In such a circumstance, can it be said that merely because a security interest has been created and it has to be enforced in a particular Forum in a particular manner, the citizen whose common law right has been infringed, would have to approach the Forum which has no jurisdiction and wherewithal to decide and enforce such violation.
The following could be considered as examples of this :-

(a) In Vineeta Sharma Vs. Rakesh Sharma and others, (2020) 9 SCC 1, the Hon'ble Apex Court, while considering the amendment to Section 6 of the Hindu Succession Act, 1956, whereby a daughter was recognised as a coparcener, has held that such recognition would give her right in the coparcenary property by her birth in the coparcenary and not from the date of death of her father or the amendment. In such a matter if the male members of the family have already created a security interest in such coparcenary properties in favour of the Bank and for non payment of dues, if the same are being sought to be taken possession of and sold by auction, under Section 13 of the SARFAESI Act, can the Special Forum, DRT herein, which is undertaking this exercise, on being approached by the daughter who now due to the amendment to the Hindu Succession Act, 1956, has a share therein which stands recognised retrospectively by the Apex Court, decide and determine the rights of such daughter and grant a preliminary decree delineating her share and take further action to separate her share ? If it cannot, then could it be said that the Civil Court does not have the jurisdiction to do so, in view of the bar created under Section 34 of the SARFAESI Act ? But if it is so held then the daughter in spite of having a right in the property duly recognised by law, would be left remediless, as she cannot go to the Civil Court nor the Special Forum, the DRT, has any authority to determine the extent of her right and grant her the relief which she would be entitled to.

(b) Where the owner/borrower/guarantor has entered into an agreement of sale of the property and has accepted consideration resiles from the contract which is then put to enforcement by instituting a suit for specific performance, during the pendency of which if a security interest is created by the owner by offering the property as an equitable mortgage, and the property is then put to auction, can the Tribunal in such a case upon the plaintiff approaching it under Section 17, adjudicate the rights of the plaintiff vis-a-vis the security interest and release the property from further process under the SARFAESI Act ? If the security interest in spite of the notice of the pendency of the suit is put to auction for recovery of the dues of the Bank, how would the principle of lis pendens in Section 52 of the Transfer of Property Act, affect the situation ? This is more so, as by filing a suit, the right of the plaintiff, has become crystallized. What would happen to the suit for specific performance, which in such a circumstance, on account of loss of the subject property, would be rendered futile ?

(c) Another case in point would be where two or more persons hold title to the security interest and one of them has a power of attorney of the other, for taking steps to get the property mutated and do all activities necessary in that regard including to get the property partitioned, without any authority, mortgages the entire property with the Bank under the power of attorney which is accepted by the Bank, which on failure to repay is sought to be auctioned by invoking the powers under Section 13 of the SARFAESI Act. Can the Special Forum on the plea of the other co-owner enter into an adjudication of the issue about the nature and scope of the power of attorney and grant a declaration that the security interest was not legal to the extent of the share of the other co-owner ?

(d) Where on a prima facie demonstrable case, the person who has created the security interest, was not having any legal right in the property in respect of which security interest is created.
....

27. In view of what we have discussed above, our considered opinion to the question as referred to is as under:-

Question :

"Whether the jurisdiction of a Civil Court to decide all the matters of Civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation Act ?

Answer :

The answer, looking to the nature of the question, in our view, is in parts :-

(A) Jurisdiction of the Debts Recovery Tribunal, to decide all matters relating to Sections 13 and 17 of the SARFAESI Act, is exclusive.

(B) In all cases, where the title to the property, in respect of which a security interest', has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters,to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the DRT.

(C) The jurisdiction of the Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Sections 13 and 17 of the SARFAESI Act, in relation to enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.

(D) Where civil rights of persons other than the borrower(s) or guarantor (s) are involved, the Civil Court would have jurisdiction, that too, when it is prima facie apparent from the face of record that the relief claimed, is incapable of being decided by the DRT, under Section 17 of the DRT Act, 1993 read with Sections 13 and 17 of the SARFAESI Act.

(E) Even in cases where the enforcement of a security interest involves issues as indicated in Mardia Chemicals (supra) of fraud as established within the parameters laid down in A. Ayyasamy (supra); a claim of discharge by a guarantor under Sections 133 and 135 of the Contract Act [Mardia Chemicals (supra)]; a claim of discharge by a guarantor under Sections 139, 142 and 143 of the

Contract Act; Marshaling under Section 56 of the Transfer of property Act [J.P. Builders (supra)]; the Civil Court shall have jurisdiction.

(F) Examples as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.

(G) The principles laid down in para 33 (i) to (ix) of Sagar Pramod Deshmukh (supra) are in accordance with what we have discussed and held above.

17.7.Therefore, the law has been settled, where civil rights of a person other than the borrower or guarantor are involved, the Civil Court would have jurisdiction.

17.8.In fine, this Court is of the view that in the present case, the plaintiff is neither a borrower nor a guarantor, thus, his civil right can be decided by the Civil Court, when it is prima facie apparent from the face of record that the relief claimed is incapable of being decided by DRT, under Section 17 of the Act. In view of the above, this Court inclined to hold that there is no bar, for the present suit filed by the plaintiff, under Section 18 of the Act. Accordingly, the issue is answered in favour of the plaintiff.

Substantial Question of Law (ii) in S.A.Nos.1022 & 1055 of 2018 - Whether the mere deposit of copy of the title deed by L.Srikantiah would create a valid equitable mortgage in the absence of any document evidencing such deposit is with intention to create an equitable mortgage?

Additional Substantial Question of Law Nos. (ii) and (iii) in Cross Appeal No 54 of 2020 - (ii) Whether the mere deposit copy of the title deed by L.Srikantiah would create a valid equitable mortgage in the absence of any document evidencing such deposit is with intention to create an equitable mortgage?

iii)Whether a valid mortgage by deposit of title deed can be created by depositing Xerox Copy of the documents when the original is not available with the depositor/mortgagor?"

18.1.Mr.Benjamin George, learned counsel appearing for the 5th defendant, Bank submitted that one Mr.Mahadevan borrowed IMFL loan (Term loan and Cash Credit facilities) from the 5th defendant Bank. To secure the said loan, the father of the defendants 1 and 2, L.Srikantiah deposited the notarized copy of unregistered family settlement deed dated 11.10.1999 with the Bank on 06.05.2000. The documents relating to the deposit of title deed have been marked as Ex.B2 and B11 through the 4th defendant. Since 4th defendant was the Auction Purchaser, the photocopy of Exs.B2 and B11 were furnished to the 4th defendant and he filed the same before the Trial Court.

18.2.The learned counsel further submitted that originally the suit scheduled property was owned by Lakkay Gowder, who is the father of L.Srikantiah. After the death of the said Lakkay Gowder, his legal heirs entered into oral partition in the year 1968. By virtue of the said oral partition, L.Srikantiah got his share to the extent of 1.16 ¼ acres together with land and building bearing Door No. 2/379 and 2/387 in R.S.No.169/1 at Uthagamandalam. Subsequently, the oral partition drawn into writing on 11.10.1999 among the legal heirs of the Lakkay Gowder, which was an unregistered family settlement deed. The copy of the said deed was produced by L.Srikantiah to the Bank to secure the loan of one Mahadevan on 06.05.2000.

18.3.Therefore, the learned counsel for the 5th defendant submitted that there was a duly created mortgage by deposit of title deed by L.Srikantiah for securing the loan of the said Mahadevan. As there was a default in repayment of loan by the borrower, the 5th defendant initiated recovery proceedings after due notice to the borrower and the guarantors. The 5th defendant Bank, filed O.A.Nos.47 & 49 of 2003 against the borrower and the guarantors. L.Srikantiah was arrayed as 3rd respondent in the above said two O.As, he entered appearance through his Lawyer and filed his reply statement. The learned counsel further submitted that L.Srikantiah also admitted the execution of the deposit of the title deed for securing the debt of Mahadevan in the reply statement.

