

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 30TH DAY OF JULY 2021

THE HON'BLE MR. JUSTICE R.SUBRAMANIAN

Tr C.S. No.108 of 2017

Tr C.S.No.108 of 2017:-

1. EIH Limited, an existing company
incorporated within the meaning of the
Companies Act, 1956 and having its
registered office at No.4, Mangoe Lane,
Calcutta 700 001.

2. Oberoi Hotels Private Limited, an
existing company within the meaning of
the Companies Act, 1956 and having its
registered office at No.4, Mangoe Lane,
Calcutta 700 001.

...Plaintiffs

Vs

1. Balaji Hotels and Enterprises Limited,
a Company incorporated under the
Companies Act;1956 and havings its
registered office at 365 (old No.267)
Anna Salai, Teynampet, Chennai 600 018.

2. Balaji Industrial Corporation Limited, a
Company incorporated under the
Companies Act, 1956 and having its
Corporate Office and carrying on business at
No.9, Bazullah Road, T.Nagar, Chennai 600 017.

3. Asset Reconstruction Company (India) Limited, a Company incorporated under the Companies Act, 1956 and having its office and carrying on business at 17th Floor, Express Towers, Nariman Point, Mumbai 400 021.
4. ICICI Bank Limited having its office at ICICI Bank Towers, Bandra-Kurla Complex, Mumbai 400 051.
5. IFCI Limited having its office at IFCI Tower, 61, Nehru Place, New Delhi 110 019.
6. Tourism Finance Corporation of India Limited, a Company incorporated under the Companies Act, 1956 and carrying on business at IFCI Tower, 15th Floor, 61 Nehru Place, New Delhi 110 019.
7. Anand Rathi Securities Private Limited, 54-55 Mittal Court, 'B', Nariman Point, Mumbai 400 021.
8. Robust Hotels (P) Limited having its Registered Office at 365 Anna Salai, Teynampet, Chennai, Tamil Nadu.
9. Avali Srinivsan residing at 5, Bethel, Chedda Nagar, Mumbai 400 089.
10. Arun Kumar Saraf residing at Grand Hyatt Residencies, Off. Western Express Highway, Santacruz (E), Mumbai 400 055, Maharashtra.
11. Amit Saraf residing at 303 A, Satellite Gardens, Film City Road, Goregaon (East), Mumbai 400 063, Maharashtra.
12. Hyatt Hotels Corporation, a Company incorporated under the appropriate laws of the USA and

having its office at 71S Wacker Dr.Chicago,
IL 60606-4637, United States.

(Defendant-8 to 12 impleaded as per order
dated 23.03.2010 in Application No.6722 of 2009)

...Defendants

Civil Suit praying that this Hon'ble Court be pleased to pass a judgment
and decree for:

a) Declaration that the Technical Services Agreement dated 26th October, 1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October, 1988 and the Agreements dated 12th January, 2000, 10th June, 2000 and 4th February 2002 are valid, legal and subsisting and are binding and enforceable on the Defendant Nos. 3 to 12 and/or its assigns.

b) Permanent injunction restraining the Defendant Nos.3 to 7 whether by itself, its servants, agents and/or assigns or otherwise howsoever from selling, encumbering and/or disposing of in any manner howsoever, the Schedule property of the Defendant No.1 situated at Mount Road, Chennai, in favour of any persons without disclosing and/or recognizing the rights of the Plaintiff to operate and manage the hotel as provided for under the Technical Services Agreement dated 26th October, 1988 and the Project consultancy Agreement and Royalty Agreement both dated 26th October, 1988 and the Agreements dated 12th January 2000, 10th June 2000 and 4th February 2002.

(bb). Permanent Injunction restraining the Defendant Nos.8 to 12 whether by itself its servants, agents and/or assigns or otherwise howsoever from taking any steps or acting in a manner inimical to and/or in derogation of the rights of the plaintiffs as embodied in the Technical Services Agreement dated 26th October, 1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October 1988 (Amended as per order dated 13.04.2010 in Application No.6723 of 2009).

This Transfer Civil Suit connected with the C.S.No.164 of 2011 having been heard on 13.07.2021 in the presence of Mr.Siddhartha Mitra, Senior Counsel for M/s.Iyer and Thomas, Advocates for the Plaintiff's herein and Mr.Rahul Balaji, Advocate for the defendants 1 & 2 and Mr.A.R.L.Sundaresan, Senior Counsel for M/s.K.Harishankar Advocates for the defendants 8,9,10 & 11 and Mr.P.L.Narayanan, Advocate for the defendants 5 & 6 and Mrs.Shanthi Meenakshi, Advocate for the defendants 3 & 4, and Mr.Krishna Ravindran, Advocate for the 7th defendant and Mr.G.R.M.Palaniappan, Advocate for the 12th defendant herein and upon reading the plaint filed herein in Tr.C.S.No.108 of 2017 and the other exhibits therein referred to and upon perusing the evidence adduced therein and having stood over for consideration till this date and coming on this day before this court for orders in the presence of said advocates for the parties hereto and this court having observed that the plaintiff's rights under the agreements dated 26.10.1988 got extinguished upon the

plaintiff entering into the agreement dated 04.02.2002, therefore, the plaintiffs are not entitled to the reliefs of declaration as well as the injunctive relief sought for in the suit, and the bar enacted under section 34 of SARFAESI Act, will not apply to the suit, and the plaintiff's have also not taken any steps to implead the entities which are mentioned in the written statement of the twelfth defendant and the suit is not barred by limitation, and the sum of Rs.15.12 Crores deposited by the 8th defendant pursuant to the directions of the Hon'ble Supreme Court in Civil Nos.11886 to 11889 of 2016, along with accrued interest shall be paid over to the 8th defendant, **it is ordered as follows:-**

That the Tr.C.S.No.108 of 2017, be and is hereby dismissed.

2. That the Manager, Reserve Bank of India do with the privity of the Registrar General of this court encash the security Fixed deposit for a sum of Rs.15,12,00,000/- crores (Rupees Fifteen crores and Twelve Lakhs Only) in Indian Bank, Madras High court Branch, Chennai – 600 104 standing to the credit of Tr.C.S.No.108 of 2017 and C.S.No.164 of 2011 on the file of the High Court, Madras and pay to Robust Hotels (P) Limited, the 8th defendant in Tr.C.S.No.108 of 2017, the realisation thereof, Less Government Commission and Audit Fees on accrued interest and issue a cheque therefor in their favour.

3. That the plaintiff's herein, do pay to the defendants 8 to 11 herein, the costs of this suit as and when taxed by the taxing officer of this court, and noted in the margin thereof.

WITNESS THE HON'BLE MR. JUSTICE SANJIB BANERJEE, CHIEF JUSTICE, HIGH COURT AT MADRAS AFORESAID, THIS THE 30TH DAY OF JULY 2021.

Sd./-

ASSISTANT REGISTRAR (Comm.Cases)

//Certified to be true copy//

Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments.

VSP
06/12/2021

Tr C.S. No.108 of 2017

ORDER

DATED :30/07/2021

THE HON'BLE MR.JUSTICE
R.SUBRAMANIAN

FOR APPROVAL:23/02/2022

APPROVED ON:23/02/2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 13.07.2021	Delivered on 30.07.2021
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THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

**C.S.Nos.164 of 2011
and Transfer C.S.No.108 of 2017**

in Tr CS No.108 of 2017

1. EIH Limited, an existing company incorporated within the meaning of the Companies Act, 1956 and having its registered office at No.4, Mangoe Lane, Calcutta 700 001.

2. Oberoi Hotels Private Limited, an existing company within the meaning of the Companies Act, 1956 and having its registered office at No.4, Mangoe Lane, Calcutta 700 001.

... Plaintiffs

Vs

1. Balaji Hotels and Enterprises Limited, a Company incorporated under the Companies Act;1956 and havings its registered office at 365 (old No.267) Anna Salai, Teynampet, Chennai 600 018.
2. Balaji Industrial Corporation Limite, a Company incorporated under the Companies Act, 1956 and having its Corporate Office and carrying on business at No.9, Bazullah Road, T.Nagar, Chennai 600 017.

3. Asset Reconstruction Company (India) Limited, a Company incorporated under the Companies Act, 1956 and having its office and carrying on business at 17th Floor, Express Towers, Nariman Point, Mumbai 400 021.
4. ICICI Bank Limited having its office at ICICI Bank Towers, Bandra-Kurla Complex, Mumbai 400 051.
5. IFCI Limited having its office at IFCI Tower, 61, Nehru Place, New Delhi 110 119.
6. Tourism Finance Corporation of India Limited, a Company incorporated under the Companies Act, 1956 and carrying on business at IFCI Tower, 15th Floor, 61 Nehru Place, New Delhi 110 019.
7. Anand Rathi Securities Private Limited, 54-55 Mittal Court, 'B', Nariman Point, Mumbai 400 021.
8. Robust Hotels (P) Limited having its Registered Office at 365 Anna Salai, Teynampet, Chennai, Tamil Nadu.
9. Avali Srinivsan residing at 5, Bethel, Chedda Nagar, Mumbai 400 089.
10. Arun Kumar Saraf residin at Grand Hyatt Residendies, Off. Western Express Highway, Santacruz (E), Mumbai 400 055, Maharashtra.
11. Amit Saraf residing at 303 A, Satellite Gardens, Film City Road, Goregaon (East), Mumbai 400 063, Maharashtra.

12. Hyatt Hotels Corporation, a Company incorporated under the appropriate laws of the USA and having its office at 71S Wacker Dr.Chicago, IL 60606-4637, United States.

(D-8 to 12 impleaded as per order dated 23.03.2010 in Application No.6722 of 2009)

... Defendants

Prayer (in TR CS No.108/2017): Amended Plaintiff filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

(a) declaration that the Technical Services Agreement dated 26.10.1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October, 1988 and the Agreements dated 12th January, 2000, 10th June 2000 and 4th February, 2002 are valid, legal and subsisting and are binding and enforceable on the defendant Nos.3 to 7 and the added defendants Nos.8 to 12 and/or its assigns (Amended as per order dated 12.04.2010 in Application No.6723 of 2010)

(b) Permanent injunction restraining the defendant Nos.3 to 7 whether by itself, its servants, agents and/or assigns or otherwise howsoever from selling, encumbering and/or disposing of in any manner howsoever, the Schedule property of the defendant No.1 situated at Mount Road, Chennai, in favour of any persons without disclosing and/or recognizing the rights of the plaintiff to operate and manage the hotel as provided for under the Technical Services Agreement

dated 26th October, 1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October, 1988 and the Agreements dated 12th January, 2000, 10th June, 2000 and 4th February, 2002.

