

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
COMMERCIAL DIVISION**

Present:

The Hon'ble Justice Krishna Rao

IA No: GA 7 of 2022

IA No: GA 8 of 2022

In CS 390 of 2014

Swadha Builders Pvt. Ltd. & Ors.

Versus

Nabarun Bhattacharjee & Ors.

Mr. Abhrajit Mitra, Sr. Adv.

Mr. Suddhastava Banerjee

Mr. Pranit Bag

Ms. Rituparna Chatterjee

Mr. Rafat Reyaz

... for the plaintiffs/petitioner.

Mr. Rupak Ghosh

Mr. Abhijit Sarkar

Mr. Abhikchitta Kundu

...for the respondent nos. 4 & 5.

Mr. Jishnu Chowdhury

Mr. Ranojit Chowdhury

Mr. Sudipto Chowdhury

Mr. Abhidipto Tarafder

... for the respondent no. 7.

Heard on : 16.12.2022, 05.01.2023, 11.01.2023, 08.02.2023,
20.02.2023, 27.02.2023, 17.03.2023, 20.03.2023 &
21.03.2023.

Judgment on : 22.03.2023

Krishna Rao, J.:

The petitioners/plaintiffs have filed the instant application being GA 7 of 2022 praying for following reliefs :

- “(a) *An order be passed restraining the respondents forthwith from giving any effect to or giving any further effect to and/or to act in furtherance of and in pursuance of the purported equitable mortgage of the said property alleged to have created in favour of the respondent – No.3.*
- (b) *An order be passed appointing a fit and proper person as the Receiver/Special Officer to do the following:*
 - i. To take custody of the deeds/documents in respect of the said property in relation to the creation of the purported mortgage.*
 - ii. To take custody of all documents in relation to the purported creation of mortgage in respect of the said property.*
 - iii. To deposit such documents in a sealed cover before this Hon’ble Court, pending disposal of the instant suit.*
- (c) *An order be passed restraining the respondents forthwith from seeking to enforce such purported equitable mortgage by taking any coercive steps against the petitioner;*
- (d) *An order be passed restraining the respondents from giving any effect and/or further effect to and/or from taking any steps in terms of and in pursuance of the corporate guarantee purportedly given by the petitioner No. 1 to the respondent No. 7;*
- (e) *An order of injunction be passed restraining the respondent No. 7 from disbursing any further sum in favour of the respondent No. 3 against and/or in connection the purported creation of equitable mortgage of the said property of the respondent No. 3 against and/or in connection the purported*

creation of equitable mortgage of the said property.

- (f) Ad-interim orders in terms of the prayer made above;*
- (g) Such further or other order or orders be passed and/or direction or directions be given as this Hon'ble Court may deem fit and proper."*

The respondent no. 7 has filed an application being GA. 8 of 2022 praying for revocation of Leave granted under Clause 12 of the Letters of Patent.

The petitioner No.1 was earlier known as Falcon Footwears Industries Limited. The entire shareholding of the petitioner no.1 is owned by the petitioners Nos. 2 to 5 having different number of shares.

The respondent no. 2 is the wife of the respondent no.1 and the respondent no. 5 is the wife of respondent no. 4. The respondent nos. 1 and 2 are the principle share holders of the respondent no. 3. The respondent nos. 4 and 5 are the principle share holders of respondent no. 6.

The respondent no. 7 is the banker of the respondent no. 3 and had granted substantial loan and advances to the respondent no. 3.

The petitioner no.1 was the sole and absolute owner of the entirety of the premises no. 6, Jessore Road (North) having 24 cottahs with the basement plus ground floor and four storied brick built building standing thereon. On 26th April, 2011, the petitioner no. 1 sold a portion of the fourth floor of the building at the said property comprising an area of 1250 sq. ft to one Sheela Sharma.

The petitioner No. 1 was looking for the buyers. The respondent no. 4 who is personally known to the directors of the petitioner no. 1 requested the shareholders of the petitioner no. 1 to transfer the property to the respondent no. 1 and 2 on the terms proposed by the respondents earlier. It was ultimately agreed and decided that the portion sold to Sheela Sharma would be transferred to respondent nos. 1 and 2 by the petitioner nos. 2 to 5. The petitioner nos. 2 to 5 will transfer all their shares held in the petitioner no. 1 to the respondents at the total consideration of Rs. 17,68,37,500/-. It was agreed that the sum of Rs. 51,00,000/- would be paid by the respondent no.1 and 2 to the petitioner no. 1 before signing of the agreement and subject to such payment, an agreement would be entered into by and between the shareholders of the petitioner no. 1 and the respondent no.1 and 2. It was further agreed that the balance amount of Rs. 17,17,37,500/- would be paid within 31st May, 2013 for which post-dated cheques would be issued.

On 1st October, 2012, the respondent nos. 1 and 2 made payment of Rs. 51,00,000/- by transferring the same in the account of the petitioner no.1 maintained with the respondent no. 7. On receipt of the said amount, the petitioner no. 1 had returned the loans taken from the petitioner nos. 2 to 5 or their sister concerns. On 14th September, 2012, the respondent nos. 1 and 2 were inducted in the board of the petitioner no. 1. After resignation of the remaining directors on 1st October, 2012, the petitioner no.1 has filed the necessary Form for appointment and resignation of directors. On 3rd October, 2012, an agreement was entered between the petitioner nos. 1 to 5

and the respondent nos. 1, 2 and 4 for transfer of shares held by the petitioner nos. 2 to 5 in the petitioner no. 1 against the payment of Rs. 17,68,37,500/-. On execution of agreement, the respondent nos. 1 and 2 issued four cheques dated 3rd October, 2012 of Rs. 12.75 lacs each total amounting to Rs. 51 lacs to the petitioner nos. 2 to 5 and also handed over four post dated cheques dated 30th May, 2013 for the balance amount of Rs. 17,17,37,500/- to the petitioner nos. 2 to 5.