18.4.The learned counsel further submitted that, after filing the reply statement, there was no representation on behalf of L.Srikantiah, therefore the suit filed before DRT was decreed in ex-parte on 24.04.2007. Subsequently, they came to know about the demise of L.Srikantiah, the legal heirs were impleaded and they have also filed the application to set aside the exparte decree. The impleading application was allowed and subsequently the case was posted for final hearing, but none appeared for the impleaded parties. Therefore, once again exparte order dated 24.04.2007 was confirmed on 05.06.2008. Thereafter, the legal heirs of L.Srikantiah have not preferred any appeal, thus, the said order dated 24.04.2007 of DRT attained finality.

18.5.The proclamation of sale was issued to sell the property of L.Srikantiah on 28.11.2008. Subsequent to the same the, auction sale was conducted and the property was sold to the 4th defendant, Auction Purchaser. The 6th defendant issued the sale certificate and the same was registered on 06.02.2009 and the sale certificate was marked as Ex.B5. Ex.B6, the possession certificate was issued on 06.02.2009 in favour of the 4th defendant. Thereafter, chitta was obtained by the auction purchaser on 12.02.2010 which was marked as Ex.B7 and the Advocate Commissioner was appointed on 03.07.2009 to evict the defendants 1 and 2 who are the legal heirs of L.Srikantiah. On 07.10.2009, Advocate Commissioner filed the report with the undertaking of the 1st and 2nd defendants to vacate the suit schedule property within five months for which, the Auction Purchaser also agreed and the same has been marked as Ex.B10.

18.6.The learned counsel for the Bank submitted that the security by way of deposit of title deed was made in the year 2000. The sale deed said to have executed, in favour of the plaintiff, in the year 2003. Therefore, the mortgage was prior to the said sale, to the plaintiff. Thus, the auction conducted by the Recovery Officer is valid, legal and the property was sold to the 4th defendant in accordance with law and no fraud was played in the sale as contended by the plaintiff. Mr.Benjamin George, learned counsel for the 5th defendant further submits that on the side of the Bank the order of the DRT passed in O.A.No.47 of 2003 was produced before the Court. The genuinity of the execution of security document by L.Srikantiah was proved and held as legal. Further, he submits that once the execution of document was proved and held as legal by one legal forum, the same fact need not be proved once again before the another Court to adjudicate the same subject matter. Hence, he submits that once he produced the order passed by the DRT in O.A.No.47 of 2003 before the Court below, the same is the conclusive proof of the creation of mortgage by deposit of title deed, thus the same need not be proved once again.

18.7.In support of his contention, he referred the following judgments of this Court as well as the Hon'ble Apex Court:

(i) Malini Srinivasan Vs. Canara Bank reported in 2009 2 LW 785.

(ii) State of Haryana & Others Vs. Navir Singh & another reported in (2014) 1 SCC 105.

(iii) R.Arumugam Vs. United Bank of India & Others reported in 2017 SCC Online Mad 21820

(iv) Assam Co-operative Apex Bank Vs. Punjab National Bank & Others reported in (2019) 1 Gauhati Law Reports 597

(v) M/s. Ride Master Rims Private Ltd Vs. ING Vysya Bank Ltd., reported in 2006 SCC Online Mad 683

18.8.By referring the above judgments, the learned counsel also submitted that the mortgage can be created by producing the photocopy of the document. In the present case, the deposit of title deed was made with the intention to create the security. The deposit of the title deed made as security by L.Srikantiah to secure the loan of one Mahadevan has been proved by virtue of Exs.B2 and B11. The Courts below have already dealt with this aspect in a proper perspective and well reasoned judgment need not be interfered on this aspect. Therefore, he submits that there was a valid deposit of title deed by L.Srikantiah to secure the loan of one Mr.Mahadevan.

19.Mr.Sanjeev Kumar, learned counsel for the appellant/4th defendant/Auction Purchaser submitted that since one Mahadevan failed to repay his loan, the Bank has initiated the recovery proceedings before DRT against L.Srikantiah and Papanna Gowder, who are the Guarantors for the borrowing of Mahadevan. Based on the final order passed in O.A.No.47 of 2003, the Recovery certificate dated 03.08.2007 was issued in DRC.No.220 of 2007 to L.Srikantiah. On 26.12.2008, the Recovery Certificate was issued to all the legal heirs of L.Srikantiah in DRC.No.245 of 2008. The legal heirs have not challenged the same, thus, auction sale was conducted in accordance with law, to recover the loan. In the said auction sale, 4th defendant participated, as he was the successful bidder, the suit schedule property was sold to him by the 6th defendant. Therefore, it was the valid sale made by the Recovery Officer and there was no illegality in the process of auction sale. Further, the learned counsel submits that he will adopt the arguments of Mr.Benjamin George, learned counsel appeared for the 5th defendant/Bank and prayed to allow the Second Appeals.

20.None appeared for the 1st defendant who is one of the legal heir of the L.Srikantiah.

21.Mr.G.K.Muthukumar, learned counsel appearing for the 2nd defendant submitted that the 2nd defendant is one of the son of L.Srikantiah. The defendants 1&2 and L.Srikantiah jointly sold the 2nd suit schedule property to the extent of 1.05 acres by virtue of the sale deed dated 17.02.2003 to the plaintiff and 4 ¾ cents of land to the 3rd defendant out of 1.16 ¼ acres, being obtained by virtue of the unregistered family settlement deed dated 11.10.1999.

21.1.The learned counsel further argued that the suit schedule property is a joint family property. Subsequent to the partition, his father and defendants 1 and 2 are Co-parceners. The learned counsel submits that L.Srikantiah had not created any security for securing the loan of the third party as stated by the Bank. There was no legal necessity to create the security of the joint family property for a third party, borrower. In this regard, the Bank has not adduced any evidence to substantiate the creation of security, by deposit of title deed by L.Srikantiah. When a plea was made by the plaintiff that without any proper title, the property was sold by the Recovery

Officer, it is the duty of the Bank to prove the genuinity of the creation of security by L.Srikantiah by adducing both oral and documentary evidence and the same has not been proved by the Bank in the manner known to the law. Further, he submits that L.Srikantiah has not executed any mortgage in favour of the 5th defendant Bank to secure any third party loan. The document which was referred by the Bank is a copy of an unregistered family settlement deed, the original/photocopy of, deposit of said unregistered family settlement deed said to have been handed over by L.Srikantiah has not been produced before the Trial Court by the Bank. Hence, there was no validly created mortgage by deposit deed by L.Srikantiah.

21.2.The learned counsel further submitted that the 5th defendant Bank heavily relied on Exs.B2 and B11, photocopies of documents, which were filed and marked by the 4th defendant. The 4th defendant is not a competent person to mark those documents, which has to be marked only through Bank Officials. In the present case, D.W.3 Bank Manager was examined. No such documents were marked through D.W.3, Bank Manager. When a plea was raised by the plaintiff that there was no deposit of title deed, made by L.Srikantiah in favour of the third party, it is the duty of the Bank to prove that there was a valid mortgage but they have failed to prove the same. Further, by referring the deposition of D.W.3, he submitted that D.W.3, Bank Manager admitted the factum of death of L.Srikantiah on 13.04.2003 and the initiation of DRT proceeding in the month of June 2003. Therefore, the suit was filed against the dead person. Any action against the dead person is nullity, and hence, the entire order passed by DRT in O.A.No.47 of 2003 is null and void.

21.3.Further by referring the deposition of D.W.3, the learned counsel submitted that D.W.3 has stated at his cross examination that at the time of receipt of the deposit of title deed, the Bank will enter into the memorandum of agreement. In the present case, on behalf of the Bank no such document was produced either before the Courts below or before the DRT in order to prove that L.Srikantiah, deposited title deed with the intention to create a security thereon to secure the debt of Mahadevan. Therefore, there is no valid mortgage by deposit of title deed. Further, even assuming that there is a valid deposit of title deed, being karta of the joint family, L.Srikantiah can mortgage the property only for the benefit of the family, he cannot create a security for the borrowings of someone else for the IMFL loan as a guarantor. He has no authority to give the Co-parcenery property as security to someone else loan, which is not for any legal necessity to the family. Therefore, the learned counsel submitted that there was no valid mortgage by virtue of deposit of title deed as alleged by the Bank and the finding of the Courts below in this regard is liable to be set aside. In addition to the above submission, the learned counsel submitted that he will adopt the arguments of Mr.V.Raghavachari, learned counsel for the plaintiff, as well.