(bb). Permanent Injunction restraining the Defendant Nos.8 to12 whether by itself its servants, agents and/or assigns or otherwise howsoever from taking any steps or acting in a manner inimical to and/or in derogation of the rights of the plaintiffs as embodied in the Technical Services Agreement dated 26th October, 1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October 1988 (Amended as per order dated 12.04.2010 in Application No.6723 of 2010)

(c) Costs.

For Plaintiffs : Mr.Siddhartha Mitra, Senior Counsel
for M/s. Iyer and Thomas,

For Defendants : Mr.Rahul Balaji, for 1 & 2
Mr.AR.L.Sundaresan, Senior Counsel
for M/s.K.Harishankar, for D8,9,10 & 11
Mr.P.L.Narayanan, for D5 & D6
Mrs.Shanthi Meenakshi, for D3 & D4
Mr.Krishna Ravindran, for D7
Mr.G.R.M.Palaniappan, for D12

(in CS No.164 of 2011)

1. EIH Limited, an existing company incorporated within the meaning of the Companies Act, 1956 and having its registered office at No.4, Mangoe Lane, Kolkata 700 001, Rep by its Authorised Signatory Mr.Gautam Ganguly

2. Oberoi Hotels Private Limited, an existing company within the meaning of the Companies Act, 1956 and having its registered office at No.4, Mangoe Lane, Kolkata 700 001, Rep by its Authorised Signatory Mr.Gautam Ganguly

... Plaintiffs

Vs

1. Balaji Hotels and Enterprises Limited, a Company incorporated under the Companies Act;1956 and having its registered office at 365 (old No.267) Anna Salai, Teynampet, Chennai 600 018. and Corporate Office at 9, Bazullah Road, T.Nagar, Chennai 600 017.

2. Balaji Industrial Corporation Limite, a Company incorporated under the Companies Act, 1956 and having its Corporate Office and carrying on business at No.9, Bazullah Road, T.Nagar, Chennai 600 017.

3. IFCI Limited, a Company incorporated under the Companies Act, 1956 and having its office at Continent Towers, 142, M.G.Road, Chennai 600 034.

4. Tourism Finance Corporation of India Limited, a Company incorporated and existing under the Companies Act, 1956 and having its registered office at Tower 1, 4th Floor, NBCC Plaza, Pushp Vihar Sector 5, Saket, New Delhi 110 017.

5. Robust Hotels Pvt. Ltd.,
 a Company incorporated under the Companies Act, 1956 and
 having its Registered Office at 365 Anna Salai,
 Teynampet, Chennai, Tamil Nadu. ... Defendants

Prayer (in CS No.164/2011): Complaint filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 of the Code of Civil Procedure, praying for the following judgment and decree:-

(a) Declaration that the said Deed of Transfer dated July 5, 2007 Doc. No. 752/2007 entered into between the defendants nos.3 and 4 on one part and the defendant no.5 on the other and the certificate of sale of immovable property dated July 5, 2007 are illegal, null and void and of no effect and not binding.

(b) Perpetual injunction restraining the defendants whether by themselves, their servants, agents or otherwise howsoever from purporting to act or to give effect to or taking any steps in furtherance of the purported deed of transfer dated July 5, 2007 and the certificate of sale of movable and immovable property also dated July 5, 2007 or from enforcing the same in any manner whatsoever.

(c) Costs.

For Plaintiffs : Mr.Siddhartha Mitra, Senior Counsel
 for M/s. Iyer and Thomas,

For Defendants : Mr.Rahul Balaji, for 1 & 2
 Mr.AR.L.Sundaresan, Senior Counsel
 for M/s.K.Harishankar, for D5
 Mr.P.L.Narayanan, for D3 & D4

J U D G M E N T

These two suits were jointly tried as per the orders of this Court. The suit in Transfer CS No.108 of 2017 was withdrawn to this Court from the City Civil Court. Transferred CS No.108 of 2017 was originally filed before this Court as C.S.No.257 of 2005, upon the enhancement of the pecuniary jurisdiction of the City Civil Court, the said suit stood transferred to the City Civil Court and was numbered as OS No.12159 of 2010. Thereafter, since the suit was connected with CS No.164 of 2011 which was pending on the file of this Court, the suit was transferred to this Court to be tried along with CS No.164 of 2011. Hence both the suits are disposed of by this common judgment.

2. The brief averments in the plaint in Transfer CS No.108 of 2017 (CS No.257 of 2005) are as follows:

2.1. The plaintiffs are limited companies carrying on business in hospitality industry. The first plaintiff owns a chain of luxury hotels of international standards and the second plaintiff owns the brand '*oberoi*' which has acquired a tremendous reputation and goodwill in hospitality industry both in India and abroad. The first defendant viz. Balaji Hotels and Enterprises Limited, which is the sister concern of the second defendant Balaji Industrial Corporation Limited had approached the plaintiffs for provision of Technical Services, Project Consultancy for the proposed Star Hotel which

they intended putting up in their property situate on Mount Road, which is one of the arterial roads having high commercial potential in the City of Chennai.

2.2. After negotiations, the plaintiff entered into a technical services agreement on 26.10.1988. As per the said Technical Services agreement, the first plaintiff had agreed to provide technical knowledge, skill and professional services required for operation of the Hotel. On the same day, a Project Consultancy Agreement was also entered into between the plaintiff and the first defendant under which the plaintiff agreed to provide consultancy for creating the infrastructure viz. buildings etc., for the proposed Star Hotel. The second plaintiff which is the owner of the brand '*Oberoi*' entered into a Royalty Agreement with the first defendant for use of the name Oberoi for the Hotel to be constructed by the first defendant.

2.3 According to the plaintiffs, the first defendant agreed to complete the construction of the Hotel by 31.03.1992 and the first plaintiff had agreed to provide complete technical support for running the Hotel. It was also agreed between the parties that the first defendant will disclose the existence of the agreement and the vested rights of the plaintiffs in the Hotel to any lender, leasing company or other financial institutions which are involved in the project. It was also agreed that the owner viz., the first defendant shall inform the plaintiff about any loans that are taken by it for the construction of the Hotel. Though the project was commenced in all earnestness, the

first defendant could not complete the project by 31.03.1992 as agreed to. The first defendant was unable to complete the Hotel and commence business despite several extensions being granted.

2.4. On an appraisal of the project by the Financial Institutions the estimated project cost was pegged at Rs.120 Crores. The same was to be financed through equity share capital of Rs.45 crores and term loan of Rs.75 Crores consisting of Rs.20 crores to be advanced by the Tourism Finance Corporation of India/ sixth defendant and Rs.55 crores by the Industrial Finance Corporation of India/ fifth defendant. In September 1996 there was a reappraisal of the cost of the project and the financial institutions which were involved in the project estimated the total cost at Rs.192 crores. The fourth defendant ICICI Bank sanctioned a debenture assistance of Rs.49.5 crores for funding the commercial complex. Despite such increased inflow, the first defendant could not complete the construction of the Hotel as it could not bring in its own capital. It is claimed that the first defendant was required to disclose the existence of the three agreements, viz. the Technical Services Agreement, the Project Consultancy Agreement and the Royalty Agreement with the plaintiffs 1 and 2 to the Financial Institutions and get an acknowledgment from them as to the binding nature of the said agreements on them also. The plaintiff would further aver that the Financial Institutions which were involved, were aware of the existence of the aforesaid agreements.

2.5. The plaintiff would further claim that it paid a sum of Rs.9 crores in three instalments during the year 1999 by way of financial accommodation to the first defendant for the Hotel project. This financial assistance rendered for the purpose of construction of the Hotel was recorded by way of an agreement dated 12.01.2000. There was a supplemental agreement dated 10.06.2000 which provided for repayment of the amounts advanced together with interest. The period that was fixed at six months under the agreement dated 12.01.2000 was extended to 24 months from 12.01.2000, the date of the first agreement. These two agreements were entered into within the jurisdiction of this Court at Chennai.

2.6. The plaintiff made a further advance of Rs.5 crores and Rs.1.12 crores on 31.03.2001 and 02.02.2002 respectively. Thus the plaintiff had advanced a sum of Rs.15.12 crores to the first defendant in order to enable the first defendant to complete the Hotel project. Since the first defendant was unable to complete the Hotel project in time and the Financial Institutions were pressing for repayment of the loan, the plaintiffs and the first defendant reached an agreement to the effect that the plaintiffs would have no objection for sale of the Hotel property, subject to payment of the aforesaid sum of Rs.15.12 crores with interest on or before 31.12.2002. This agreement was entered into on 04.02.2002.

2.7. According to the plaintiffs, the effect of the agreement dated 04.02.2002 is that, on the defendants 1 and 2 making the payment of Rs.15.12 crores with agreed

interest on or before 31.12.2002 the Technical Services Agreement, the Project Consultancy Agreement and the Royalty Agreement would stand cancelled and the first defendant or the Financial Institutions will have absolute power to alienate the property. The consequence of failure to pay a sum of Rs.15.12 crores with the agreed interest on or before 31.12.2002, according to the plaintiffs, is that the above three agreements would stand revived and the plaintiffs would be entitled to enforce their rights under the said agreements. Therefore, according to the plaintiffs, the failure on the part of the first defendant to pay the sum of Rs.15.12 crores advanced by the first plaintiff on or before 31.12.2002 would enable the plaintiffs to enforce the three agreements entered into on 26.10.1988. It is also claimed that the defendant No.2 executed an irrevocable and continuing guarantee in favour of the plaintiff No.1, guaranteeing payment of a sum of Rs.15.12 crores with interest. The second defendant undertook to pay the said sum in the event of the failure on the part of the first defendant to pay the same on or before 31.12.2002.

2.8. The plaintiff would add that the sixth defendant viz., the Tourism Finance Corporation of India Limited, published an advertisement in Economic Times, on 24.07.2002 inviting offers for takeover/joint venture and/or sale of the Hotel that was being constructed by the first defendant consisting of 405 rooms along with food and beverage outlets and other facilities on a plot measuring 16680.70 sq. meters with a built up area of 55058 sq. meters on Mount Road on 'as is where is basis'.