In the agreement dated 3rd October, 2012 at Clause 8.1 and 8.2 it is provided that the petitioner no.1 may mortgage the Jessore Road property with any recognized bank provided that such mortgage could be created only upon necessary resolution being passed to such effect at a Board Meeting of the company and at the General Meeting of the company, in both of which the petitioners nos. 2 to 5 shall be present. In Clause 8.1, it also provided that in such event the petitioner no.1 company would give standing instructions to the concerned loanee bank that the loan amount would be disbursed only after payment of the balance consideration for the sale of shares was made by the respondent nos.1 and 2 to the petitioners nos. 2 to 5.

The respondent nos. 1, 2 and 4 were fully aware of the fact that the Jessore Raod property was Sali land and the application for conversion of the same had been rejected against which an appeal would required to be filed before the concern authorities. At the request of the respondent nos. 1 and 2 , Shri Binod Kumar Drolia was reappointed as a Director of the petitioner no.1 on 10th April, 2013 only for the purpose of filing appeal

against the order of refusing conversion and immediately upon doing so he has resigned as Director of the petitioner nos.1 on 13th April, 2013.

On 9th May, 2013, a supplementary agreement was entered between the petitioners and the respondent nos. 1, 2 and 4 by extending the time for completion of sale and transfer of shares till 27th August, 2013 or within 15 days of conversion order being passed in respect of the land, which ever is earlier subject to the respondent nos. 1 and 2 agreeing to the appropriation of the sum of Rs. 5 lacs paid to the petitioner nos. 2 and 3 on 15th January, 2013 as delay compensation and the sum of Rs. 51 lacs paid by the respondents nos. 1 and 2 to the petitioner Nos. 2 to 5 to be treated as earnest money against the total amount of Rs. 17,68,37,500/-. In the said supplementary agreement, it is clearly recorded that all works relating to conversion of the property would be exclusively handled by the respondent nos.1 and 2 and the petitioners would not be responsible for the same. The respondent nos.1 and 2 have issued four fresh cheques all dated 28th August, 2013 for the total amount of Rs.17,17,37,500/- in favour of the petitioner nos. 2 to 5 with the request to extend the time for making balance payment till 29th October, 2013 or such other time as the petitioners may deem fit and proper. The respondent no.4 guaranteed such payment of the said four cheques by endorsing his signature in the letter dated 28th August, 2013.

As the respondent nos. 1 and 2 were not able to make payment even within the extended time and have approached the petitioners with an offer to further secure the payment of balance consideration for the shares of the

respondent nos.1 and 2 by a corporate guarantee of the respondent no. 6 backed up by mortgage of a tea garden owned by the respondent no. 6 at Agartala. Believing the representation of the the respondent no. 4 and 5 and by their company, respondent no. 6, the petitioners were agreed to accept the corporate guarantee of the respondent no. 6 and the mortgage of the tea garden owned by the respondent in Agartala and allowed the time for making balance payment till 25th November, 2013.

The respondent nos.1 and 2 were put in management of the petitioner no.1 company, the entire shareholding of the petitioner continued to remain with the petitioner nos. 2 to 5 and the respondent nos. 1 and 2 were obliged to act as fiduciary in the best interest of the petitioner no.1 company. The respondent no.1 and 2 have not taken any steps to file audited accounts of the petitioner no.1 and accordingly the petitioners have enquired from the respondent nos. 1 and 2 but they failed to provide any satisfactory explanation and finding no other alternative, the petitioner nos. 2 to 5 have issued notice to the respondent nos. 1 and 2. Without giving any reply to the notice of the petitioners, in the second week of November 2013, the respondent nos. 1, 2 and 4 requested the petitioners for further extension of four months to pay the consideration for the said equity shares of the petitioner no.1. By a letter dated 25th November, 2013, the respondent nos. 1 and 2 have issued further four post dated cheques dated 12th December, 2013 and the respondent no. 4 had also signed the letter on 25th November, 2013 by confirming the continuous of his guarantee.

As the respondents have not responded to the notice of the petitioners with regard to the audited account and accordingly, the petitioners have enquired from the office of the Registrar of Companies and on queries, the petitioners came to know from the Registrar of Charges in the Website maintained by the Ministry of Corporate Affairs that a charge on the property appeared to have been created in favour of the respondent no. 7, the Union Bank of India. The Statutory Auditor of the petitions have No.1, M/s T.K. Niyogi & Associates submitted a report to the petitioner No. 5 on 13.12.2013 which are as follows :

- “a) That the Petitioner no. 1 had filed Form-8 on 8th January, 2013 in favour of Union Bank of India in respect of Creation of Equitable Mortgage on the said Jessore Road Property as collateral security to secure a loan of Rs. 40 crores granted by the Bank to Respondent no. 3, vide sanction letter dated 11th December, 2012.*
- b) That the Petitioner No. 1 had also provided corporate guarantee of Rs. 5.46 crores to secure the said loan.*
- c) The charge which was filed on 8th January, 2013 had been modified by filing another Form 8 dated 25th September, 2013.”*

The Statutory Auditor of the petitioner along with the report also enclosed two Form 8, one creation of charge filed on 31.12.2012 and other modification of charge filed on 25th September, 2013 also supporting Memorandum of Equitable Mortgage and the Resolution dated 22nd December, 2012. The petitioners came to know from the report that respondent nos. 1 and 2 had proceeded to create the said mortgage of the property in favour of the respondent no. 7 to secure loan of Rs. 40 crore

sanctioned in favour of the respondent no. 3. The said equitable mortgage have been created by depositing the title deed of the property with the respondent no. 7. The respondent no.7 approved the loan of Rs. 40 crore in favour of the respondent no. 3 against collateral security of the property of the petitioner no. 1 on 11th December, 2012 in spite of the fact that the Board Resolution was passed at the purported meeting only held on 22nd December, 2012. Without the Board Resolution, the respondent no. 7 proceeded to accept the property of the petitioner no. 1 as collateral for the loan agreed to be advanced to the respondent no. 3 and sanctioned such loan.