22.Mr.Ragavachari, learned counsel appearing for the plaintiff/cross objector submitted that the First Appellate Court rightly held that the decree passed against the dead person is null and void. Though, it has held that the property is the joint family property, it has wrongly held that the mortgage is valid to the extent 1/3rd share of the L.Srikantiah.

22.1.The learned counsel submitted that there was no valid mortgage by deposit of title deed created by L.Srikantiah, and only the photocopy of Ex.B2 and Ex.B11 were filed by the 4th defendant along with his written statement. The 4th defendant has not deposed anything about whether there is valid mortgage or not and he is not a competent person to speak about the validity and execution of Ex.B2 and B11.

22.2.The Bank supposed to have marked all the documents relating to the deposit of title deed through their Officials. D.W.3, the Bank Official was examined, he has not deposed anything about the execution of Exs.B2 & B11, on the other hand, he deposed that at the time of handing over the documents by the mortgagor to create mortgage by deposit of title deed, they used to enter into a memorandum of agreement. But no such agreement was produced before the Courts below. It is the duty of the Bank to prove the factum of creation of valid mortgage but no document has been filed/marked through D.W.3 to prove the validity of creation of mortgage. Thus, the title of the Bank in the suit schedule property has not been proved. Therefore, the property was sold by the 6th defendant, Recovery Officer, without any valid title in favour of 4th defendant.

22.3.The learned counsel further submitted that the order in O.A.No.47 of 2003 was passed against the dead person. At the time of passing the exparte order by the DRT in O.A.No.47 of 2003 on 24.04.2003, L.Srikantiah was not alive, he passed away on 13.04.2003 itself. This fact was admitted by DW3 in the cross examination. When such being the case, they supposed to have impleaded the legal heirs. Even, as per the Ex.B15, copy of the DRT order filed and marked before this Court by the Bank was passed on 26.12.2008 confirming the exparte order dated 24.04.2007. The decree was passed only against the dead person. The decree against the dead person is void. Even issuing the recovery certificate against the dead person is not correct, which was rightly considered by the First Appellate Court, but wrongly held that the auction purchaser is entitled 1/3rd share in the suit schedule property.

22.4.The learned counsel further submitted that the Ex.B2 is nothing but a copy of an entry made by the Bank in the entry register about the details of the persons entering into the Bank. Obviously this cannot be relied as document for creation of any mortgage by deposit of title deed. The entry register maintained by the Bank will not prove the creation deposit of title deed. The entry register was maintained by the Bank to note down the details of the visitor to visit the Bank. Ex.B2 shows that L.Srikantiah visited the Bank to meet the Manager to handover the title deed for executing equitable mortgage. Difference in colour of paper, handwriting and inks in Ex.B2 would prove that it was created one for the purpose to implicate L.Srikantiah in this case. Therefore, the Bank has failed to establish its case with regard to the creation of mortgage, by L.Srikantiah by way of deposit of title deed to secure the debt of Mr.Mahadevan.

22.5.The plaintiff's case is that without any title, 6th defendant sold the property in public auction. The title should have been obtained by virtue of creation of valid mortgage. There was no valid mortgage, thus, the 6th defendant sold the suit schedule property without any title and the said sale is void ab initio.

22.6.Both the Court below held that there was a valid mortgage by way of deposit of title deed, simply by relying on Exs.B2 and B11, without looking into the aspect about the intention to create the mortgage on the part of the mortgagor. The Courts below have failed to assign any findings, whether L.Srikantiah had any intention to create security by way of equitable mortgage or not. When the plaintiff question the validity of title of the Bank to sell the property, the Bank should have come forward to adduce both oral and documentary evidences to substantiate the genuineness of creation of security by way of deposit of title deed of unregistered family settlement deed by L.Srikantiah. The Bank have to prove that the said security was provided with intent to create equitable mortgage to secure the loan of Mahadevan. However, the Bank has not proved the same in the manner know to law. In the absence of any such evidence the Courts below ought not to have come to the conclusion that there is a valid deposit of title deed to secure the loan of Mr.Mahadevan. The Exs.B2 & B11 were marked through Auction Purchasers. The Auction Purchaser is not a competent person to mark those documents. In support of his contention, he referred the following judgments:

(i) R.Janakiraman Vs. State reported in AIR 1967 SC 1634

(ii) K.J.Nathan Vs. S.V.Maruthi reported in 1964 6 SCR 727

22.7.By referring the above judgments, the learned counsel submitted that for the purpose of creation of mortgage in terms of Section 58 (f) of the Transfer of Property Act, there are three criteria needs to be satisfied, which are (i) debt, (ii) deposit of title deed and (iii) intention to create the mortgage to secure the debt. The intention to create the mortgage is a question of fact. Thus, it is the duty of the Court to find out whether there was any intention to L.Srikantiah to create the equitable mortgage to secure the loan of Mahadevan. The Courts below have not given any finding on this aspect though the available evidence would be sufficient to deal with this aspect. Therefore, the findings given by both the Courts below with regard to the validity of the creation of mortgage is not correct and the same is liable to be set aside.

22.8.Further, he submitted that throughout the proceedings, the Bank have not produced the unregistered family settlement deed either before the Trial Court or before the First Appellate Court. Even at the time of argument, the learned counsel appearing for the Bank submitted that they have received a notrazied photocopy of the said deed but the same has not been produced before the Court.

23.Though the learned counsel entered appearance for the 3rd defendant/4th respondent, thereafter, none appeared to make their oral submissions.

24.Heard the learned counsel for the appellant/4th defendant, cross objector/plaintiff, 2nd defendant and the 5th respondent/5th defendant and perused the materials available on records.

25.The suit property was originally owned by one Mr.Lakkay Gowder, after his death, the legal heirs of the Lakkay Gowder entered into the oral partition in the year 1969. Subsequently, the oral partition was drawn into writing among the legal heirs of the Lakkay Gowder on 11.10.1999. The said oral partition is an un-registered family settlement deed. The plaintiff in the suit marked the copy of the un-registered family settlement deed as Ex.A2.

26.The case of the 5th defendant-Bank was that by virtue of the said un-registered family settlement deed, 1.16 acres were allotted to one of the son of Lakkay Gowder, namely L.Srikantiah. The said L.Srikantiah mortgaged the un-registered family settlement deed, by virtue of deposit of title deed to secure the debt of one Mahadevan. The said mortgage was said to have been made on 06.05.2000. According to the Bank, the L.Srikantiah handed over the un-registered family settlement deed as security for IMFL loan obtained by one Mahadevan who is third party to the family. The further contention of the Bank was that by merely handing over the copy of the un-registered family settlement deed to the Bank, it will automatically amounts to the deposit of title deed to secure the debt of Mahadevan.

27.As the original borrower failed to repay the IMFL loan to the Bank as agreed, thus, the Bank made a demand to the guarantors for repayment of loan. However, none of the guarantor had come forward to settle the dues of Mahadevan. Therefore, the Bank has instituted recovery proceedings under O.A.Nos.47 & 49 of 2003 and the exparte decree was passed by DRT on 24.04.2007. It was contended on the side of the Bank that the legal heirs of L.Srikantiah, themselves filed the application to implead them in O.A.No.47 and 49 of 2003, and the said applications were allowed. However, at the time of final hearing, the advocate who appeared for the legal heirs reported no instruction. Hence, the order dated 24.04.2007 passed against the borrower and two guarantors including L.Srikantiah stand confirmed and based on the said order the property was auctioned. The 4th defendant/Auction Purchaser participated in the auction and his bid was confirmed and the suit schedule property was sold for a sum of Rs.8,50,000/-, to fourth defendant.

28.During the course of argument, the learned counsel appearing for the Bank also made a submission that the Bank need not prove the deposit of title deed made by L.Srikantiah to secure the loan of L.Srikantiah for the reason that by virtue of order dated 24.04.2007 in O.A.No.47 of 2008, the DRT held that the creation of security by virtue of the deposit of title deed by L.Srikantiah is valid. Against the said order, no one preferred any appeal, thus, the said order reached finality.