2.9. Upon learning about the said advertisement, the plaintiff addressed the letter to the Tourism Finance Corporation of India Limited on 18.09.2002 informing it of the existence of the Technical Services agreement and the liability of the first defendant to the tune of Rs.15.12 crores with interest. In the said letter, it was also pointed out, that the agreements stood revived and the plaintiffs would have the right to enforce them, in the event of the failure on the part of the first defendant to discharge its obligation to pay a sum of Rs.15.12 crores with interest by 31.12.2002. The plaintiff would further plead that the first defendant has acknowledged the liability to pay 15.12 crores along with interest and sought for extension of time up to 31.03.2004 by its letter dated 11.01.2003. The second defendant also extended the guarantee by its letter dated 12.01.2003. An acknowledgment of liability was also issued by the first defendant on 08.06.2004, with regard to its liability to the tune of Rs.15.12 crores with interest at 12% per annum to the first plaintiff.

2.10. The plaintiff would contend that the third defendant viz. the Asset Reconstruction Company (India) Limited, had acquired the financial assets of the first defendant together with the underlying security interest from ICICI Bank, the defendant No.4. The first plaintiff also wrote to the third defendant viz., the Asset Reconstruction Company (India) Limited, informing it about the subsisting Technical Services agreement dated 26.10.1988 and the rights of the plaintiffs under the said agreement on 15.12.2004. It is the claim of the plaintiffs that till such time the sum of Rs.15.12 crores

advanced by it, is repaid by the first defendant along with interest as per the agreement dated 04.02.2002, the plaintiff will have an exclusive right to operate the Hotel.

2.11. A request was also made to the third defendant to take notice of the currency of the aforesaid agreements before it proceeds with any reconstruction proposal made to it. In reply to the said letter, the third defendant had informed the plaintiff that it had acquired the financial assets of the first defendant with underlying security interest from the fourth defendant viz., ICICI Bank and in terms of the provisions of Section 5 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the agreements that were entered into by the debtor in respect of such financial assets will not be valid, once the creditor takes possession of the property under Section 13 of the said Act.

2.12. Again on 31.01.2005, the plaintiff No.1 through its Solicitors and Advocates wrote to the third and seventh defendants that the Technical Services Agreement dated 26.10.1988, the Project Consultancy Agreement and the Royalty Agreement are subsisting and they would be binding on all the assignees of the Hotel property. The defendants 3 and 7 were also cautioned to inform the intending purchasers about the existence of the aforesaid agreements, since those agreements would be binding on the purchasers also. In the response to the said letter, the third defendant reiterated its contentions in its earlier reply dated 28.12.2004. The plaintiff would therefore claim that it is entitled to the legal character and right to operate the

Hotel under the Technical Services Agreement and the Project Consultancy Agreement dated 26.10.1988 and the second plaintiff would be entitled to have its name for the Hotel pursuant to the Royalty agreement dated 26.10.1988.

2.13. It was also claimed that the defendants 3 to 7 are threatening to transfer, sell and/or dispose of the Mount Road Hotel Unit belonging to the first defendant in order to realise their security. While the third defendant has obtained an assignment of the right from the fourth defendant, the defendant Nos.5 and 6 had in fact financed the Hotel business. The seventh defendant is only a consultant. Therefore, the plaintiff sought for the relief of declaration that the above said three agreements dated 26.10.1988 and the Finance Agreements dated 12.01.2000, 10.06.2000 and 04.02.2002 are valid, subsisting, binding and enforceable on defendants 3 to 7 along with a relief of permanent injunction restraining the defendants 3 to 7 from transferring or encumbering the property of the defendant No.1 without disclosing and/or recognising the rights of the plaintiff to operate and manage the Hotel as provided for under the said three agreements dated 26.10.1988 and the subsequent Finance Agreements dated 12.01.2000, 10.06.2000 and 04.02.2002.

2.14. An Interlocutory Application in OA. No.300 of 2005 was filed along with the suit, the prayer in the said application reads as follows:

“To pass an order of interim injunction restraining the respondent Nos.3 to 7 whether by itself, its servants, agents and/or assigns or

otherwise howsoever from dealing with, disposing of selling and/or encumbering in any manner howsoever the hotel unit of the respondent No.1 situate at Mount Road, Chennai in favour of any person without disclosing the rights of the Applicants to operate and manage the hotel in terms of the Technical Services, Project Consultancy & Royalty Agreements dated 26th October, 1988 and the agreements dated 12th January 2000, 10th June 2000 and 4th February 2002 be passed, pending disposal of the suit.”

This Court on 18.03.2005 passed the following order:

“That 1. Assets Reconstruction Company (India) Limited, 2. ICICI Bank Limited, 3. IFCI Limited, 4. Tourism Finance Corporation of India Limited and 5. Anand Rathi Securities Private Limited, the respondents 3 to 7 herein, whether by itself, its servants, agents and/or assigns or otherwise howsoever be and are hereby restrained by an order of interim injunction until further orders of this court from dealing with disposing of, selling and/or encumbering in any manner howsoever the hotel unit of the respondent No.1 situated at Mount Road, Chennai in favour of any person without disclosing the rights of the Applicants to operate and manage the hotel in terms of the Technical Services, Project Consultancy & Royalty Agreements dated 26th October, 1988 and

the Agreements dated 12th January 2000, 10th June, 2000 and 4th February 2002.

2. That the notice of this original application be served on the respondents 3 to 7 herein and returnable on or before 15.04.2005.

3. That the further hearing of this original application No.300 of 2005 do stand adjourned to 15.04.2005.”

2.15. Since the property was sold to the eighth defendant of which the defendants 9 to 11 are the Directors pending the suit on 05.07.2007, the plaintiff took steps to implead the purchasers viz. the 8th defendant and its Directors/defendants 9 to 11 and also got the plaint amended incorporating certain averments to the effect that the Directors of the eighth defendant were aware of the existing agreements between the plaintiff and the first defendant. It was also contended that the eighth defendant had entered into an agreement with the 12th defendant/Hyatt Hotel Corporation for running the Hotel in their name. According to the plaintiff, in view of the subsisting agreements between the plaintiff and the first defendant neither the eighth defendant nor the twelfth defendant can run the Hotel at Mount Road in their name. Therefore, a further relief was sought for in the form of a permanent injunction restraining the defendants 8 to 12 or any person claiming under them from taking any steps or acting in a manner inimical to and/or in derogation of the rights of the plaintiff as embodied in the Technical Services Agreement dated 26.10.1988, Project Consultancy Agreement and Royalty Agreement

dated 26.10.1988. These amendments were allowed on 12.04.2010.

2.16. The plaintiff would therefore seek the aforesaid declaratory and injunctive reliefs on the premise that the three agreements dated 26.10.1988, viz., the Technical Services Agreement, the Project Consultancy Agreement and the Royalty Agreement entered into between the plaintiffs 1 and 2 and the first defendant continued to be valid and would be binding on the purchaser viz., the eighth defendant. Though, the defendant Nos. 3 and 4 are impleaded in the suit since the security interest of the fourth defendant only relates to the commercial complex part of the Hotel building, the purchasers of the Commercial Complex were not impleaded in the suit and no prayer was sought for against them.

3. The defendants 1 and 2 did not file a written statement. The third defendant filed a written statement, contending that the third defendant has only purchased the security interest of ICICI Bank, which was covered by a mortgage of the Commercial Complex property. It was further contended by the third defendant that there was a clear demarcation between the Hotel property and the commercial complex property. While the Hotel Unit was mortgaged to defendants 5 and 6 viz., the Industrial Finance Corporation of India and the Tourism Finance Corporation of India, the commercial complex portion alone was mortgaged to ICICI Bank.

3.1. It was also pointed out that the sales having taken place under the

SARFAESI Act, the Civil Courts will not have jurisdiction to entertain the suit. Reference was also made to a letter dated 21.02.2005 addressed to the third defendant by the plaintiffs to the effect that the plaintiffs have no interest, if the third defendant's venture is restricted to the financial asset viz., the commercial complex at Mount Road, belonging to the first defendant. The sum and substance of the pleading of the third defendant is that the agreements entered into between the first defendant and the plaintiffs do not pertain to the commercial complex and therefore the plaintiffs would not acquire any right over the Commercial Complex which was the part of the security interest created in favour of ICICI Bank which was assigned to the third defendant.

3.2. The fourth defendant filed a Memo informing the Court that it had assigned the rights to the third defendant in terms of the SARFAESI Act and in view of the said assignment, it is no longer a necessary party to the suit. The defendants 5 and 6, who are the other Financial Creditors of the project did not file a written statement.

3.3. The eighth defendant viz., the purchaser of the Hotel Unit from the defendants 5 and 6 on 05.07.2007 filed a separate written statement contending that the suit itself is not maintainable. It would also claim that it was not aware of the existence of the agreements between the plaintiffs and the first defendant. It was also the further contention of the defendant No.8 that the agreement dated 04.02.2002 had in fact put an end to the agreements dated 26.10.1988 viz., the Technical Services Agreement, the Project Consultancy Agreement and the Royalty Agreement. According to the eighth

defendant, on the execution of the Agreement dated 04.02.2002, the plaintiff had lost its rights to enforce the other three agreements, inasmuch as, the plaintiffs have agreed to give up their rights under the said Agreements on receipt of Rs.15.12 crores on or before 31.12.2002.

3.4. Pointing out to the fact that the agreement dated 04.02.2002, in fact contains the consequences of the breach also viz. the right of the plaintiff to proceed against the guarantor the second defendant in the event of failure by the first defendant to honour the Agreement dated 14.02.2002, the eighth defendant would contend that the plaintiffs cannot seek the declaratory relief and the negative injunction reliefs that are sought for by them against the eighth defendant or its Directors or the twelfth defendant. It is also the further contention of the eighth defendant that its sale being one under the SARFAESI Act, the same is protected and it is free from all encumbrances.

3.5. Reference is also made to Section 34 of the Specific Relief Act, by the eighth defendant to contend that the declaratory relief sought for by the plaintiffs cannot be granted, since it would be a declaration without any further relief where the plaintiff is in a position to seek a further relief. The eighth defendant would further add that the reliefs of injunction being negative in nature cannot be granted unless the Court finds that grant of such negative injunction is absolutely necessary. The eighth defendant would also point out the conduct of the plaintiffs as well as defendants 1 and 2 to contend that there is an apparent collusion between the plaintiffs and the defendants 1

and 2. Attack is made particularly on the conduct of the plaintiffs in not attempting to enforce the corporate guarantee given by the second defendant and attempting to collect its money.