The respondent nos. 1, 2, 3 and 4 have acted in collusion and in conspiracy with the respondent no. 7 in creating the mortgage of the property by playing fraud upon the petitioners.

The respondents have illegally mortgaged the land of the petitioner no.1 by playing fraud upon the petitioners and have also not repaid the loan amount to the respondent no. 7 and accordingly on 4th August, 2014, the respondent no. 7 had issued notice to the respondent no. 3, copy to the petitioner no.1 alleging that the account maintained by the respondent no. 3 has become non-performing assets and had informed that the respondent no.7 will take steps against the respondent no. 3 and against the petitioner no. 1. The petitioners have submitted several applications to the designated authorities of the respondent no. 7 under Right to Information Act seeking particular transactions between the respondent no. 7 and the respondent nos. 1 to 6 but no informations were provided to the petitioners.

On 28th April, 2015, the petitioner No. 1 had made complaint to the Reserve Bank of India but the Reserve Bank of India has also not considered the complaint made by the petitioner and accordingly the petitioner No.1 had filed a Writ Application but the same was also dismissed. The petitioner had preferred an appeal and the Hon'ble appellate Court had directed the Reserve Bank of India to file report and the Reserve Bank of India has submitted report on 11th February, 2020 wherein it was stated that there is a clear cut element of fraud in the account of the borrower and the bank has also relied upon the forensic audit conducted by Kansal Singla and Associates wherein report dated 24th February, 2019 reveals that the borrower had intentionally and by planned strategy defrauded the bank by mortgaging the property which did not belong to them. As per the order passed by the Appellate Authority, the petitioner had received the copy of forensic audit report.

The petitioner no.1 had also made a written complaint to the Hare Street Police Station against the fraud committed by the respondents and accordingly the police has registered a FIR No. 590 of 2016 dated 2nd November, 2016. On completion of investigation, the police has also submitted chargesheet against the respondent nos. 1 and 2 as well as the AGM and Chief Manager of the respondent no. 7 for the offence under Sections 406/409/420/465/467/468/471/120B of the IPC.

Mr. Jisnu Chowdhury Counsel for the defendant No. 7, the Union Bank of India, Industrial Finance Branch has raised the question of maintainability on the ground that the suit filed by the plaintiff is barred

under Section 34 of the SARFEASI Act, 2002. He submits that the plaintiff has filed the instant suit only for the purpose to install the SARFAESI proceeding.

Mr. Chowdhury submits that the plaintiffs have filed an application under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of the Security Interest Act, 2002 against the order passed by defendant no. 7 on 2nd August, 2017 under Section 14 of the Act of 2002 before the Debts Recover Tribunal at Kolkata but the Learned Tribunal had dismissed the application filed by the plaintiff on 10th April, 2017.

Mr. Choudhury submits that the being aggrieved with the order of the Ld. Tribunal, the plaintiff had filed a Civil Revisional Application before the Hon'ble High Court but the same was also dismissed on the ground of availability of alternative remedy to the petitioner but the petitioner has not preferred any appeal.

Mr. Chowdhury relied upon Section 430 of the Companies Act and submits that the grounds raised by the petitioner is the interse dispute between the parties regarding their shares in the companies and the resolution relied by the petitioner and the same can be decided only by the Ld. National Company Law Tribunal.

Counsel for the respondent no. 7 submits that the respondent no. 7 has taken the specific plea in the affidavit-in-opposition that the purported Civil Suit clearly indicates that the same has been filed as a counterblast of

the steps taken by the authorized officer of the defendant no. 7 under SARFEASI Act, 2002 in collusion and conspiracy in between the plaintiffs and the defendant nos. 1 to 5.

Mr. Chowdhury relied upon the following judgments :

- a. (2010) 1 CHN 86 (*Prime Timbers Pvt. Ltd. -versus- State Bank of India*).
- b. (2014) 1 SCC 479 (*Jagdish Singh -versus- Heeralal and Ors.*)
- c. (2018)8 SCC120 (*Authorised Officer, State Bank of India - vs- Allwyn Alloys Private Limited & Ors.*)
- d. (2022) 2 SCC 573 (*Electrosteel Casting Limited –vs- UV Assets Reconstruction Company Limited & Ors.*)
- e. 2022 SCC Online Cal 1389 (*Asha Agarwal & Others -vs- Williamson Magor & Company*).
- f. Unreported judgment dated 12.07.2022 passed by Hon'ble Punjab & Haryana High Court in the case of (*Punjab National Bank –vs- Surender Singh Bedi & Ors.*).
- g. AIR 2004 SC 2371 (*Mordia Chemicals Ltd. etc. –vs- Union of India & Ors.*).

Mr. Abhrajit Mitra, Learned Senior Advocate representing the petitioner submits that the issue was taken before the Learned Debt Recovery Tribunal but the Tribunal is of the view that the Tribunal cannot decide the issue raised by the petitioner.