29.Both the Courts below concurrently held that there was valid mortgage by deposit of title deed created by L.Srikantiah in favour of Bank to secure the debt of Mahadevan. The Courts below have merely relied on the copy of the extract of Ex.B2 and Ex.B11. These two documents are relating to the 5th respondent Bank but the copy of the documents have been marked through the auction purchaser. Though, on behalf of the Bank DW3 was examined, these documents have not been marked by the Bank official. This is only a photocopy of the document. The originals of these extract have not been produced and marked. The auction purchaser is not a competent person to mark and speak about Ex.B2 and Ex.B11. Only the Bank Officials are competent to mark and speak about these document. When the plea of fraud was raised by the plaintiff before the Civil Court, it is the duty of the Bank to prove the validity of the creation of the mortgage. The Bank has not proved the same, admittedly the Bank has not taken any steps to prove the same.

30.A perusal of Ex.B2, it does not reflect anything about the deposit of un-register family settlement deed by L.Srikantiah to secure the loan of Mahadevan. The Bank have also not produced the so called family settlement deed said to have deposited in the Bank by L.Srikantiah, before the Courts below. Further, in Ex.B2, it was written that L.Srikantiah visited the Bank for handing over the deposit of title deed to the Manager. This would not be sufficient to prove that L.Srikantiah deposited the title deed with the Bank with the intent to create the mortgage. Ex.B2 is only the extract of the copy of the entry register of the Bank, there are different inks and in different point of time the entries have been made. The Bank Manager or the other officials are not available for the purpose of cross examination to prove about the genuinity of the document as the same have not been marked through them. Therefore, these documents have not been proved in the manner known to law. Ex.B11 is the Bank register which was not marked through the Bank officials. In the absence of marking these documents, through the Bank Officials, genuinity and entries made therein are doubtful, and the same cannot be relied to support the case of the Bank as well as the auction purchaser.

31.During the cross examination, DW3 deposed that the memorandum of agreement would be prepared at the time of deposit of title deed. No doubt the said memorandum of agreement is conclusive proof for the execution of mortgage by deposit of title deed by L.Srikantiah to secure the loan of Mahadevan. But the said document has not been produced either before DRT or before the Tribunal. In the absence of such document no valid deposit of title deed can be created with the photocopy of an unregistered family settlement deed. Thus, this Court unable to trace out any documentary or oral evidences that would substantiate the contention of the Bank that there was a valid deposit of title deed. The Courts below failed to analyse the available oral and documentary evidences in a proper perspective. As discussed above the available oral and documentary evidences would be sufficient to come to the conclusion whether there was a valid mortgage by deposit of title deed or not. From the above analysis of the oral and documentary evidences, this Court is of the opinion that L.Srikantiah had not created any valid mortgage by virtue of deposit of title deed as contended by the Bank to secure the debt of Mahadevan.

32.In the present case, the plaintiff was neither a guarantor nor the borrower, thus, his grievance cannot be addressed before DRT proceedings. Hence, the plaintiff herein filed the suit seeking the following relief:

"a. For a declaration that the alleged sale by public auction and the sale certificate issued pursuant to the public auction by the sixth defendant to the 4th defendant in respect of the first schedule property are null and void, unenforcable and not binding on the plaintiff.

b. For an injunction restraining the defendants from interfering or disturbing the peaceful possession and enjoyment of the plaintiff in respect of the second schedule property described in the plaint.

c. For partition of the first schedule property and allotment and separate possession of the second schedule property forming part of the property described in the first schedule, to the plaintiff the same having been purchased by him

d. For costs of the suit."

33.There was a plea of fraud has been raised against the Bank by the plaintiff in the creation of mortgage by deposit of title deed by L.Srikantiah to secure the debt of Mahadevan. The plaintiff also alleged that L.Srikantiah is not entitled to mortgage the joint family property to secure the loan of 3rd party in the capacity as karta. Further in the suit, the plaintiff also pleaded for partition and for declaration to declare the sale as null and void.

34.Therefore, according to the plaintiff all these issues can be decided only before the Civil Court and not by the DRT. The Auction Purchaser filed the application to reject the plaint, however, the said application was dismissed. Subsequently, C.R.P.No.941 of 2011 was filed and the said C.R.P was also dismissed holding that the issues raised by the plaintiff in the plaint cannot be decided by the DRT and only the Civil Court can decide the same.

35.When this Court held that the issue raised by the plaintiff cannot be adjudicated by DRT and it can be decided only by the Civil Court, the 5th respondent Bank cannot take the stand that creation of the security by deposit of title deed was already been established and decided by DRT in the exparte proceeding, therefore, there is no need for the Bank to once again to prove before the Civil Court. It is the duty of the Bank to prove the case that L.Srikantiah created mortgage by handing over the copy of the unregistered family settlement deed with the intention to secure the debt of Mahadevan.

36.The exparte order passed by DRT against a dead person in O.A.No.47 of 2003 is void and not binding against the third party in the Civil Court. Thus, it is the duty of the Bank to establish that there was a valid mortgage by way of deposit of title deed.

37.In the present case, the plaintiff took a stand that the 6th defendant auctioned the property without proper title and any such illegal action cannot bind the plaintiff. Thus, it is the duty of the Bank to prove the validity of title obtained from the mortgagor, in the third party civil proceeding before the Civil Court.

38.Ironically, neither the 5th defendant-Bank nor the auction purchaser has marked the copy of the un-registered deposit of title deed said to have handedover by L.Srikantiah to the Bank with the intention to create the security to secure the loan of Mahadevan. When there was a plea that the fraud has been played with regard to the deposit of title deed and when the title of the defendants 5 and 6 was disputed with regard to the suit schedule property, it is the duty of the Bank to prove that there was no fraud and there was a valid creation of mortgage by virtue of deposit of title.

39.On side of the Bank no steps have been taken to prove that there was a valid deposit of title deed before the Courts below and the auction purchaser has filed a copy of the Exs.B2 and B11. Ex.B2 is the extract copy of the register showing the creation of equitable mortgage. Ex.B11 is the extract copy of register of loan said to have maintained in Bank. These two documents are the photocopy of the document and no originals have been produced before the Courts below. The Bank officials are the only competent person to speak about Ex.B2 and B11. In the present case, these photocopy of the documents have been marked through 4th defendant-auction purchaser. On behalf of the Bank, D.W.3-Bank Manager was examined. No document was marked through him.

40.Even, a perusal of Ex.B2, it would appears to be an entry register maintained by the Bank. Before entering into the Bank, one should mark his/her entry in the register. Such entry register would not be sufficient to prove that L.Srikantiah deposited the copy of the unregistered family settlement deed with the intention to create the security for the loan obtained by the third party. Both the Courts below by referring the Exs.B2 and B11, concurrently held that there is a valid deposit of title deed. This Court unable to understand how both the Courts below have come to the conclusion that there is a valid mortgage when the original family settlement deed and memorandum of agreement evidencing the deposit of title to secure the debt of R.Mahadevan were not filed and marked by the Bank inspite of the admission of D.W.3 at his cross examination that it would prepare a memorandum of agreement at the time of deposit of title deed. The copy of family settlement deed was filed as Ex.A2 by the plaintiff. It is the contention of the Bank that L.Srikantiah created the valid mortgage by deposit of title deed. The contention of the plaintiff is that there was no mortgage at all as stated by the Bank. When such being the case, it is the duty of the Bank to prove the validity of creation of mortgage by virtue of deposit of title deed by L.Srikantiah and also the intention on the part the L.Srikantiah to create the security to secure the debt of Mahadevan. It is the question fact to prove the intention to create the mortgage. Thus, it is the duty of the Court to find out the whether there was an intention on the part of L.Srikantiah to create the mortgage by virtue of deposit of title deed to secure the IMFL loan of Mahadevan. Both the Courts below desperately failed to deal with this aspect as to whether there was an intention for L.Srikantiah to create the mortgage to secure the debt of Mahadevan, though there are enough oral and documentary evidence are available to decide this issue, as discussed above.