3.6. Relying upon the recitals in the Agreement dated 04.02.2002, the eighth defendant would contend that the plaintiffs having categorically stated that they have no objection for sale or encumbrance of the property cannot now claim that no objection is conditional upon payment. The eighth defendant would further plead that the agreement dated 04.02.2002 read as a whole would only signify that the plaintiffs' intention was to walk out of the three agreements and accept the repayment of the sum of R.15.12 crores with interest as provided therein and not to insist on continuance of the agreements. The eighth defendant would further add that because the plaintiff cannot seek to enforce the agreement between them and the defendants 1 and 2, as against these defendants because it feels that the defendants 1 and 2 are not solvent enough to answer the money claim for Rs.15.12 crores with 12% interest as agreed to by them under the agreement dated 04.02.2002.

3.7. The ninth defendant filed a separate written statement of course adopting the written statement of the eighth defendant. A memo was also filed by defendants 10 and 11 adopting the written statement of the eighth defendant. The twelfth defendant filed a separate written statement, contending that it had not entered into any contract with

defendant No.8 concerning the operation and maintenance of the Hotel at 365, Anna Salai. The eighth defendant has entered into following agreements with the following companies:

- i. Strategic Oversight Agreement with Hyatt International – South West Asia, Limited (Dubai);*
- ii. Hotel Operations Service Agreement with Hyatt India Consultancy Private Limited (India); and*
- iii. Trademarks License Agreement with Hyatt International Corporation (U.S.A)*

3.8. The twelfth defendant has categorically stated that it has not entered into any agreement with the eighth defendant as alleged in paragraph 34 (A) of the plaint.

4. On the above pleadings, this Court had framed the following issues in the suit:

- 1. Whether the suit is maintainable;*
- 2. Whether there is cause of action to the suit;*
- 3. Whether the suit is barred under the provision of SARFAESI Act;*
- 4. Whether this Court has got jurisdiction to try the case;*
- 5. Whether the 12th defendant is unnecessary party to the suit;*

6. Whether the suit is barred by limitation;

7. Whether the plaintiffs are entitled to relief of declaration as prayed for

8. Whether the plaintiffs are entitled to the reliefs sought for in prayer (b) and (bb)

9. To what other reliefs the parties are entitled to?

5. At trial, one Singanellore Natesan Sridhar was examined as P.W.1 and Exhibits P1 to P14 were marked on the side of the plaintiffs. One T.N.Thanikachalam was examined as D.W.1 on behalf of the eighth defendant and Exhibits D1 to D13 were marked. The other defendants did not let in any evidence.

6. The brief averments in the plaint in CS No.164 of 2011 are as follows:

6.1. The plaintiff would reiterate the averments in the plaint in Tr.CS No.108 of 2017 and add that the sale by the Financial creditors viz. the Industrial Finance Corporation of India and the Tourism Finance Corporation of India, are in violation of the orders of this Court made in OA No.300 of 2005 on 18.03.2005. Though there were Appeals against the orders of injunction granted and ultimately the proceedings ended before the Hon'ble Supreme Court on 07.01.2011, wherein the injunction orders were confirmed with slight modifications. The plaintiff would contend that the transfer made by the defendants 3 and 4 in favour of the fifth defendant on 05.07.2007 without

disclosing the subsisting agreements and the rights of the plaintiff under those agreements is invalid. The plaintiff would further claim that the defendants 3 and 4, viz., the Financial Creditors were under an obligation to disclose the existence of the agreements on the date when the sale was effected and therefore any sale in breach of the obligation is invalid. On the strength of the above pleadings the plaintiff would seek a declaration that the Transfer Deed dated 05.07.2007 between defendants 3 and 4 and fifth defendant is invalid and for a perpetual injunction restraining the defendants from giving effect to or taking any steps in furtherance to the purported transfer dated 05.07.2007.

6.2. In this suit also the defendants 1 to 4 viz., the debtors and the financial creditors did not file any written statement. The fifth defendant viz., the purchaser alone contested the suit. The fifth defendant would claim that it was not made aware of any of the agreements between the plaintiffs and the defendants 1 and 2. It would further contend that the sale being one under SARFAESI Act, and in view of the non-obstante clause found in Section 5 of the said Act, the agreements entered into between the debtor and other third parties relating to the secured assets would not be binding on the purchaser. Another legal plea was also raised by the fifth defendant to the effect that the very suit is barred under Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

6.3. The fifth defendant would further add that since there was no prohibition

against the defendants 3 and 4 from transferring the property, the transfer cannot be attacked by the plaintiffs. If at all the plaintiffs have any remedy its against defendants 1 and 2 and the plaintiffs cannot seek any relief against the purchaser viz. the fifth defendant. It was also contended that the purchasers of the commercial complex are also necessary parties to the suit. The fifth defendant would further contend that if at all the plaintiffs had any rights its only a right as an unsecured creditors of defendants 1 and 2 and none of the agreements viz., the Technical Services Agreement dated 26.10.1988, the Project Consultancy Agreement dated 26.10.1988 and the Royalty Agreement dated 26.10.1988 or the Finance Agreements dated 12.01.2000, 10.06.2000 and 04.02.2002 would confer any right or interest in immovable property in favour of the plaintiffs. Therefore, the plaintiffs cannot seek a declaration that the sale done under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is a nullity and the Deed of sale executed by the Recovery Officer cannot be attacked or impugned by the plaintiffs, who have no semblance of right over the immovable property. The legal effect of the provisions of the SARFAESI Act, are also pressed into service by the fifth defendant in order to dispute a claim of the plaintiffs.

6.4 The fifth defendant would also plead that it had, in fact, entered into an agreement for settlement of creditors with the first defendant on 05.07.2007 and the claim of the plaintiffs did not form part of the said agreement also. Therefore, according

to the fifth defendant, the plaintiff cannot impugn the sale or seek an injunction being a simple money creditor. It is also contended that the suit itself is a camouflaged attempt by the plaintiffs, who are in the same business as that of the defendants, to harass the defendants due to business rivalry.

7. Upon consideration of the above pleadings, this Court had framed the following issues on 22.03.2018.

1. Whether the plaintiffs have any cause of action to file the present suit?

2. whether the suit has been properly valued in terms of Section 40 of the Tamil Nadu Court Fees and Suits Valuation Act, 1955;

3. Is the suit barred by limitation?

4. Is not the suit barred under the provisions of Order II Rule 2 of CPC?

5. Whether the suit is maintainable in view of the provisions of the SARFEASI Act, 2002;

6. Whether the suit for a declaratory relief without seeking specific performance maintainable;

7. Is the suit liable to be dismissed for non joinder of necessary parties?

8. Whether the plaintiff can claim any charge over the suit property for the monies allegedly advanced by them to the 1st defendant;

9. In the absence of involving the corporate guarantee given by the 2nd defendant and in the absence of claiming recovery of money against the 1st defendant, are the plaintiffs entitled to any reliefs?

10. Are the plaintiffs entitled to any claims against the 5th defendant and over the property at No.365, Anna Salai, Chennai 600 018?

11. Has not the 1st defendant indemnified the 5th defendant against any claim made against them by any third party including the plaintiffs?

12. Is not the 1st defendant alone liable for any monetary claim made by the plaintiffs?

13. To what other reliefs are the parties entitled to?

8. As already pointed out the evidence in both the suits is common.

9. I have heard Mr.Siddhartha Mitra, learned Senior Counsel appearing for M/s. Iyer and Thomas, for the plaintiffs in both the suits, Mr.Rahul Balaji, learned counsel for defendants 1 and 2 in both the suits, Mr.AR.L.Sundaresan, learned Senior Counsel

appearing for M/s.K.Harishankar, for defendants 8, 9, 10 & 11 in Tr.CS No. 108 of 2017 & for the fifth defendant in CS No.164 of 2011, Mr.P.L.Narayanan, learned counsel appearing defendants 5 & 6 in Tr. CS No.108 of 2017 & for the defendants 3 and 4 in CS No.164 of 2011, Mrs.Shanthi Meenakshi, learned counsel appearing for defendants 3 & 4 in Tr. CS No.108 of 2017, Mr.Krishna Ravindran, learned counsel appearing for the seventh defendant in Tr. CS No.108 of 2017 and Mr.G.R.M.Palaniappan, learned counsel appearing for the twelfth defendant in Tr. CS No.108 of 2017.

10. Issue Nos.1, 2, 7 & 8 in Tr.CS No.108 of 2017:

10.1. The plaintiffs seek a declaration that the following agreements:

- i. Technical Services Agreement dated 26.10.1988
- ii. Project Consultancy Agreement dated 26.10.1988
- iii. Royalty Agreement dated 26.10.1988
- iv. Finance Agreements dated 12.01.2000, 10.06.2000 and 04.02.2002

are valid, legal and subsisting and are binding and enforceable on defendants 3 to 7 and the added defendants 8 to 12. Consequential injunctions are also sought for restraining the defendants 3 to 7 from alienating the property without disclosing and are recognizing the rights of the plaintiff to operate and manage the Hotel as provided

under the above said agreements. After the sale of the property in favour of defendants 8 to 12 and after the impleading of the alienees viz., the eighth defendant, its Directors and the twelfth defendant another prayer for injunction is included by way of amendment which in effect seeks an injunction in the form of a negative covenant restraining the defendants 8 to 12 from acting in any manner inimical to and/or in derogation of the rights of the plaintiffs as embodied in the three agreements dated 26.10.1988. The claim of the plaintiffs is that the above agreements impose a duty on the first defendant to avail the services of the first plaintiff in constructing and running the hotel, as far as the second plaintiff is concerned its right under the Royalty Agreement is restricted to the user of the name “Oberai”.

10.2. In order to ascertain the rights of the plaintiffs vis-à-vis the first defendant, the three agreements dated 26.10.1988 will have to be looked into. All these agreements are to provide services both Technical and Consultancy which contain the finer details of services offered in the hospitality industry. Under the Technical Services agreement, the first plaintiff has agreed to provide its technical knowledge, skill and technical services for the **operation of the Hotel** upon payment of fee subject to other terms and conditions provided. The said agreement also provides that the same shall be valid for a period of 25 years and an option for renewal is also given to the parties. The term of the agreement is to commence on the date of the agreement viz. 26.10.1988.

10.3. Article III of the Technical services agreement dated 26.10.1988, which is heavily relied upon by the plaintiffs in support of their claims reads as follows:

1. Owner warrants and covenants that Owner has or shall acquire and shall maintain full ownership of the Hotel throughout the Term of Agreement.