Mr. Mitra submits that from the Forensic Audit Report it is categorically mentioned that the borrower had intentionally and by planned strategy defrauded the bank by mortgaging the property which did not

belongs to them and the property was intentionally overvalued in order to justify the grant of loan and to avail facility from the bank.

Mr. Mitra submits that from the investigation of the police, it is also made clear that the Bank Official from the rank of AGM and Chief Manager are also involved in the said fraud and the police has also submitted charge-sheet against the bank official also.

Mr. Mitra Submits that before the Learned Debts Recovery Tribunal, the Learned Counsel for the respondent no. 7 submits that the Tribunal is not having jurisdiction to deal with the fraud and now the Ld. Counsel for the respondent no. 7 submits that the Tribunal is having the jurisdiction to decide the fraud but in the order of the Ld. Tribunal, the Tribunal has recoded that the Tribunal cannot decide the issue raised by the petitioner.

Mr. Mitra Submits that when the petitioner has filed the previous application, at the relevant point of time the petitioner was not equipped with the documents and now there is a change of circumstances, accordingly, the petitioner has filed the instant application.

Mr. Mitra submits that after filing of the suit, the plaintiff has filed an application under Section 15 of the Commercial Courts Act, 2015 for transfer of the suit from Ordinary Original Civil Jurisdiction to the Commercial Division. The said application was duly contested by the respondents and this Court vide order dated 13th January, 2021 had allowed the said application by transferring the suit before this Court and

the respondent no. 7 has not preferred any appeal against the order dated 13.01.2021.

Mr. Mitra relied upon the following judgments and submits that the portioner has pleaded fraud with support of sufficient documents and the said dispute cannot be decided by the Ld. Tribunal.

- a. 2022 SCC Online SC 1601 (*Leelamma Mathew -versus- Indian Overseas Bank & Ors.*)
- b. 2011 SCC Online Gij 2413 (*Shree Bharat Co-operative Bank Ltd. -vs- Vilasben Lalchand Kothari & Ors.*)
- c. ILR 60 Bom 326 (*T.R. Pratt (Bombay) Ltd. -vs- E.D. Sassoon & Co. Ltd.*).
- d. 79 CWN 883 (*Scotts (P) Ltd. & Ors. -vs- Corporation of Calcutta & Ors.*)
- e. 2012 SCC Online MP 9503 (*Smt. Prabha Jain -vs- Central Bank of India & Ors.*)
- f. 2017 SCC Online Cal 123 (*Frontline Corporation Ltd. -vs- Punjab and Sind Bank*)
- g. (2017) 11 SCC 852 (*J. Vasanthi & Ors. -vs- N. Ramanai Kantammal (dead)*).
- h. AIR 1969 SC 823 (*Official Trustee, West Bengal & Ors. -vs- Sachindra Nath Chatterjee & Anr.*)
- i. MANU/WB/0788/2015 (*Housing Development Finance Corporation Limited (HDFC Ltd) & Ors. -vs- Doorjee Dolma Bhutia & Ors.*)

Investigation/Forensic Audit Report of M/s. Jupitar Spun Pipes and Casting Private Limited (Respondent No. 3 herein) reads as follows :

“This shows that the Sale proceeds of JSPCL were not deposited in the Bank Account maintained with the

branch and it was also in violation of the terms and conditions of Sanction Letter. As per the Sanction letter, the Company had to deposit its proportionate Sales in Cash Credit Account of Union Bank of India.”

“The Company was enjoying CC facility from UBI Bank and the same was secured by the property owned by a third party i.e. Swadha Buidlers Private Limited. The Company misutilised/ misappropriated the funds for purposes other than for which the Bank had released the funds and diverted the Working capital facilities through its associates and other concerns by adopting fraudulent practices.

As per the Audited Balance Sheet dated 31.03.2013, the actual amount of sales was only Rs. 110.43 Crores viz the actual annual sales were less than the reported sales of Rs. 122.02 crore for the six months ended 30.09.2012. Thus, the Company submitted false and manipulated Financial statements to Union Bank of India in order to get the credit facilities sanctioned.

Bhattacharjees had intentionally and by pre-planned Strategy defrauded the Bank by mortgaging the property which did not belong to them and the property was intentionally overvalued in order to justify the grant of loan and to avail the facilities from the Bank.

Further, the funds disbursed by the Bank were not used for the purpose for which the same were intended. The same were in fact diverted for other unrelated activities.

In view of the above, we are of the opinion that the Promoters of the Company diverted the funds made available for business purposes and defrauded the Bank by Pre planned strategy. In this process they caused a huge loss to the Bank and used the Public money for their personal gains.”

The police of Hare Street had registered a FIR No. 590 dated 2.11.2016 pursuant to the order passed by the Learned Court of Chief Metropolitan Magistrate, Calcutta U/s 156(3) of the Code of Criminal Procedure on the basis of the complaint of the authorised representative of the petitioner. On completion of investigation, the police has submitted

Charge-sheet in the said criminal case wherein the following persons were named as accused persons :

- a. Nabarun Bhattacharjee (Respondent no.1)
- b. Shampa Bhattacharjee (Respondent no.2)
- c. M/s .Union Bank of India, Through its Charman (Respondent no.7)
- d. Mr. S.K. De (AGM, Union Bank of India)
- e. Mr. Abhijit Basak (Chief Manager of Union Bank of India).

During investigation, various documents were seized and statement of witnesses were also recoded and the police has found the following facts :

“During investigation, various documents were seized and collected from the complainant and various other authorities, the complainant and other witnesses were examined in light of the case. From investigation of the case, the following facts were ascertained.