41.A perusal of Ex.B11 would show that it is the extract of the copy of the register maintained by the Bank. Certainly, the auction purchaser is not competent to speak about the registered maintained by the Bank and only D.W.3-Bank Manger is the competent person to speak about these documents. Though he was examined, he had not come forward to mark these document and to speak about the same. All these vital aspect have not been taken into consideration by both the Court below and they have concurrently in a mechanical manner held that there is a valid mortgage by way of deposit of title deed by relying on Exs.B2 and B11. This Court is of the view that it is the duty of the 5th defendant-Bank to prove the genuinity of creation of deposit of title deed. Thus, this Court also find that there is a fault in the decision making process by both the Courts below while arriving at a conclusion that there was a valid mortgage by deposit of title deed without analysing the available evidence in the proper perspective.

42.On behalf of the 5th defendant Bank, D.W.3 was examined. In his cross examination he has stated as follows:

"அடமானம் கொடுக்கும் போது ஆவணத்தை ஒப்படைவு செய்தால் அதற்கு ஒரு புரிந்துணர்வு ஒப்பந்தம் தயார் செய்வோம் என்றால் சரிதான்"

43.Which means a memorandum of agreement for the deposit of title deed would be prepared at the time of deposit of title deed. D.W.3 in his cross examination stated that they have prepared the memorandum of agreement at the time of depositing the title deeds. Thus, it is clear, it is the practice of Bank to prepare the memorandum of agreement at the time of deposit of title deeds which would be signed by both the parties. When such being the case, such memorandum of agreement has not been filed any where and marked on the side of the Bank in order to prove their stand that there is a valid mortgage by deposit of title deed of L.Srikantiah. In the absence of production of said memorandum of agreement, as deposed in the cross examination by D.W.3, the Court at no stretch of imagination can come to the conclusion that there was a mortgage by deposit of title deed.

44.The judgment in O.A.No.47 of 2003 may be relevant but it is not a conclusive proof in a third party civil proceedings. There is a serious cloud over in the filing of O.A.No.47 of 2003 and in passing the exparte order dated 24.04.2007. According to D.W.3 the O.A was filed in the month of June 2003. D.W.3 deposed in his cross examination stating that L.Srikantiah passed away on 13.04.2003. Thus, O.A. itself filed against the dead person. According to 5th defendant the said L.Srikantiah engaged the Advocate and filed the reply statement. Further, it was averred that L.Srikantiah admitted the execution of deposit of title deed in reply statement. I am unable to understand when L.Srikantiah passed away in the month of April 2003, how the dead person would have engaged the Advocate and filed the reply statement admitting the creation of mortgage by way of deposit of title deed in O.A filed in the month of June 2003. That apart, at the time of passing exparte decree on 24.04.2007, the Bank was well aware of the fact that L.Srikantiah was died. Though the Bank contended that legal heirs, themselves have been impleaded in O.A.No.47 of 2003, in the year 2008, the entire proceedings subsequent to the passing of the decree by DRT was proceeded only against the dead person. The proclamation of sale was issued 28.11.2008, recovery notice was issued on 26.12.2008, tender sale notice was issued on 28.11.2008, recovery certificate was issued 03.08.2007, notice of demand was issued on 14.12.2007, order of attachment was issued on 13.05.2008 and Recovery Certificate on 03.08.2007. All these proceedings have been taken against the dead person. Therefore, any action against dead person is null and void. When these type of illegal void acts committed on the part of the Bank, it is the duty of the Bank to prove all the actions taken against dead person are legal and valid but nothing has been proved. All these aspect have not been considered by both the Courts below while holding that there was a valid mortgage by virtue of deposit of title deed. Therefore, this Court finds perversity on the judgment and decree passed by both the Court below on the aspect of the finding that there was a validly created mortgage by way of deposit of title deed by L.Srikantiah, thus, the said finding is liable to be set aside.

45.The argument also put forth by all the learned counsel by referring Section 58 (f) of the Transfer of Property Act. For the ready reference the said provision is extracted hereunder:

> "Where a person in any of the following towns, namely, the towns of Calcutta, Madras 2 [and Bombay], 3 *** and in any other town which the 4 [State Government concerned] may, by notification in

the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immoveable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title -deeds."

46.A perusal of the Section 58 (f) of the Transfer of Property Act, would reveals that there are three criteria to be satisfied to create mortgage by way of deposit of title deed which are as follows:

(i) debt,

(ii) deposit of title deed and

(iii) intention to create security for the debt

47.In the present case, to prove the creation of mortgage by deposit of title deed, all these three criteria needs to be satisfied by the Bank. No steps have been taken by the Bank to prove that there was deposit of title deed by L.Srikantiah. Even based on Ex.B2 and B11, this Court unable to find anything to satisfy the above requirements. As far as the 1st criteria is concerned there must be a debt, according to the Bank there was debt, but the plaintiff contended that he has no knowledge about the money lent by the Bank to R.Mahadevan.

48.As far as 2nd criteria is concerned, the Bank has to prove that there was a valid mortgage by deposit of title deed created by L.Srikantiah, in order to prove the same, the Bank has supposed to have produced original copy of the title deed. In the present case, even the photocopy of the unregistered family settlement deed was not filed and marked by the Bank. According to D.W.3, at the time of deposit of title deed, they used to prepare the memorandum of agreement. Even the said document has not been filed by the the Bank to establish that there was a valid mortgage by deposit of title deed. Hence, the 2nd criteria also not satisfied by the Bank.

49.As far as, 3rd criteria is concerned, at the time of deposit of title deed, guarantor has to express his intention to deposit the title deed for securing the loan debt. Though D.W.3, Bank Manager deposed at his cross examination that there was a memorandum of agreement for the deposit of title deed, the same was not produced and marked by the Bank before the Courts below. Ex.B2 and Ex.B11 would not be sufficient to prove the intention of the L.Srikantiah to deposit the title deed for securing the debt of Mahadevan. Further, the Bank has also not filed any other document to establish the intention of the guarantor to create the security

50.The Bank has not satisfied the 2nd and 3rd criteria as per the provision under Section 58 (f) of the Transfer of Property

Act. The Courts below have also not dealt with this aspect. An analysis by this Court with the available evidences, this Court finds that the Bank has not satisfied the 2nd and 3rd criteria of Section 58 (f) of the Transfer of Property Act. Therefore, the judgment of both the Court is perverse on the aspect of holding that there was a valid mortgage by deposit of title deed, and the same is liable to be set aside on this aspect also.

51.The learned counsel appearing for the 5th defendant/Bank also referred the following judgments in support of his submissions.

(i) The learned counsel referred the Paragraph Nos; 3 and 12 in the case of Malini Srinivasan Vs. Canara Bank reported in 2009 2 LW 785, which reads as follows:

> "3.Learned Senior Counsel for the petitioner would submit that the petitioner is neither a borrower not a guarantor; no valid mortgage is created concerning the property in favour if the Bank; the entries in the Equitable Mortgage Register alone are not sufficient to give legal validity to the alleged claim of the Bank of an existence of an equitable mortgage; an unregister mortgage deed cannot be called in evidence; the dates in the Equitable Mortgage Register have been malafidely altered by the Bank and they are incompatible; the petitioner is not an earning member and, therefore, she is not in a position to deposit the amount, as a condition precedent for hearing the appeal by DRAT.
>
> 12.It is true that at page No.70 of Equitable Mortgage Register, there is a material alteration of date from 23.10.1991 to 24.10.1991. But, in the same page, the date of deposit is clearly stated as 23.10.1991 and the manager also certified that mortgagor was present on 23.10.1991 and deposited the title deeds. When the date of deposit was clear, the said material alteration, which was probably due to a clerical mistake, cannot be given much importance."

51.1.In the above said case, the mortgage by deposit of title deed was produced and proved by the Bank before the Court. Whereas in the present case in hand, no such deposit of title deed has been produced before the Courts below in order to prove the creation of the mortgage by deposit of title deed and the deposit of title deed itself in dispute. Therefore, this case will not be applicable for the 5th defendant/Bank to substantiate their case.