2. Owner shall disclose the existence of this Agreement and operator's vested interest in the Hotel to any lender(s), leasing company(ies), financial institution(s), and/or bank(s) having or proposing to take any lease, mortgage, charge or other security over the Hotel or any part thereof and shall obtain from such institution(s) in writing a confirmation of existence of this Agreement and that this Agreement is binding upon the institution(s). However owner shall inform the Operator prior to raising such loans. Similarly, in the case of foreclosure, the owner shall disclose to the purchaser of the Hotel the existence of this Agreement and the purchaser shall be deemed to be a successor to owner for the purpose of this Agreement and the rights of Operator, to continue as per the terms and conditions of this Agreement, shall not be effected or prejudiced in any way.

3. Owner undertakes that owner shall not enter into any other agreement and/or arrangement with any other company or organisation which may affect the operation and/or profitability of the Hotel without prior approval of Operator.

10.4. The other finer details of the Technical Services Agreement may not be very relevant for our purposes excepting to state that the agreement contains the mutual rights and obligations of the parties. The agreement is also made terminable on the happening of certain events and an Arbitration clause is also included in the event of disputes between the parties.

10.5. Under the Project Consultancy Agreement dated 26.10.1988 the second plaintiff had agreed to provide consultancy services with reference to conceptual design, architectural guidelines, interior designing, mechanical installations, lighting, provision of furniture, kitchen and laundry equipment, operating equipment, graphic and other design work etc., for a fee of Rs.45 lakhs.

10.6. The Royalty Agreement of even date entered into between the first defendant and the second plaintiff provides for use of the name '**oberoi**', the logo and insignia by the Hotel constructed by the first defendant. The same is based on revenue sharing terms. From the very nature of the agreements it could be seen that the

Technical Services Agreement and the Royalty Agreement would become operational only on the completion of the Hotel building as such. The project consultancy agreement imposes certain obligations on the second plaintiff to render its consultancy services in order to enable the first defendant to construct the Hotel which will comply with the requirements of star hotels, as the second plaintiff is already running and managing several Star credited Hotels both in India and abroad.

10.7. The other three agreements viz. the agreements dated 12.01.2000, 10.06.2000 and 04.02.2002 are Finance Agreements in and by which the first plaintiff has rendered financial assistance to the first defendant for completion of the Hotel project. Under the agreement dated 04.02.2002, the plaintiffs have agreed that they will no longer participate in the Hotel Unit and the Technical Services agreement will be terminated. It also reads that the first defendant shall repay the sum of Rs.15.12 crores with interest as applicable to the first plaintiff. The bone of contention between the parties is the interpretation and effect of this agreement dated 04.02.2002.

10.8. Mr.Siddhartha Mitra, the learned senior counsel appearing for the plaintiffs would vehemently contend that the agreement dated 04.02.2002 is a conditional agreement and it will take effect only if the first defendant repays the sum of Rs.15.12

crores on or before 31.12.2002. In the event of the failure on the part of the first defendant to repay the sum of Rs.15.12 crores with applicable interest on or before 31.12.2002, according to Mr.Siddhartha Mitra, the three agreements dated 26.10.1988 would stand revived and the plaintiffs would be entitled to enforce the obligations of the first defendant under the said agreement against the successors in interest of the first defendant. The learned counsel would further contend that the stipulations in the agreement dated 04.02.2002 particularly clauses 4 and 5 which read as follows:

“4. In the event the said amount of Rs.15.12 crores is not paid within the said date of 30th September 2002, interest @ 12% per annum from 1st October, 2002 to the actual date of repayment will be applicable on the said sum payable by BH&EL to EIH till the repayment of the total sum of Rs.15.12 crores. Such repayment with interest, however, shall be made before 31st December 2002. In the event of default beyond 31st December, 2002 EIH will be free to invoke the guarantee as stated in Clause 3 above.

5. Upon receipt of the payments of Rs.15.12 crores along with interest as applicable either from BH&EL or BICL, the Technical Service Agreement dated 26th October 1988 or any modification thereof between the parties hereto shall stand terminated.”

would necessarily lead to the conclusion that the performance or otherwise of the agreements dated 26.10.1988 would depend on the payment of the sum of Rs.15.12 crores on or before 31.12.2002. On the said assumption, the learned counsel would

argue that the plaintiff is justified in seeking the relief of declaration and enforcement of the negative covenant and not specific performance, since Sections 14(b) & (d) of the Specific Relief Act read with Section 41(e) would stand in the way of the plaintiffs if they are to seek specific performance of the Agreements dated 26.10.1988.

10.9 Relying upon Section 42 of the Specific Relief Act, Mr.Siddhartha Mitra, learned senior counsel, would contend that the fact that the Court is prohibited from either granting the relief of specific performance or an injunction will not prevent the Court from granting an injunction to perform the negative covenant. According to the learned counsel, the defendants 1 and 2 had agreed not to avail the services of any other person than the plaintiffs 1 and 2 for performance of the duties under the Technical Services Agreement, the Project Consultancy Agreement and the Royalty Agreement. Therefore such a negative covenant contained in those agreements could be enforced by the plaintiff by way of an injunction, in view of Section 42 of the Specific Relief Act.

10.10. Elaborating further, Mr.Siddhartha Mitra, would contend that, in any event, this Court as a Court of equity has got the powers to mould the relief and even grant a money decree against the defendants, if the Court concludes that the plaintiff cannot be favoured with the equitable/discretionary relief of declaration and injunction as prayed for in the suit. According to the learned counsel, the fact that the plaintiffs

have advanced a sum of Rs.15.12 crores to the first defendant is beyond any pale of doubt. The Agreement dated 04.02.2002 makes it obligatory on the part of the first defendant to repay the said sum with interest. The first defendant has also acknowledged the liability in the year 2004 under Ex.P11 dated 08.06.2004.

10.11. The Financial Creditors viz., the fourth, fifth and the sixth defendants have been informed of the rights of the plaintiffs under the three agreements dated 26.10.1988 and the finance agreements entered into during the year 2000 and 2002. Therefore, the defendant No.8 which is a purchaser of the Hotel from the defendants 5 and 6, the financing creditors, is bound by the said agreements and hence the agreements are enforceable against the eighth defendant also. In support of his submissions, Mr.Siddhartha Mitra would heavily rely upon the recitals in the agreement dated 04.02.2002. The learned counsel would also rely upon the following judgments in support of his contentions:

1. ***Gujarat Bottling Co. Ltd and Others v. Coca Cola Co. and others***, reported in ***1995 (5) SCC 545***
2. ***Indian Charge Chrome Ltd. v. Tata Iron and Steel Co. Ltd.***, reported in ***1996 (1) Cal LT 214***

Drawing my attention to the following observations of the Hon'ble Supreme Court in

Gujarat Bottling Co. Ltd and Others v. Coca Cola Co. and others, reported in **1995**

(5) SCC 545:

'42. In the matter of grant of injunction, the practice in England is that where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction and injunction is normally granted as a matter of course, even though the remedy is equitable and thus in principle a discretionary one and a defendant cannot resist an injunction simply on the ground that observance of the contract is burdensome to him and its breach would cause little or no prejudice to the plaintiff and that breach of an express negative stipulation can be restrained even though the plaintiff cannot show that the breach will cause him any loss. [See : Chitty on Contracts, 27th. Edn., Vol. I, General Principles, para 27-040 at p. 1310 : Halsbury's Laws of England, 4th Edn. Vol. 24, para 992.] in India Section 42 of the Specific Relief Act, 1963 prescribes that notwithstanding anything contained in Clause (e) of Section 41, where a contract comprises an affirmative agreement to do a certain act, coupled with a negative agreement, express or implied, not to do a certain act, the circumstance that the court is unable to compel specific performance of the affirmative agreement shall not preclude

it from granting an injunction to perform the negative agreement.

This is subject to the proviso that the plaintiff has not failed to perform the contract so far as it is binding on him. The Court is, however, not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused if it would indirectly compel the employee either to idleness or to serve the employer. [See: Ehrman v. Bartholomew (1927) W.N. 233 N.S. G.]”

the learned counsel would contend that in view of Section 42 of the Specific Relief Act, the Court can de hors the prohibition contained under Section 41(e) of the said Act grant an order of injunction for enforcement of a negative covenant, though it is discretionary. Attention is also drawn to the observations of the Calcutta High Court in ***Indian Charge Chrome Ltd. v. Tata Iron and Steel Co. Ltd.***, reported in ***1996 (1) Cal LT 214***, to buttress the submission that the Court can grant an order of injunction to enforce a negative covenant. The said position has also been reiterated by the Calcutta High Court in ***Board of Acting Governor of the La Martienere & Ors. v. National Engineering Industries Ltd. & Ors.*** reported in ***2005 (2) CHN 207***, wherein a Division Bench of the Calcutta High Court has observed that de hors the prohibition contained under Section 41 of the Specific Relief Act, the Court can grant an injunction which will in effect be an enforcement of a negative covenant.

10.12. Mr.Rahul Balaji, learned counsel appearing for the defendants 1 and 2, the actual contracting parties, would submit that no relief has been sought for against defendants 1 and 2 in the suits. He would further point out that after the agreement dated 04.02.2002, the plaintiffs can only claim a money decree for the sum of Rs.15.12 crores with appropriate interest. The fact that the Hotel has been sold by the Financial Creditors is pointed out as a factor which will render the three agreements dated 26.10.1988 incapable of performance. Therefore, according to Mr.Rahul Balaji, the plaintiffs can neither be granted the relief of declaration nor the prayer for injunction.

10.13. The learned counsel would also point out that all the three agreements dated 26.10.1988, were for a period of 25 years and the option for renewal has not been exercised by either of the parties. Therefore, according to him, the plaintiffs' suit itself is misconceived. Drawing my attention to the cross-examination of P.W.1 at the instance of defendants 1 and 2, Mr.Rahul Balaji, learned counsel would submit that the agreements had expired by mid night of 25.10.2013. He would also draw my attention to the evidence of P.W.1, wherein it is specifically conceded that the plaintiffs have not sought for repayment of the advance from the first defendant in these suits.