- A. *(i) in complete breach of the trust, faith and confidence reposed upon them by M/s SBPL and its four share holding companies: Bhattacharjees in collusion, connivance and conspiracy with the erstwhile Assistant General Manager of Union Bank of India, Industrial Finance Branch, Kolkata namely, Sri S.K. De and other bank officer namely, Sri Abhijit Basak, Chief Manager had not only created an equitable mortgage by deposit of the Title Deeds of the Jessore Road Property on the basis of forged and manufactured documents using them as genuine but had also executed documents reflecting providing of corporate guarantee by Ms SBPL to the extent of Rs. 40 Crores for a working capital loan availed by M/s JSPCPL without any resolution to this effect on the basis of which the loan was sanctioned and in breach of all established procedures and guidelines of the bank. Surprisingly the bank as per sanction letter dated 11.12.12 and assessed the total net worth of SBPL Rs. 5.46 crores as on 31.12.12 as against the corporate guarantee of Rs. 40 Crores obtained by them from SBPL which is very abnormal.*

(ii) It is seen on perusal of the letter vide Ref. No.JSPCPL/UBI/1/2012-13 Dated 26.07.2012 signed by Nabarun Bhattacharjee, the Managing Director of JSPCPL addressed to the Assistant General Manager, Union Bank of India. It is Kolkata requesting therein for sanction of Rs. 100 Crores of loan by way of collateral security, for the purpose of which JSPCPL had Offered the security of house and landed property at Alipore and Dharmatala Vaalued at Rs. 50 Crores but not the complainant's SBPL property which was made mortgaged for the loan purpose of JSPCPL through a sinister conspiracy hatched up between the Bhatacharjee and the bank authority.

- B. (i) Upon perusal of the sanction letter dated 11.12.2012 forming part of Form No. 8 and its thorough examination it also transpired that though the Jessore Road Property was valued at Rs. 17,68,37,500/- in the agreement dated 3rd October, 2012, but Bhattacharys in collusion and conspiracy with the erstwhile Assistant General Manager and the Chief Manager of the bank had obtained from the bank appointed Valuers, M/s Ghosh Surveyors and valuers Pvt. Ltd. a highly overstated valuation of the Jessore Road Property to be Rs. 47.41 crores approximately to justify the loan of Rs. 40 Crores granted to JSPCPL and thereafter on 27.12.2012 DR. Shanker Bhattacharya at Rs. 48.25 Crores. The purpose of obtaining a second report was not explained and is suspicious.

In response to query in column V (Rate) item no. 4 of the valuation report where the valuers are required to obtain & submit by way of evidence guideline rate from the registrar office, M/s Ghosh Surveyors & Valuers Pvt. Ltd. has stated that information not available & Dr. Shanker Bhattacharjee has stated value arrived of on the basis of local inquiry and self judgment basis. However both have failed to enclose the guideline rate which was mandatory required to be obtained from registrar office & enclosed as evidence along with their valuation report. Obviously it was not done deliberately in as much as the guideline value would not have justified the valuation arrived by both the valuers in their valuation report submitted to bank.

Since both the valuers had failed to submit documentary evidence (official) to support the

valuation arrived at by them the bank officials in consultation with the valuers decided to justify the valuation arrived at by the valuers by creating imaginary sale documents wherein the sale price of Swadha property was sealed to be Rs. 45 crores.

As part of the aforesaid conspiracy, assessment slip dated 07.01.13 was obtained from Registrar of Assurances, Kolkata by DR Shanker Bhattacharjee on bank's instructions vide letter dated 29.12.12 wherein in the query from Dr. Shanker Bhattacharjee of his agent mentioned the set forth value of Jessore Road Property at Rs. 45 crores as decided by them in advance in consultation with the bank officials. As per the procedure in vogue, if the set forth value which is provided by the party i.e. by the bank valuer in the instant case is higher than the market value as generated otherwise from the system then the set forth value is shown as the market value and accordingly the market value of Jessore Road property of SBPL was assessed at Rs. 45 crores by the Registrar of assurances Kolkata which on record served the purpose of all concerned involved in the conspiracy.

In fact the market value as on 26.04.2011, assessed by the Registering Authority in respect of the one of the units measuring 1250 sq. Feet sold to one Sheela Sharma in the same building on the fourth floor was assessed as Rs. 40,75,000/- which translates to Rs. 3260/- per square feet. As against this the valuers have valued the fourth floor at Rs. 8500/- per square feet and Rs.8450/- per square feet respectively which is absurd.

This clearly proves collusion of bank officials & directors of JSPCPL to their efforts to justify the amount of loan granted to JSPCPL by over valuing the Jessore Road property of SBPL with ulterior motives to derive pecuniary gain.

It is not understood as to wherefrom the set forth value of Rs. 45 Crores was derived by the valuer in order to justify his valuation. It is also not understood as to which sale document was relied upon by the authorities as mentioned in type of deed (0101) sale document while obtaining the assessment slip dated 07.01.2013.

- C. *Thereafter in furtherance of their misdeeds the bank sanctioned maximum possible loan against mortgage of the Jessore Road property to M/s JSPCPL The erstwhile Assistant General Manager of Union Bank of India, Industrial Finance Branch, Kolkata namely, Sri S.K. De and another bank official, namely, Sri Abhijit Basak, Chief Manager had active participation in preparation and obtaining of such overstated valuation report dated 05.11.2012 by deceiving the higher management of the Bank and they obviously derived pecuniary benefit out of such fraudulent deeds. Surprisingly the Chief Manager of the bank namely Sri Vijay Kumar Shaw in a letter bearing Ref. No. ARB:KOLJSPCL303:18-19 dated 25.06.18 addressed to SBPL has stated as follows that*

QUOTE "M/s (JSPCPL) availed substantial finance from our bank against the corporate guarantee of M/s SBPL it may be noted that only due to corporate guarantee from SBPL bank extended substantial finance" UNQUOTE.