(ii) Secondly the learned counsel referred the Paragraph Nos.14.2 and 14.3 in the case of State of Haryana & Others v. Navir Singh & another reported in (2014) 1 SCC 105, which reads as follows:

"14.2. But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor document of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit if the title deeds. In such a case also registration is not required. But, in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration.

14.3. In our opinion, the letter of the Finance Commissioner would apply in cases where the instrument of deposit of title deeds incorporates the terms and conditions in addition to what flows from the mortgage by deposit of title deeds. But in that case there has to be an instrument which is an integral part of the transaction regarding the mortgage by deposit of title deeds. A document merely recording a transaction which is already concluded and which does not create any rights and liabilities does not require registration."

(iii) Thirdly, the learned counsel referred the Paragraph Nos.3.23 and 3.24 in the case of R.Arumugasamy Vs. United Bank of India & Others reported in 2017 SCC Online Mad 21820, which reads as follows:

"3.23. The learned counsel for the petitioner relies on the decision State of Haryana v. Narvir Singh, (2014) 1 SCC 105 at special page 111, whereby amd whereunder, at paragraph 13, it is observed as follows:

"13. This Court while relying on the aforesaid judgment in the case of United Bank of India v. Lekharam Sonaram & Co., 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 bargan 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 the character is not registered it cannot be used in the evidence at all and the transaction itself cannot be proved by oral evidence either."

3.24. Also, in the aforesaid decision at paragraph 14.2. at page 111, it is held as follows:

"14.2. But the question is whether a mortgage by deposit of title deeds is required to be done by an instrument at all. In our opinion, it may be effected in a specified town by the debtor delivering to his creditor document of title to immovable property with the intent to create a security thereon. No instrument is required to be drawn for this purpose. However, the parties may choose to have a memorandum prepared only showing deposit if the title deeds. In such a case also registration is not required. But, in a case in which the memorandum recorded in writing creates rights, liabilities or extinguishes those, the same requires registration."

(iv) Fourthly, the learned counsel referred the Paragraph Nos.48 in the case of Assam Co-operative Apex Bank Ltd., v. Punjab National Bank & Others reported in (2019) 1 Gauhati Law Reports 597, which reads as follows:

"48.Thus, in view of the discussions above, and in view of the requirement of Section 58(f) of the Transfer of Property Act, 1882 that a person must hand over title deeds with the intention to create a security, the petitioner-Bank must show such intention by producing a admissible copy of (i) their mortgage register maintained in normal course of ordinary business, or (ii)a memorandum of deposit of title deeds, or (iii) take delivery letter by the person making such deposit to create equitable mortgage by deposit of title deeds. Thus, the prima facie conclusion of this Court is that merely by holding the Sale Deed dated 1.5.1970, the petitioner-Bank has not been able to demonstrate the creation of an equitable mortgage of the immovable property of Hautley Tea Estate by deposit of title deeds. Moreover, by its own conduct, the petitioner-Bank not only recognized the existence of a subsequent Sale Deed dated 9.1.1984, by which ATCPL transferred Hautely Tea Estate to R-2, but also allowed advances on account of Hautely Tea Estate to (i) Shew Prasad Nimodia, (ii) R-2 and (iii) R-3 and R-4 Thus, by conduct, the petitioner-Bank has absolved the said ATCPL, who is alleged to have created the initial mortgage by recognizing others as owners of Hautley Tea Estate and by continuing to grant them advance on account of Hautley Tea Estate even after R-3 had admittedly liquidated the entire outstanding dues of Hautely Tea Estate as on 16.8.2001."

51.2.As far as 2nd, 3rd and 4th case law referred by the learned counsel for the 5th defendant/Bank is concerned the Hon'ble Apex Court and the High Court of Guwahati have held that to create the mortgage by way of deposit of title deed the mortgagor must handover the title deed with the intention to provide the security for the debt. The said intention of the mortgagor to provide security, in the present case, has not been proved by the Bank. It is the bounden duty of the Bank to prove the said aspect of the case. Therefore, the law laid down by the the Hon'ble Apex Court and the High Court of Guwahati will not apply for the case in hand.

(v) Finally the learned counsel referred the Paragraph Nos. 6 and 17 in the case of M/s. Ride Master Rims Private Ltd., v. ING Vysys Bank Ltd., reported in 2006 SCC Online Mad 683, which reads as follows:

> "6.The next question that would arise is as to whether there could be a creation of equitable mortgage with Xerox Copy of a particular document. In this connection reliance was placed upon by the applicant/plaintiff in a case law reported in R.Janakiraman v.State rep. by Inspector of Police, C.B.I., SPE., Madras, (2006) 1 SCC 697 : 2006 AIR SCW 754. In that case original title deeds were not deposited. What were deposited were not title deeds, but only a certificate copy issued by the Co-opertive House Building Society, certifying that the appellant is owner of the particular building and two receipts showing that the appellant had paid some electric charges. The alleged mortgage by deposit of title deeds was based upon Ex.P69 in that case, which was also not produced. In that context it was held that the equitable mortgage was also a make-believe and not real one, inasmuch as no document of title was shown to have been deposited.
>
> 17.In consideration of these aspects, I find that there is a valid creation of equitable mortgage in favour of the Respondent-Bank and therefore no injunction could be granted. Original Application

No.264 of 2006 is dismissed. Application No.3452 of 2006 is allowed. Interim injunction granted by this Court order dated 20.3.2006 is vacated."

51.3.By referring above, the learned counsel for the 5th defendant contended that the xerox-copy of the document would suffice to create the title deed. This Court unable to accept the contention of the Bank that the photocopy of the document is sufficient to create the valid mortgage. The Bank should not have accepted the photocopy of the settlement deed for the purpose of securing the debt. Lending money by receiving the photocopy of the document would not be a good practice. According to the plaintiff, it was the unregistered family settlement deed, the original will be available with only one person. No doubt, only one original deed will be available. In the present case, according to the Bank, they have obtained the photocopy of the unregistered family settlement deed as a security to secure the debt of the third party. When the original was not available, when the Bank taking the photocopy of the document as security, in such case, the Bank should have necessarily entered into a memorandum of agreement with the guarantor for depositing the photocopy of the unregistered settlement deed with the intention to create the security for the debt of the third party, but, in the present case, the Bank has not at all entered any such memorandum of agreement. Further, nothing prevented the Bank from obtaining the Revenue documents such as patta, Chitta and Adangal in order to prove the title of the guarantor. If the Bank was really serious enough in obtaining the security for the loan, the Bank should have obtained all these documents and entered into an memorandum of agreement. As stated above the memorandum of agreement was not entered and produced before the Court. Under such circumstance, the Bank wants the Court to make believe of their case. Even, D.W.3, in his cross examination has admitted the fact that at the time of depositing the title deeds, the Bank will enter into a memorandum of agreement. However, no such agreement was produced by the Bank. Thus, this Court unable to accept that mere handing over the photocopy of the title deeds would suffice to create the valid mortgage by deposit of title deed, in the absence of any other original supporting revenue documents and memorandum of agreement to deposit the title deed. Thus, the above case will not apply to the facts of the present case.

52.The learned counsel appearing for the plaintiff has referred the following case laws in support of his contention.

(i) Firstly, the learned counsel referred the Paragraph No.27 in the case of Jananiraman vs. State reported in 2006 1 SCC 697, which states as follows:

"27. Equitable mortgage is created by depositing the original title deeds. But in this case, the original title deeds are not deposited. Not even the two documents referred in Ext. P-69 are deposited. What are deposited (Exts. P-82 and P-83) were not title deeds but only a certificate issued by the Swarnapuri Cooperative House building Society Ltd., dated 1.2.1984 certifying that the appellant is owner of Plot No.10. Swarnapuri Extension (Ext. P-82) and two receipts issued by Tamil Nadu Electricity Board showing that the appellant had paid some electricity charges (Ext. P-83). PW 11 and PW 15 being experienced moneylenders, if really were lending Rs.2,50,000 would have certainly insisted upon the original title deeds or at least the documents mentioned in Ext. P-69 being deposited. This shows that the equitable mortgage was also a "make-believe" and not real."