10.14. Mr.AR.L.Sunderasan, learned Senior Counsel appearing for the defendants 8 to 11 would submit that the agreement dated 04.02.2002 in effect puts an end to the relationship between the plaintiffs and defendants 1 and 2. According to the learned

Senior Counsel a combined reading of Clauses D, E, F and Clauses 3 and 4 of the agreement dated 04.02.2002 marked as Ex.P8 would lead to the irresistible conclusion that the plaintiffs have walked out of the contracts and had agreed to settle for accepting the money claim of Rs.15.12 crores with appropriate interest. It is also the submission of Mr.AR.L.Sunderasan, learned Senior Counsel that Clause 5 has to be read along with the other Clauses of the agreement. It cannot be read in isolation to the effect that the agreements dated 26.10.1988 stood revived, if defendants 1 and 2 failed to repay the sum of Rs.15.12 crores with appropriate interest by 31.12.2002. Even otherwise, the learned counsel would submit that the agreements dated 26.10.1988 cannot be specifically enforced against the purchasers viz., defendants 8 to 11, since these agreements are personal in nature and they would be covered by Section 41 (e) of the Specific Relief Act.

10.15. Relying upon Section 34 of the Specific Relief Act, the learned Senior Counsel would submit that the power of the Court to grant a declaration is also discretionary and the Court will not grant a declaratory relief which cannot be enforced under law. Attacking the prayers for injunction as cleverly couched Mr.AR.L.Sundaresan, learned senior counsel would submit that such negative injunctions cannot be granted by the Court particularly in contracts which by their nature require constant supervision by the Court and involve minute or numerous details and are dependent on personal qualification or volition of the parties. The

learned Senior Counsel would rely upon Section 14(1) (b) and (d) to strengthen his submission regarding unenforceability of the agreements dated 26.10.1988 that too against third parties, after the lapse of nearly 17 years even at the time of the institution of the Suit.

10.16. Referring to paragraph 34 (A) to (I) included by way of amendment, the learned counsel would submit that the fact that the sales happened under the SARFAESI Act, having not been denied, the plaintiffs cannot enforce the contract entered into by the debtor. The learned counsel would also contend that an injunction for performance of a negative covenant cannot be granted under Section 42 of the Specific Relief Act, in a case where, it would be detrimental to third parties to the contract. Mr.A.R.L.Sunderasan, learned Senior Counsel would also further contend that in view of the proviso to Section 42, the plaintiffs who have failed to perform their part of the contract cannot seek injunction to perform a negative covenant under Section 42 of the Specific Relief Act.

10.17. Reference is also made by the learned Senior Counsel to the order of the Hon'ble Supreme Court made in Civil Appeal Nos.11886 to 11889 of 2016 dated 07.12.2016, wherein the Hon'ble Supreme Court has in fact pointed out that the liability of defendants 1 and 2 to the tune of Rs.15.12 crores was recognised by the agreement

dated 04.02.2002. My attention is also drawn to the evidence of P.W.1 in cross-examination to the effect that the plaintiffs have no contract with defendants 3 to 12 in Tr.CS No.108 of 2017, except the three agreements between the plaintiffs and defendants 1 and 2. He would also point out that the witness viz. P.W.1 has conceded that the plaintiffs have not taken any steps for enforcement of the guarantee executed by the second defendant regarding performance of the agreement dated 04.02.2002.

10.18. The plaintiffs would be entitled to the declaration and injunction sought for only if they are able to sustain their interpretation of the agreement dated 04.02.2002. No doubt, Mr.Siddhartha Mitra, learned Senior Counsel appearing for the plaintiffs would vehemently contend that the Hon'ble Supreme Court in its judgment in Civil Appeal Nos.11886 to 11889 of 2016 dated 07.12.2016 had found that the non-compliance with the agreement dated 04.02.2002 would lead to revival of the agreements dated 26.10.1988. I am afraid that such an argument cannot be countenanced. Admittedly, the order passed by the Hon'ble Supreme Court is only in Interlocutory proceedings and the Court had not pronounced on the merits of the matter. The Hon'ble Supreme Court as well as the Division Benches of this Court which had considered the Interlocutory proceedings were only concerned with prima facie case and balance of convenience. Now that the entire maze of evidence is before this Court, the actual purport of the agreement dated 04.02.2002 will have to be considered. A reading of the agreement dated 04.02.2002, particularly Clauses D, E, F and Clause 4 would

lead to the irresistible conclusion that the plaintiffs gave up their rights under the agreements dated 26.10.1988 and agreed to receive a sum of Rs.15.12 crores with subsequent interest. The consequence is also spelt out in Clause 4 of the said agreement which very clearly states that in the event of default beyond 31.12.2002, the first plaintiff will be free to invoke the guarantee as stated in Clause 3.

10.19. The Agreement dated 04.02.2002, nowhere provides for revival of the contracts in the event of default by the plaintiff. Even otherwise the agreements dated 26.10.1988 expired on 25.10.2013 as per the evidence of P.W.1. None of the contracting parties even attempted to have them renewed beyond 25.10.2013. No doubt the rights of the parties will have to be decided on the basis of the prevailing situation on the date of the institution of the suit. But the subsequent events should also be taken into account by the Court and even as argued by Mr.Siddhartha Mitra, learned Senior Counsel the Rule that the Court can mould the relief based on subsequent events is one of ancient vintage. When the Court takes note of the subsequent events that had happened in the case on hand, it is clear that much water has flown under the bridge from the date of institution of Tr.CS No.108 of 2017 in the year 2005 and now when the suit is taken up for final disposal.

10.20. The eighth defendant has commenced its business and is in fact running a Hotel in the disputed property from the year 2010. The relief of injunction sought for in the second suit viz., CS No.164 of 2011 was refused by the Division Bench of this

Court as well as the Hon'ble Supreme Court solely on the ground that it will not be in the interest of justice to stop a running business. If we are to examine the effect of the declarative relief and the injunctive reliefs sought for by the plaintiffs, the same would definitely lead to the defendants being forced to shut down their operations and remain idle. Prayer (b) viz. the first injunctive relief cannot be granted since the sale has already happened in the year 2007. Prayer (bb) which was introduced by way of amendment, after the sale had taken place, reads as follows:

“(bb). Permanent Injunction restraining the Defendant Nos.8 to12 whether by itself its servants, agents and/or assigns or otherwise howsoever from taking any steps or acting in a manner inimical to and/or in derogation of the rights of the plaintiffs as embodied in the Technical Services Agreement dated 26th October, 1988 and the Project Consultancy Agreement and Royalty Agreement both dated 26th October 1988 (Amended as per order dated 12.04.2010 in Application No.6723 of 2010)”

The effect of grant of Prayer (bb) would be to prevent the eighth defendant from running the Hotel. The learned counsel for the plaintiff would also concede that he cannot seek specific performance of the agreements dated 26.10.1988, in view of Section 14 (1) (b) and (d) of the Specific Relief Act. Therefore, the plaintiffs are not willing to perform their obligations under the agreements dated 26.10.1988. At the same

time they do not want the defendants to act in derogation of the said agreements. The effect would be to force the defendants to close the Hotel and remain idle. Even while recognising the power of the Court to grant an injunction for enforcement of a negative covenant, Courts have always held that such a grant cannot be made if it would force the defendants to idleness.

10.21. Even in *Gujarat Bottling Co. Ltd. and others v. Coca Cola Co. and Others, reported in 1995 (5) SCC 545*, very strongly relied upon by the plaintiffs in support of the proposition that the Court can grant an injunction to perform a negative covenant, the Hon'ble Supreme Court has qualified the grant of injunction and held that the plaintiff should not have failed to perform the contract so far as it is binding on him and the Court is not bound to grant an injunction in every case and an injunction to enforce a negative covenant would be refused, if it would indirectly compel the employee either to idleness or to serve the empower. Therefore, grant of a negative injunction is not automatic but the plaintiffs should go one step further and prove that it had performed its part of the contract. All the contracts dated 26.10.1988 by their very nature fall either under 14 (1) (b) or 14(1)(d) of the Specific Relief act. Therefore, grant of specific performance of the contracts is not possible. In such a backdrop, the Court would not grant an injunction to enforce a negative covenant invoking Section 42 in favour of the plaintiffs.

10.22. Undoubtedly, the plaintiffs were in a position to ask for a further relief of

mandatory injunction for performance of the agreements dated 26.10.1988 when they filed the suit in Tr. CS No.108 of 2017 in the year 2005, inasmuch as, the alienation had not happened and defendants 1 and 2 were the owners of the property. The plaintiffs, however, did not ask for any further relief in the nature of a positive direction, the plaintiffs were contend with prayer (b) in Tr CS No.108 of 2017, which is an injunction restraining the Finance Creditors from selling the property without notifying the purchaser regarding the rights of the plaintiffs. Such an injunctive prayer has now become redundant because of the supervening event of the sale of the property by the Financing Creditors even in the year 2007. Therefore, the claim of the plaintiffs for a declaration would fall within the mischief of proviso to Section 34 of the Specific Relief Act, which prevents the Court from granting a declaration when the plaintiffs who is in a position to seek a consequential or further relief fails to do so.

10.23. In *Union of India v. Ibrahim Uddin and another*, reported in (2012) 8 SCC 148, the Hon'ble Supreme Court had reiterated the said position and after referring to the judgments of the Hon'ble Supreme Court itself in *Ram Saran v. Ganga Devi*, reported in (1973) 2 SCC 60, and *Vinay Krishna v. Keshav Chandra*, reported in 1993 Supp (3) SCC 129, the Hon'ble Supreme Court concluded that it is not permissible to claim the relief of declaration without seeking the consequential relief. In the light of the law laid down by the Hon'ble Supreme Court and the evidence that is made available in the case on hand, particularly the agreement dated 04.02.2002, I find that

the plaintiffs' rights under the agreements dated 26.10.1988 got extinguished upon the plaintiffs entering into the agreement dated 04.02.2002. Therefore, the plaintiffs are not entitled to the reliefs of declaration as well as the injunctive reliefs sought for in the suit. Hence, Issue Nos.1, 2, 7 and 8 in Tr. CS. No.108 of 2017 are answered against the plaintiffs.