- D. *Clause 55(1) of the Articles of Association of M/s SBPL clearly stipulates that no mortgage can be created on the company's property unless and until it is for the purpose of business of the company. But Bhattacharjees being aware of this fact, fraudulently obtained loan facilities in the name of their own company being M/s JSPCPL for the purpose of business of the said company, knowing g fully well that wrongful loss would ensure to M/s SBPL and its shareholders in case of default by their company. Moreover they did not possess the power to avail of any disbursement by mortgaging the Jessore Road property and have fraudulently availed loan from Union Bank of India in league with the erstwhile.*

Assistant General Manager, Sri S. K. De and another bank official, namely, Sri Abhijit Basak, Chief Manager. The erstwhile Bank officials intentionally ignored the restriction imposed by the aforesaid clause 55(2) which categorically state that mortgage of the property of the of the said company could be created only for securing a financial accommodation granted in favour of M/s SBPL and for no other purpose and illegally sanctioned such high value loan in favour of JSPL the company of Bhattacharjees.

In this connection it is pertinent to point out that while creating the mortgage the erring bank officials have totally ignored the contents of instruction contained in a part of clause 3(a) to the circular no. 3072 dated 13th June, 85 issued by the Central Law Department of Union Bank of India. Central office in relation to the process followed by the bank official while creating a mortgage which specifically directed as follows :

“When the property belongs to a Company, the Memorandum of Article of Association of the Company should be studied to ensure that the Company has power to borrow and mortgage the property and a resolution delegating the powers to one or two of the Directors or to one of the officers of the Company as per provisions of the Articles of Association of the Company, to deposit the title deeds must be passed by the Board of Directors. The letter of authority/power of attorney/certified copy of the Board Resolution should be kept along with the title deeds. Before accepting letter of authority, the Branch Manager must satisfy about its genuineness.

- F. On examination it is found that Bhattacharyas have used forged letter head of M/s SBPL to avail the said loan by JSPCPL against mortgage of entire property of SBPL and use the said forged and manufactured documents as genuine before the statutory authorities like Bank and ROC. It was found during investigation of the case that the landline phone number as well as the email address on the said letterhead did not belong to SBPL in order to prevent any kind of bonafide communication with the complainant of the case thereby terming the said letterhead as the counterfeit letterhead of SBPL with ulterior motives.*
- H. It is surprising that Search report on title was concluded on 14.12.2012 while the inspection of the property by the bank Officers took place on 29.12.2012, however loan of Rs. 40 Crores was sanctioned on 11.12.2012 i.e. much earlier even without a resolution of the borrower company i.e. JSPCPL existing on the date of sanction of loan on 11.12.12 and without any resolution authorizing the company i.e. SBPL for mortgaging and/or providing corporate guarantee by SBPL to secure the loan of Rs. 40 Crore granted in favour of JSPCPL. The bank*

officials by misutilising their post as public servant had dishonestly sanctioned the loan on the basis of such forged and manufactured documents, fully knowing those to be forged and ingenuine and never intimated the higher authorities of the Bank of the irregularities in the operating of the bank account by JSPCPL.”

Section 34 of the SARFAESI Act, 2002 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).”

In the case of **Leelamma Mathew (supra)**, the Hon’ble Supreme Court held that section 34 of the SARFAESI Act shall be applicable only in a case where the debts Recovery Tribunal and/or Appellate Tribunal is empowered to decide the matter under the SARFAESI Act. The plaintiff is not challenging the sale/sale certificate. The plaintiff claimed the damages/compensation with respect of less area. Therefore, the High Court has seriously erred in holding that the suit was barred by Section 34 of the SARFAESI Act.

In the case of **Frontline Corporation Limited (Supra)**, the Division Bench of this Court held that the expression “in respect of any matter” referred to in Section 34 of the SARFAESI Act, would take in “measures” provided under Section 13(4). Consequently, if, an aggrieved person has got any grievance against any “measure” taken by a secured creditor under

Section 13(4), the remedy open to him is to approach the Debts Recovery Tribunal and not the Civil Court. The filing of a suit for specific performance pertaining to an agreement and a lease deed entered into between the parties does not come within the bar provided under Section 34. The suit filed by the plaintiff does not question any notice under Section 13(4). The bar under Section 34 is not absolute because where the dispute raised cannot be adjudicated by the Tribunal created under the Act, right of the parties to approach the Civil Court cannot be whittled down. Hence it cannot be stated that the jurisdiction of Civil Court to entertain, try and decide the suit claiming specific performance, is totally barred under Section 34.

In the case of **Prabha Jain (Supra)**, the Hon'ble Division Bench of Madhya Pradesh High Court held that from the Scheme of the SARFAESI Act it is apparent that the Debts Recovery Tribunal has no jurisdiction to decide the question whether persons other than the mortgager had title in the mortgaged property. In that context, the validity of the Sale Deed of the property mortgaged with the Central Bank of India cannot be decided by the Debt Recovery Tribunal. If, the Sale Deed is held to be wholly and partially invalid, it will immediately effect the validity of the mortgage of that property. The jurisdiction of the Civil Court is ousted in respect of the matters which the Debts Recovery Tribunal is empowered to decide. Absence of a provisions to enable the Debts Recovery Tribunal for holding an enquiry on a particular question is indicative that Jurisdiction of the Civil Court on that question is not excluded. The above question relating to validity of Sale

Deed and its consequent effect on the mortgage are matters which the Debts Recovery Tribunal is not empowered to decide. The provision of appeal under Section 17 of the SARFAESI Act by “any person” does not oust the Jurisdiction of Civil Court on matters which cannot be decided by the Debts Recovery Tribunal. Therefore, the Jurisdiction of Civil Court to decide these matters cannot be held to be ousted under section 34 of the SARFAESI Act.