52.1.A perusal of the above judgment would show that the Bank should have insisted for the original title deed. When they are lending a huge sum of money they should have insisted for the original title deed. Failure to get the original shows that the equitable mortgage said created was not real and it was only a make-believe. The law laid down by the Hon'ble Apex Court in the above case will squarely apply for the case in hand. In the present case Ex.B2 and Ex.B11 were not marked through the Bank Officials. Even, if the Bank marked Ex.B2, it is only a copy of the extract of the register maintained by the Security guard at the time of entering into the Bank. By simply relying on the entry in the said register and photocopy of the unregistered family settlement deed marked by the 4th defendant, the Bank wants this Court to believe their case. As deposed by D.W.3, the Bank Manager, the memorandum of agreement entering the deposit of title deed has also not been produced by the Bank to prove their case. Further, in the present case, there is no valid deposit of title deed. Thus, the law laid down in the above case will squarely apply to the case in hand.

(ii) Secondly, the learned counsel referred the Paragraph No.10 in the case of K.J.Nathan Vs. S.V.Maruthi reported in 1964 6 SCR 727, which reads as follows:

"10.The foregoing discussion may be summarized thus: Under the Transfer of Property Act a mortgage by deposit of title deeds is one of the forms of mortgages whereunder there is a transfer of interest in specific immovable property for the purpose of securing payment of money advanced or to be advanced by way of loan. Therefore, such a mortgage or property takes effect against a mortgage deed subsequently executed and registered in respect of the same property. The three requisites for such a mortgage are (i) debt (ii) deposit of title deed; and (iii) and intention that the deeds shall be security for the debt. Whether there is an intention that the deeds shall be security for the debt is a question of fact in each case. The said fact will have to be decided just like any other fact on presumption of law that the mere deposit of title deeds constitutes a mortgage, for no such presumption has been laid down either in the Evidence Act or in the Transfer of Property Act. But a court may presume under Section 114 of the Evidence Act that under certain circumstances a loan and a deposit of title deeds constitute a mortgage. But that is really an inference as to the existence of one fact from the existence of some other fact or facts."

52.2.A perusal of the above judgment would show that there are three requisite for a mortgage (i.e) (i) debt (ii) deposit of title deed (iii) Intention that the deed shall be security for the debt.

52.3.The Hon'ble Apex Court in the above case held that it is a question of fact to find out whether there was an intention to create security for the debt. Further, the said fact should be decided as any other fact on presumption rule under Section 114 of the Evidence Act. This Court is unable to find anything to arrive at such conclusion that there may be a valid mortgage even under presumption Rule. The Bank wants this Court to believe Exs.B2 and B11. If this Court believe those documents as it is, today, tomorrow anything can happen in the Banking activities to hide their misdeeds.

53.As discussed above, in the present case, the Bank has deliberately failed to prove the deposit of title deed was made with the intention to provide the security for the debt. The three requisites for the creation of security as held by the Hon'ble Apex Court has not been satisfied in the present case and this aspect has been elaborately discussed by this Court already. In view of the above discussion and finding of this Court, the findings of the Courts below that there was a valid mortgage by way of deposit of title deed by virtue of ExsB2 and B11 is set aside and accordingly, the Substantial Question of Law No.ii framed in S.A.No.1022 & 1055 of 2018 and Additional Substantial Questions of Law No.ii and iii framed in Cross Appeal No.54 of 2020 are answered as follows:

(i)A mere deposit of photocopy of title deed by L.Srikantiah would not create a valid equitable mortgage in the absence of other revenue documents and memorandum of agreement evidencing the deposit of title deed as stated by D.W.3 in his cross examination, to prove that the equitable mortgage, was created with the intention to secure the debt.

(ii)The valid mortgage of deposit of title deed cannot be created only by depositing the xerox copy of the title deed without any memorandum of agreement, as admitted by the D.W.3, to reflect the intention of the mortgagor to mortgage the property to secure the particular debt and other supporting revenue records, as far as wherever the photocopy of the title deed produced in the absence of non-availability of original in the case of partition.

Substantial Question of Law Nos. (i) in Cross Appeal in 54 of 2020-i)Whether the Court below are right in restricting the suit claim to 2/3rd especially after holding the auction sale deed 03.12.2008 and the possession certificate under Exhibit B6 are null and void?

54.The challenge was made against the findings of the First Appellate by the Cross Objector stating that the Court below held that the decree was passed against the dead person. However, it held that that 1/3rd share of L.Srikantiah has to be taken as a security for the loan, thus, the plaintiff is entitled only to the extent of 2/3rd share in the suit schedule property.

55.Mr.K.V.Sanjeev Kumar, learned counsel appearing for the 4th defendant/Auction Purchaser submitted that the Court below has wrongly held that the plaintiff is entitled for 2/3rd share of the suit schedule property. The entire suit schedule property was mortgaged by L.Srikantiah as Karta. The learned counsel admits the fact that the suit schedule property is a joint family property and L.Srikantiah as a Karta of the family is entitled to mortgage the property for the benefit of the family members. Therefore, he submitted that the First Appellate Court holding that the karta is not entitled to mortgage the property to the extent of 2/3rd property and thereby decreeing the suit to the extent of 2/3rd share of the property is illegal and the same is liable to be set aside.

56.Mr.Benjamin George, learned counsel appearing for the 5th defendant/Bank submitted that both the Courts below held that there was a valid mortgage by virtue of deposit of title deed. When, the Courts below held that there was a valid mortgage by deposit of title deed, the question of restricting the right of L.Srikantiah to the extent of 1/3rd share is not proper. Further, he also reiterated that L.Srikantiah as a Karta of the family is entitled to mortgage the suit schedule property in entirety including the share of the other family members for their benefits. Therefore, he has also submited that the decreeing the suit to the extent of 2/3rd share in favour of the plaintiff is not proper, which is contrary to the finding of the Courts below. Hence, the finding of the First Appellate Court is liable to be set aside is this regard.

57.Mr.Raghavachari, learned counsel for the plaintiff and Mr.G.K.Muthukumar, learned counsel for the 2nd defendant submitted that, the suit schedule property is a joint family property, the said fact has been admitted by all the parties in these appeal proceedings. No doubt that the L.Srikantiah as a Karta of the family can mortgage the suit property on behalf of the other family members for their benefit. In the present case, the suit schedule property was mortgaged to and in favour of the Bank for securing the IMFL loan obtained by one Mahadevan, who is a third party. The said Mahadevan is noway connected with the family members of L.Srikantiah. The said mortgage was not created for the benefit of the family members. It is not the case of L.Srikantiah borrowed the loan by creating the security in favour of the Bank, whereas, the loan was granted to the third party. Therefore, Sirkantiah is not entitled to create the present mortgage on the share of the other coparcener. Even assuming that there was a valid mortgage by L.Srikantiah to the extent of his 1/3rd share, the First Appellate Court has categorically held that the decree was passed against the dead person and all other execution proceedings were initiated in the name of the dead person and the same is void. After coming to the said conclusion, the Court below wrongly held that there was an valid mortgage to the extent of 1/3rd share of Shri L.Srikantiah in favour of the Bank, securing the IMFL loan. Therefore, he submitted that restricting the decree to the extent of 2/3rd alone is not proper. Hence, the said finding is liable to be set aside and prayed for to decree the entire suit schedule property in favour of the plaintiff.

58.Heard the learned counsel for the appellant/4th defendant, cross objector/plaintiff, 2nd defendant and the 5th respondent/5th defendant and perused the materials available on records.

59.The First Appellate Court while passing the decree it has restricted the suit claim to the extent of 2/3rd and passed the decree in favour of the plaintiff. The Court below found that the suit schedule property is a joint family property and there are three copaeceners to the suit schedule property. At the time of mortgage the other two copaeceners are the majors and no consent was obtained from them. Therefore, it was held that the mortgage created by L.Srikantiah is valid to the extent of 1/3rd share of the suit schedule property.