Issue No.3:

11. This issue relates to the bar created by Section 34 of SARFAESI Act. What is prohibited under Section 34 is a claim which could be projected before the Debt Recovery Tribunal or the Appellate Tribunal by any person who is aggrieved by an action of a secured creditor. It is clear from a perusal of the prayers in the suit viz., Tr CS No.108 of 2017 that the plaintiffs are not questioning any of the actions of the secured creditor or a Recovery Officer under Section 13 of SARFAESI Act. The prayers in the suit relate to a declaration and injunction which cannot be dealt with by the Debt Recovery Tribunal or an Appellate Tribunal either under Section 17 or under any other provision of the said Act. As pointed out by the Full Bench of this Court in ***Periathambi Goundan v. The District Revenue Officer, Coimbatore and ors.***, reported in ***AIR 1980 Mad 180***, a bar of jurisdiction of a Civil Court created by an enactment will operate only to the extent to which the authorities constituted under the enactment have been empowered to adjudicate upon. If there is no machinery under the enactment to adjudicate upon an issue that is raised in the suit, the bar created under the enactment

will not operate. As on the date of filing of the suit in Tr. CS No.108 of 2017, the secured creditors have not taken any action under Section 13 of the said Act. The publication that was given in the year 2002 will not come within a step taken under Section 13, since it is even prior to the enactment of SARFAESI Act. The prayers in the suit also are not ones challenging the validity or otherwise of an action taken by a Secured Creditor or an Authorised Officer, under Section 13 of SARFAESI Act. Therefore, the bar enacted under Section 34 of SARFAESI Act, will not apply to the suit in Tr.Cs No.108 of 2017. Issue No.3 is answered in favour of the plaintiffs.

Issue No.4:

12. Issue No.4 relates to the jurisdiction of the Court. Either of the parties had not advanced any arguments touching upon the jurisdiction of this Court. In any event I find that all the agreements which are subject matter of the suit, were entered into at Chennai within the jurisdiction of this Court and therefore, this Court has got jurisdiction to try the suit. Issue No.4 is answered accordingly.

Issue No.5:

13. This issue relates to the 12th defendant. Mr.G.R.M.Palaniappan. learned counsel appearing for the twelfth defendant would submit that the twelfth defendant has nothing to do with the Hotel in question. The twelfth defendant is described as follows in the plaint:

Hyatt Hotels Corporation, a Company incorporated

under the appropriate laws of USA
and having its office at 71S Wacker Dr.Chicago,
IL 60606-4637, United States.

In the written statement filed by the twelfth defendant, the twelfth defendant had set out the contracts that have been entered into by the eighth defendant with other Companies. The claim of the twelfth defendant is that it is not a party to any of those agreements and it is an unnecessary party to the suit. But, the twelfth defendant has not let in any evidence in support of its above claim. It is also seen that the plaintiffs have also not taken any steps to implead the entities which are mentioned in the written statement of the twelfth defendant. In any event in view of the conclusions reached on Issue Nos. 1, 2, 7 and 8, I do not think, I should go into the question as to whether the suit is maintainable as against the twelfth defendant.

Issue No.6:

14. Though an issue was framed on limitation none of the parties advanced any arguments on the question of limitation. In any event, the right of the plaintiffs to seek a declaration as its legal status would commence only when such legal status is denied. Therefore, I conclude that the suit is not barred by limitation. Issue No.6 is answered in favour of the plaintiffs.

15. Adverting to the arguments of the learned Senior Counsel appearing for the

plaintiffs that the Court can always mould the relief and grant a relief of repayment of money as pointed out by the Hon'ble Supreme Court in *Ramesh Kumar v. Kesho Ram*, reported in *AIR 1992 Supp(2) SCC 623*, and *Pratha Rai Tanwani v. Uttam Chand*, reported in *2004 (8) SCC 490*, I must point out that the plaintiffs by their own conduct had made it impossible for the Court to grant relief of payment of money, as per the agreement dated 04.02.2002. No doubt the agreement dated 04.02.2002 contains an unequivocal acknowledgement of the fact that defendants 1 and 2 have borrowed a sum of Rs.15.12 crores from the first plaintiff. But the plaintiffs had the right to seek enforcement of the guarantee executed by the second defendant, if the monies are not paid by 31.12.2002. The plaintiffs never chose to enforce the said guarantee against the second defendant. The explanation given by the plaintiffs for not choosing to sue upon the guarantee is least convincing. The plaintiffs would claim that they were aware of the financial position of defendants 1 and 2 and therefore, they did not choose to enforce the money claim against the second defendant. This explanation is hardly convincing.

16. Even in the present suits, the plaintiffs never sought for an alternative relief against defendants 1 and 2. After the sale of the property in favour of the eighth defendant, the plaint was extensively amended and the prayer (bb) was incorporated, even then the plaintiffs did not choose to seek a prayer for repayment of the money. Though several decisions were relied upon by the learned Senior counsel for the plaintiffs to contend that the Court can mould the relief and grant a decree for payment

of money, I do not think those decisions would help the plaintiffs in the case on hand, inasmuch as, the plaintiffs have not chosen to seek any relief against D1 & D2 at any point of time even though the plaintiffs had the cause of action for claiming such reliefs. The power of the Court to mould the relief is beyond doubt, but at the same time the same can be exercised only if the circumstances warrant. I do not see any special circumstances that would warrant the exercise of such power in favour of the plaintiffs.

CS No.164 of 2011

17. Though as many as 13 issues have been framed in the suit, the Issue No.5 will have to be answered first, since it relates to the jurisdiction of the Court. If the answer to Issue No.5 is in the negative then the other issues cannot be gone into by this Court. Issue No.5, reads as follows:

Whether the suit is maintainable in view of the provision of the SARFAESI Act, 2002.

17.1. The sum and substance of the defence in CS No.164 of 2011 is that the suit which seeks to nullify the action of a Recovery Officer done on behalf of the Financing Creditor under Section 13(4) of SARFAESI Act, is barred under Section 34 of the said Act. A brief survey of the provisions of SARFAESI Act, will definitely ease the complexity of the issue relating to maintainability of the suit which attempts to challenge the actions of the secured creditors, under the provisions of the said Act.

17.2. Section 13 of the Act provides for enforcement of security interest. Sub Section 4 of Section 13, lists out the measures that could be taken by a secured creditor upon the failure of the borrower to discharge the liability in full within the period specified under Sub Section 2 of Section 13. Clause (a) of Sub Section 4 empowers/authorises the secured creditor to sell the secured assets for realisation of the debts. Section 17 of SARFAESI Act confers a right on **any person** aggrieved by any of the measures referred to in Sub Section 4 of Section 13 taken by the Secured Creditor or the Authorised Officer to the Debt Recovery Tribunal having jurisdiction in the matter. Section 34 bars the jurisdiction of the Civil Court in respect of matters for which a provision is made under the Act. Section 34 of the Act, reads as follows:

“34. Civil court not to have jurisdiction.—No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

A reading of Section 34 would show that what is barred is “a suit or a proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine”. There is no dispute that the sale that took place on 05.07.2007 is a sale by the Recovery Officer under Clause (a) of Sub Section (4) of Section 13 of the Act.

17.3. The prayer in the suit in CS No.164 of 2011 is for a declaration that the said sale is a nullity on the ground that it is in violation of the order of injunction granted by this Court in OA No.300 of 2005 on 18.03.2005. According to Mr.Siddhartha Mitra, learned Senior Counsel appearing for the plaintiffs in CS.No.164 of 2011, the Debt Recovery Tribunal or the Appellate Tribunal do not have the power to grant a declaration regarding the validity or otherwise of a sale, more so when it is in violation of the order of this Court. Heavy reliance is placed on by the learned Senior counsel on the judgment of the Hon’ble Supreme Court in *Anita International v. Tungabadra Sugar Works Mazdoor Sangh and Others*, reported in **(2016) 9 SCC 44**, wherein the Hon’ble Supreme Court held that a sale held by the Recovery Officer under the Provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, in violation of the order of the Company Court is void. The learned Senior Counsel appearing for the plaintiffs would also draw my attention to the judgments in *Clarke & Ors v. Chadburn & Ors.* reported in **1985 (1) ALL ER 211**; *Century Flour Mills v.*

S.Suppiah & Ors, reported in ***AIR 1975 Mad 270***; and ***Vidya Charan Shukla v. Tamil Nadu Olympic Association & Anr***, reported in ***AIR 1991 Mad 323***, to contend that a sale in violation of an order of a Court is invalid and the same can be declared a suit.

17.4. The proposition of law that a sale in violation of an order of Court has to be set aside cannot be disputed, however, whether such relief could be granted by the Court in the light of the statutory prohibition contained under Section 34 of the SARFAESI Act, which contains a non-obstante clause in Section 35 which provides that the provisions of the SARFAESI Act, would have an overriding effect on the provisions of other enactments. The bar enacted by Section 34 of the SARFAESI Act is very wide in its sweep.

17.5. In ***Anita International v. Tungabadra Sugar Works Mazdoor Sangh and Others***, reported in ***(2016) 9 SCC 44***, the Hon'ble Supreme Court did not consider the scope of the bar of jurisdiction of a Civil Court under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. A reading of the judgment of the Hon'ble Supreme Court would show that the question as to whether the jurisdiction of the Civil Court was barred under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, was neither addressed nor gone into. The Appeal before the Hon'ble Supreme Court was against the order of the High Court made under the Companies Act, nullifying a sale that had taken place in violation of the orders of the Company Court, which granted leave to the applicant Bank to proceed and

prosecute Original Application No.1300 of 1997 filed by it against the respondent Company before the Debt Recovery Tribunal at Bangalore. This Court had on 10.03.2000 granted leave subject to the condition that the Official Liquidator is impleaded and no coercive steps are taken against the assets of the Company during or after the conclusion of the proceedings before the Tribunal. However, the Debt Recovery Tribunal issued a Recovery Certificate and the property of the Company was sold in execution of the said Recovery Certificate. Upon application made to the Company Court, the Company Court set aside the sale as the same was in violation of the orders of the Company Court granting permission.

17.6. The question whether the jurisdiction of the Company Court was barred under any of the provisions under *the* Recovery of Debts Due to Banks and Financial Institutions Act, 1993, was not gone into in *Anita International's* case. The Hon'ble Supreme Court proceeded on the footing that the Company Court having granted permission to the Bank to precede with the recovery proceedings before the Debt Recovery Tribunal at Bangalore, subject to certain conditions had the inherent jurisdiction in it to set aside the sale which was in violation of its own order.

17.7. The facts of the case on hand are slightly different. The injunction order that was granted by this Court on 18.03.2005 did not prohibit a sale. It only appended a condition that the purchasers must be made aware of the existence of the agreements between the plaintiffs and defendants 1 and 2. The eighth defendant purchaser has now

claimed that it was not made aware of the existence of the agreements. Therefore, according to Mr.Siddhartha Mitra, the sale is in violation of the order of this Court dated 18.03.2005 made in OA No.300 of 2005, as a consequence, according to him, the sale has to go. As already pointed out the scope of bar created under Section 34 is very wide in its sweep. Section 34 of the Act, bars the jurisdiction of a Civil Court in respect of any matter which could be adjudicated by the Debt Recovery Tribunal or the Debt Recovery Appellate Tribunal, under the provisions of the Act. Section 17 of the Act provides a right of appeal to any person aggrieved by any of the measures referred to in Sub Section 4 of Section 13 taken by the secured creditor or the Authorised officer to the Debt Recovery Tribunal having jurisdiction in the matter.