In the case of **Shree Bharat Co-operative Bank Ltd. (Supra)**, the Hon’ble Division Bench of the Gujrat High Court held that the the position of law is very clear, Civil Court definitely possesses jurisdiction to the extent that if, the action of the secured creditor is found to be fraudulent or the claim of the secured creditor is found to be absurd and untenable, then under such circumstances Civil Court can definitely look into the issues.

In the case of **Housing Development Finance Corporation Limited (HDFC Ltd) (Supra)**, the Coordinate Bench of this Court held that :

“12. In Paragraph 42 of the said report, the Constitution Bench posed a question as to whether there is an absolute bar in a remedy to a borrower before an action is taken under Sub-section 4 of Section 13 of the Act in view of non-obstante clause under Subsection 1 of Section 13 and the bar of jurisdiction of the Civil Court under Section 34 of the Act. Upholding the jurisdiction of the Civil Court in a limited compass, the observations made in Paragraph 51 should be noticed which runs thus:

“51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, V. Narasimhachariar, AIR at pp. 141 and 144, a judgment of the

learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

“22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams v. Scott. I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary: Law of Mortgages, Vol. II, 4th Edn., p. 784.)”

20. *The Apex Court further took note of the expression “aggrieved by”.....taken by the secured creditor appearing in Section 17(1) of the Act and held that either the reasons indicated for rejection of the objection of the borrower or the likely action of the secured creditor shall not confer any right under Section 17. It is ultimately held that the remedy by way of an appeal under Section 17 of the Act is open to the borrower after the measures are taken under Section 13(4) and before the date of sale/auction of the property and also available when any recourse to Section 14 of the Act for taking possession of the property with the help of the Officer appointed by the Magistrate.*

23. *In the present case, not only the plea of fraud has been set out in the plaint but there was no measures taken under Section 13(4) or under Section 14 of the SARFAESI Act as on the date of the institution of a suit. Admittedly the notice under Section 13(4) was issued after the institution of a suit. The Court should confine its scrutiny under Order 7 Rule 11 of the Code to the averments made in the plaint when the rejection is sought under Clause “d” thereof. The Court should not look into the documents produced by the defendants at the stage of Order 7 Rule 11 and than to say that the suit is barred.”*

In the case of **Scotts (P) Ltd (Supra)**, this Court held that “it is fundamental principle of law that a natural person has the capacity to do all lawful things unless his capacity has been curtailed by some rule of law. It is equally a fundamental principle that in the case of statutory corporation is just

the other way. The Corporation has no power to do anything unless those powers are conferred on it by statute which creates it”.

The petitioners have filed the instant suit in the month of November 2014. Plaintiff has filed the suit praying for following reliefs :

“a) Declaration that the purported creation of equitable mortgage of the Jessore Road property by the defendant Nos. 1 and 2 purporting to act on behalf of the plaintiff No. 1 in favour of the defendant No. 7 and the acceptance of the same by the defendant No. 7 is wrongful, illegal fraudulent and void.

b) Declaration that the purported corporate guarantee given by the defendant Nos. 1 and 2 purporting to act on behalf of the plaintiff No. 1 in favour of the defendant No. 7 and the acceptance of the same by the defendant No. 7 is wrongful, illegal, fraudulent and void.

c) Decree directing delivery up and cancellation of the purported equitable mortgage of the Jessore Road Property created by the plaintiff No. 1 in favour of the defendant No. 7 upon adjudging the same be void;

d) Decree directing delivery up and cancellation of the purported corporate guarantee given the plaintiff No. 1 in favour of the defendant No. 7 upon adjudging the same to be avoid;

e) Decree for perpetual injunction restraining the defendants or any of them from representing or holding out the Jessore Road property as having been mortgaged in favour of the defendant No. 7 or from in any manner giving effect or further effect to or acting in pursuance of such purported mortgage of the said Jessore Road property.

f) Decree for perpetual injunction restraining the defendants or any of them from representing or holding out that any corporate guarantee has been given by the plaintiff No. 1 to the defendant No. 7 or from in any manner giving effect or further effect to or acting in pursuance of such purported corporate guarantee;

g) A decree for perpetual injunction be passed restraining the defendant No. 7 from threatening to take or from taking any step to enforce the purported equitable

mortgage of the Jessore Road property of the purported corporate guarantee given by the plaintiff No. 1 on account of any default in the performance of any repayment obligation undertaken by the defendant No. 7 or the other defendants to it;

h) A decree for perpetual injunction restraining the defendant No. 7 from disbursing and the defendant No. 3 from receiving any further money against the purported creation of equitable mortgage of the Jessore Road property of the plaintiff No. 1 or the purported corporate guarantee given by the said plaintiff in favour of the defendant No. 7.

i) Decree for Rs. 9,50,67,840/- against the defendants jointly or severally on account of loss and damage suffered by the plaintiffs by reason of their breach and violation of the agreement dated 3rd October, 2012 and their fraudulent and wrongful acts and conduct;

j) Alternatively, an enquiry be made into the loss and damage suffered by the plaintiffs on account of the fraudulent and wrongful acts and conducts of the defendants including the breach of the terms of the agreement dated 3rd October, 2012 by them, and a decree for such sum be passed against the defendants jointly and/or severally as may be found due and payable by them on such enquiry;.”