60.The argument made on behalf of the plaintiff was that when the First Appellate Court found that the auction sale was conducted against the dead person, any decree against the dead person is null and void. After having held with such conclusion, the Court below held that the Bank is still entitled to auction the suit schedule property to the extent of 1/3rd share, which is totally contrary to the finding of the First Appellate Court.

61.To answer this issue, first the Court has to find out whether there is a valid mortgage by virtue of deposit of title deed to secure the debt of R.Mahadevan. This Court already came to the conclusion that there was no valid mortgage by deposit of title deed by L.Srikantiah. If there is no valid mortgage by L.Srikantiah to secure the debt of R.Mahadevan restricting the suit claim to the extent of 2/3rd in favour of the plaintiff is not correct. The plaintiff is entitled for the entire suit schedule property since he has has proved that he has purchased the property by virtue of the sale deed dated 17.02.2003. The said fact was admitted by Umesh and Dinesh, who are all the signatory to the said sale deed. Further, the plaintiff has proved that he is the owner of 1.05 acres of the suit property and the defendant failed to prove that there was a valid mortgage created by the L.Srikantiah in favour of the Bank to secure the IMFL loan created R.Mahadevan.

62.Secondly, whether the decree was against the dead person? In the present case, as deposed by D.W.3, the suit was filed before DRT in the month of June 2003, whereas, L.Srikantiah died in the month of April 2003. Hence, as per the statement of D.W.3, Bank Official, at the time of filing the suit L.Srikantiah was no more. The O.As were filed against the dead person. It was pleaded by the learned counsel for the 5th defendant/Bank that L.Srikantiah engaged the counsel and the learned counsel filed vakalat for L.Srikantiah and also filed the reply statement and in the reply statement L.Srikantiah admitted the creation of mortgage by virtue of deposit of title deed. On the face of it, all these submissions cannot be accepted for the simple reason that when the suit was filed after the death of the person, the question of engaging the counsel and filing reply statement does not arise. Even the final decree was passed against the dead person. Subsequent to the exparte decree dated 24.04.2007, all other proceedings in O.A.No.47 of 2003 have been passed based on the decree dated 24.04.2007 including the issuance of recovery certificate dated 26.12.2008. Ironically, Ex.B12, recovery certificate was issued for the recovery of loan amount based on the decree in O.A.No.49 of 2003. The Court below also heavily relied on Ex.B12. From a perusal of Ex.B12, it appears that notice was not issued to the legal heirs of L.Srikantiah in D.R.C.No.220 of 2007. The notice was issued only against the borrower, Mahadevan and two guarantor viz., Papannana Gowder, L.Srikantiah. Therefore, even the Recovery Certificate was issued against the dead person. Any decree and the execution proceedings against the dead person is null and void. On this ground also the judgment and decree passed by the First Appellate Court rejecting the decree to the extent of 1/3rd share of the suit schedule property is liable to be set aside.

63.Further the argument was put forth by the learned counsel for the 5th defendant/Bank that as a Karta for the benefit of the family, L.Srikantiah is entitled to mortgage the entire suit schedule property for the benefit of the family. Accordingly, he mortgaged the property.

64.In the present case, the security said to have been provided by L.Srikantiah for securing the IMFL loan obtained by one Mahadevan, cannot be construed as that L.Srikantiah provided security for the benefit of the family. The alleged security provided by L.Srikantiah will no way going to benefit his family members. He said to have provided security for a third party loan, thus, under no stretch of imagination the said security can be construed as provided by L.Srikantiah as karta for his benefit of the family members.

65.In view of the above, since there was no valid mortgage, the decree was passed against the dead person and all other recovery proceedings have been initiated only against the dead person, the question of provision of 1/3rd share in favour of Bank does not arise. Thus restricting the suit claim to the extent of 2/3rd share after holding that the auction dated 03.12.2008 and the possession certificate Ex.B6 are null and void, is not correct. Therefore, this Court able to trace the perversity in the finding of the First Appellate Court in this regard. Thus, the finding of the First Appellate Court that the auction conducted by the 6th defendant is valid for 1/3rd share is liable to be set aside. Accordingly, the same is set aside. In the result, this Court hold that the plaintiff is entitled for the suit claim as prayed for and accordingly the above said substantial question of law is answered in favour of the plaintiff.

Substantial Question of law (i) and (ii) in Cross Appeal No.54 of 2020 framed on 18.12.2020

i)Whether the Appellate Court was right in granting a decree for partition in favour of the appellant having held that the sale itself is bad?

ii)When the plaintiff had purchased the property on 17.03.2003 and the alleged auction sale took place latter in point of time and that too, against the dead person

(L.Srikantiah died on 13.04.2002) is the Lower Appellate Court right in recognising the auction sale alleged to have been held on 31.12.2008 under Exhibit B4?

66.The First Appellate Court has granted decree in favour of the plaintiff to the extent of 2/3rd share. As this Court already found that there was no creation of mortgage by L.Srikantiah, the decreeing the suit to the extent of 2/3rd is not proper. Granting the decree for partition in favour of appellant to the extent of 1/3rd is also not proper particularly when the First Appellate Court held that the sale itself is bad in law due to the reason that the decree as well as the entire sale proceedings of the suit schedule property was initiated against the dead person. When the initiation of O.A proceeding before the DRT, obtaining the decree and the entire recovery proceeding consequent to the decree are all against the dead person, the decree as well as the entire sale of suit schedule property is void ab initio. Thus, decreeing the suit to the extent of 2/3rd of the suit property by partition is not proper and the same is liable to be set aside. Therefore, the plaintiff is entitled for decree for the entire suit schedule property, as prayed for.

67.The D.W.3 in his cross examination had stated that L.Srikantiah was passed away on 13.04.2003 and the suit was filed in the Month of June 2003. Further, he admitted the fact that the suit was filed against the dead person. He also admitted the fact that the sale was conducted against the dead person and the sale against the dead person is null and void. In the present case, on perusal of documents would show that the entire auction proceedings were initiated from time to time against the dead person. The D.R.C.No.220 of 2007 was issued against the dead person and legal heirs of the dead person have not been served any notice. Thus, the finding of the Lower Court to recognise the auction sale said to have held on 31.12.2008 under Ex.B4 after coming to the conclusion that the decree and the sale was made against the dead person, is not proper and the said finding is set aside. Accordingly, both the substantial question of law are answered in favour of the plaintiff.

68.In view of the above finding, the Cross Appeal No.54 of 2020 is allowed, and S.A.Nos.1022 of 2019 is dismissed. In view of the finding in S.A.No.1022 of 2019 and Cross Appeal No.54 of 2020, no further adjudication is required in S.A.Nos.1055 of 2019 and 160 & 161 of 2021.

69.While passing the above judgment, in view of the above finding that the there was no mortgage created by L.Srikantiah by virtue of deposit of title deed in favour of the Bank and in view of the finding that the Bank sold the suit schedule property without proper title, this Court feels that it would be appropriate to compensate the innocent purchaser and direct the 5th defendant/Bank to refund a sum of Rs.8,50,000/-, the amount paid by the 4th defendant in the auction sale. Hence, 5th defendant/Bank is directed to refund a sum of Rs.8,50,000/-, the amount paid by the 4th defendant to purchase the property through auction sale from the 5th defendant Bank, with 9% interest from the date of payment i.e on 23.12.2008 till the date of refund to the 4th defendant. No costs.

List of Exhibit marked on the side of the 5th defendant, Bank:

Ex.B15 - Order passed by the Debts Recovery Tribunal, Coimbatore in O.A.No.47 of 2003, dated 05.06.2008.

Sd/-
Assistant Registrar (CS-VIII)

// True Copy //

Sub Assistant Registrar

rst

To:

1.The District Judge,
Udhagamandalam.

2.The Subordinate Judge,
Udhagamandalam.

3.The Recovery Officer,
Debt Recovery Tribunal,
Coimbatore.

Copy To

The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate SR.No.21734
+1cc to Mr.G.K.Muthukumar, Advocate SR.No.21232

S.A.Nos.1022, 1045 of 2019, 160, 161 of 2021
and Cross Appeal No.54 of 2020
and C.M.P.Nos.21997 & 22772 of 2019

RGN(CO)
RVM(12/11/2021)