17.8 The scope of the bar created by Section 34 of the SARFAESI Act, has been considered by the Hon'ble Supreme Court in ***Jagdish Singh v. Heeralal and Others, reported in (2014) 1 SCC 479***. While concluding that even a suit for partition of a property which has been sold under the provisions of SARFAESI Act, will be barred by provisions of Section 34 of SARFAESI Act, the Hon'ble Supreme Court held as follows:

“19. The expression ‘any person’ used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in Satyavati Tondon’s case.

20. Therefore, the expression ‘any person’ referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.”

The Hon’ble Supreme Court further observed as follows:

“25. We are of the view that the civil court jurisdiction is completely barred, so far as the “measure” taken by a secured creditor under sub- section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether there has been any illegality in the “measures” taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystalised, before creating security interest in respect of the secured assets.”

A peep into the facts of the case in ***Jagdish Singh v. Heeralal and Others***, would show that it was a suit for partition instituted by the members of the Hindu Undivided Family which was held to be barred under Section 34 of SARFAESI Act.

17.9. In *Sree Anandhakumar Mills Limited v. Indian Overseas Bank and Others*, reported in (2019) 14 SCC 788, the Hon'ble Supreme Court again reiterated the principles laid down in *Jagdish Singh v. Heeralal and Others*, and held that a partition suit instituted by a daughter of a debtor challenging the action of secured creditors under Section 13 of SARFAESI Act, is barred under Section 34 of the said Act. A Full Bench of this Court in *Periathambi Goundan v. The District Revenue Officer, Coimbatore and ors.*, reported in AIR 1980 Mad 180, considered the scope of the bar that was introduced under Section 16 (A) of the Tamil Nadu Agricultural Land Record of Tenancy Rights Act, (10 of 1960). While doing so, the Hon'ble Full Bench held that the scope of the bar created by an enactment will cover the jurisdiction of the Authorities in whom powers are vested under the enactment. While doing so, the Hon'ble Full Bench observed that if the question which is within the exclusive jurisdiction of the Authority viz., the Record Officer constituted under Act (10 of 1960), arises as an incidental question before a Civil Court, then the Civil Court will have jurisdiction to entertain the suit, but if the question which is within the exclusive domain of the Authority is constituted under a particular enactment, becomes the main question or a main issue in the suit then the jurisdiction of the Court will be barred. While doing so, the Full Bench observed as follows:

“41. Our conclusion as to what are the matters which are within the exclusive jurisdiction of the authorities constituted under

the Act and with reference to which the bar imposed by Section 16A comes into operation gains confirmation from the provisions of S.14(1) as already indicated. The various enactments enumerated in S.14 (1) are all enactments dealing with the rights and liabilities of landowners and tenants to whom land has been let, for cultivation. In the context of the proceedings initiated under the provisions of those Acts, the particulars mentioned in S. 3(2) of the Act will assume importance and the preparation of the approved record under the Act will constitute a preliminary determination of the matters necessary for invocation of the jurisdiction of the authorities functioning under the Acts enumerated in S.14(1). If this aspect is borne in mind, it will be indisputably clear that the matters which are within the exclusive jurisdiction of the authorities constituted under the Act are limited by the provisions contained in. Sec. 3 (2) the Act, because those were the particulars which are directed to be included in the approved record to be prepared under the Act.

42. Under these circumstances, with reference to the contention advanced on behalf of the petitioner in the present writ petition, we hold that the authorities constituted under the Act had jurisdiction to determine as to who was the tenant in respect of the land in question, as between the petitioner and the 5th respondent for the purpose of preparing the record under the Act. Hence, on this ground, to the impugned order cannot be said to be vitiated so as to warrant the issue of a writ of certiorari.”

The contention of the parties regarding the scope of the bar of jurisdiction of the Civil Court under SARFAESI Act, will have to be decided bearing in mind the law declared by the Hon'ble Supreme Court and the Full Bench of this Court, stated supra.

17.10. Undoubtedly the sale on 05.07.2007 by the Authorised officer of the secured creditors in favour of the eighth defendant is an action taken under sub Section 4 of Section 13 of the SARFAESI Act, by a secured creditor to realise its debt. If the plaintiffs are aggrieved by that action it is open to them to move the Debt Recovery Tribunal under Section 17 of the Act. The jurisdiction of the Debt Recovery Tribunal depends on, as to whether, the action questioned would be one under Sub Section 4 of Section 13 of the Act and not the grounds for seeking to set aside the said action.

17.11. Mr.Siddhartha Mitra, learned Senior Counsel appearing for the plaintiffs would try to wriggle out of the bar created by Section 34 of the SARFAESI Act, contending that since the plaint complains of violation of an order of the High Court, it will be the High Court will have a jurisdiction to decide on that question. The plaint in CS No.164 of 2011 is not in a nature of an Appeal against the order of the High Court made in OA No.300 of 2005 dated 18.03.2005, the cause of action for the suit itself is that there is a violation of the order. I do not see any prohibition for the plaintiffs to have moved a similar action before the Debt Recovery Tribunal complaining that the sale is in violation of the order of the High Court is that and therefore it has to be

declared as a nullity.

17.12. A bar created by a statute over the jurisdiction of a particular Court which is dependent on the availability of a remedy, before an alternative forum cannot be whittled down by considering the ground of challenge. I am therefore of the considered opinion that dehors the ground of challenge what is sought to be achieved is to nullify the action of an Authorised Officer of a secured creditor taken under Sub Section 4 of Section 13 of the SARFAESI Act, over which the Debt Recovery Tribunal has been conferred the exclusive jurisdiction under Section 17 of the Act.

17.13. In the light of the above, I find that Section 34 of the SARFAESI Act in effect bars the jurisdiction of the Civil Court, more so, when the actions of the Authorised Officer of a Secured Creditor are questioned dehors the grounds of challenge. Therefore Issue No.5 in CS No.164 of 2011 is answered in favour of the defendants and against the plaintiff. Once I find that this Court has no jurisdiction, I do not think I will be justified in going into the other issues raised in the suit. In fine, the suit in CS No.164 of 2011 will have to be dismissed on the ground that the jurisdiction of the Civil Court is barred in view of Section 34 of the SARFAESI Act.

18. In view of the foregoing discussion and answers to the issues as above, both the suits in Tr CS No.108 of 2017 and CS No.164 of 2011 are dismissed with costs of defendants 8 to 11 only. The sum of Rs.15.12 crores deposited by the eighth defendant

pursuant to the directions of the Hon'ble Supreme Court in Civil Nos. Nos.11886 to 11889 of 2016, along with accrued interest shall be paid over to the 8th defendant.

Sd./-R.S.M.J

30.07.2021

List of Witness examined on the side of the plaintiffs:

PW1 – Singanellore Natesan Sridhar

List of Exhibits marked on the side of the Plaintiffs:

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>
1	Ex.P1	The Original Resolution of the 1st plaintiff favouring the deponent
2	Ex.P2	The Original Resolution of the 2nd plaintiff favouring the deponent
3	Ex.P3	The Original Technical Services Agreement dated 26 th October 1988
4	Ex.P4	The Original Project Consultancy dated 26 th October 1988
5	Ex.P5	The Original Royalty Agreement dated 26 th October 1988
6	Ex.P6	The Original Agreement dated 12 th January 2000 entered into

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>
		between the plaintiff and the 1 st defendant
7	Ex.P7	The Original Supplemental agreement dated 10 th June 2000 entered into between the plaintiff and the 1 st defendant
8	Ex.P8	The Original Agreement dated 4 th February 2002, along with letter of guarantee
9	Ex.P9	The photocopy of Advertisement issued in the Economic Times dated 24 th July 2002 by the Tourism Finance Corporation of India Limited being the 6 th defendant (Mr.K.Harishankar, learned counsel for 5 th defendant in CS No.164 of 2011 and 8 th defendant in Tr C.S.No.108 of 2017 objects to the marking of Ex.P9 as there is doubt with regard to the admissibility of the same).
10	Ex.P10	The Office copy of the letter dated 18 th September 2002 by the plaintiffs to the 6 th defendant
11	Ex.P11	The original Fax copy of the letter dated 8 th June 2004 written by the 1 st defendant
12	Ex.P12	The certified copy of Annual Report of the 1 st defendant for the Financial Year 2007-2008
13	Ex.P13	The copy of the Sale Certificate dated 5 th July 2007 issued by the 5 th and 6 th defendants in favour of the 8 th defendant
14	Ex.P14	The copy of the Article published in the Business line

List of Witness examined on the side of the Defendants:

DW1 – T.N.Thanikachalam

List of Exhibits marked on the side of the Defendants:

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>
1	Ex.D1	The copy of the letter from plaintiff No.1 to defendant No.3
2	Ex.D2	The copy of th letter from defendant No.3 to plaintiff No.1

<i>Sl. No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>
3	Ex.D3	The copy of the letter plaintiff No.1 to defendant No.3 through its Advocate
4	Ex.D4	The copy of the letter defendant No.3 to plaintiff no.3 through its Advocate.
5	Ex.D5	The copy of the letter plaintiff no.1 to defendant no.3 through its Advocate
6	Ex.D6	The copy of defendant no.3 to plaintiff no.1
7	Ex.D7	The photocopy of the possession Notice dated 07.02.2007
8	Ex.D8	The photocopy of Deed of Transfer executed by Tourism Finance Corporation India Limited and IFCI Ltd. In favour of defendant 5 dated 05.07.2007
9	Ex.D9	The original letter from defendant 1's counsel to plaintiff dated 10.02.2009
10	Ex.D10	The original letter from defendant 1 to defendant 5 dated 13.02.2009
11	Ex.D11	The original legal notice issued by the plaintiff's to defendant 5 dated 01.09.2009
12	Ex.D12	The office copy with original Acknowledgment due card and Reply notice issued by defendant 5 dated 23.09.2009
13	Ex.D13	The original letter from defendant 1 to defendant 5 dated 06.01.2017

Sd./-R.S.M.J
30.07.2021

//Certified to be true copy//
Dated at Madras this the day of 2022.

COURT OFFICER(O.S.)

From 25th Day of September 2008 the Registry is issuing certified copies of the Orders/Judgments/Decrees in this format.