Admittedly on the date of filing of the suit, the respondent no.7 has not initiated any proceeding against the petitioner no.1 under the SARFAESI Act. On 14th July 2015, the respondent no.7 had issued possession notice which the petitioner has challenged before the Learned Debts Recovery Tribunal under Section 17 of the SARFAESI Act, but the Tribunal has dismissed the said application.

In the said order, the Tribunal recorded that :

“5. Before recording my findings and order, it would be appropriate to record that the Applicants have filed a bulky SARFAESI Application, (688 pages) which is very inconvenient to handle. Applicants have annexed several

papers and documents which are not at all relevant to the present proceedings. Appellants have annexed copies of agreement between Applicant No. 1 and Respondent No. 3, copies of memorandum of articles and association, copies of various minutes, copy of RTI application and reply thereto, copies of plaint & application filed by them in Civil suit before Hon'ble High Court, copy of Civil revision filed before Hon'ble High Court and several other copies of papers, irrelevant documents, only to make the SA bulky. This is not appreciated.

6. *I have considered the pleadings, affidavits papers of both the parties. My findings and observations are as under:*

(2) The Section 17(1) of SARFAESI Act provides "The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-Section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder "This Tribunal has no jurisdiction to decide the inter se dispute between the shareholders and directors of the Applicant No. 1 company, and Respondent Nos. 4 & 5."

At paragraph 58 (a to e) of the plaint, the petitioner has pleaded the act of fraud and in paragraph 66 of the plaint, the petitioners have also pleaded that the petitioners are still not able to obtain full particulars of the fraud perpetrated by the defendants acting in collusion with each other and the petitioners have been forced to file the instant suit on the basis of available particulars.

In the present application, the petitioners have filed the copies of Forensic Audit Report as well as the charge sheet submitted by the police authority after investigation. In the Forensic Audit Report it is categorically mention that *"Bhattacharjee had intentionally and by pre planned strategy defrauded the bank by mortgaging the property which did not belong to them*

and the property was intentionally overvalued in order to justify the grant of loan and to avail the facilities from the bank.”

In the Charge Sheet filed by the police in connection with the criminal case initiated by the petitioners, the respondent no.1 and 2 as well as the responsible officials of the respondent no.7 i.e. the AGM as well as the Chief Manager of the respondent no.7 bank are the accused and in the report it is categorically mentioned that “ The bank officials by misusing their post as public servant had dishonestly sanctioned the loan on the basis of the forged and manufactured documents, fully knowing these to be forged and not genuine and never intimated to the higher authorities of the Bank of the irregularities in the opening of the bank account by the respondent no. 3 Jupitar Spun Pipes Casting Private Limited (JSPCPL).

The Judgment referred by the Counsel for the respondent no. 7 in the case of ***Electrosteel Casting Limited (supra)***, the Hon’ble Supreme Court held that :

“7.2. However, it is required to be noted that except the words used “fraud”/“fraudulent” there are no specific particulars pleaded with respect to the “fraud”. It appears that by a clever drafting and using the words “fraud”/“fraudulent” without any specific particulars with respect to the “fraud”, the plaintiff-appellant herein intends to get out of the bar under Section 34 of the SARFAESI Act and wants the suit to be maintainable. As per the settled proposition of law mere mentioning and using the word “fraud”/“fraudulent” is not sufficient to satisfy the test of “fraud”. As per the settled proposition of law such a pleading/using the word “fraud”/“fraudulent” without any material particulars would not tantamount to pleading of “fraud”.

9. Having considered the pleadings and averments in the suit more particularly the use of word “fraud” even

considering the case on behalf of the plaintiff, we find that the allegations of “fraud” are made without any particulars and only with a view to get out of the bar under Section 34 of the SARFAESI Act and by such a clever drafting the plaintiff intends to bring the suit maintainable despite the bar under Section 34 of the SARFAESI Act, which is not permissible at all and which cannot be approved. Even otherwise it is required to be noted that it is the case on behalf of the plaintiff-appellant herein that in view of the approved resolution plan under IBC and thereafter the original corporate debtor being discharged there shall not be any debt so far as the plaintiff-appellant herein is concerned and therefore the assignment deed can be said to be “fraudulent”.

In the present case, the petitioners have categorically made averments of fraud and the said averment of fraud is duly supported with the documentary evidence i.e. the forensic audit report and the charge-sheet submitted by the police and thus the fact of the present case and the fact of the cases referred by the Counsel for the respondent no. 7 is distinguishable.

The cases referred by the Counsel for the plaintiff is squarely applicable in the instant case as the plaintiffs have not challenged any act initiated by the bank under the SARFEASI Act, 2002 but the plaintiffs have filed the suit for declaration, perpetual injunction and damages. The plaintiffs have categorically made an averment with regard to fraudulent act of the defendants including the officials of the defendant no. 7 which corroborate the forensic audit report as well as police report. As per the police report, it reveals that the officials of the respondent no. 7 are involved in the fraudulent act with the respondent nos. 1, 2 and 3.

The petitioner no.1 is the owner of the property and the respondent no.1 and 2 have mortgaged the said property without the knowledge of the petitioners and with the connivance of official of the respondent no.7. At the time of hearing of the present application, the counsel for the petitioner has handed over the copy of the paper publication dated 5th March 2023 wherein E-Auction Notice for Sale of the property of the petitioner No. 1 is published and the date of auction is fixed on 23rd March 2023.

Petitioners have filed the suit for declaration, perpetual injunction and for damages against the defendants by pleading fraud with the sufficient materials and thus the suit filed by the petitioners is maintainable under law in the present facts and circumstances of the case.

Considering the materials on record, this Court finds that the petitioners have made out a prima facie case, the balance of convenience and in convenience are in favour of the petitioners and at this stage if an order of injunction as prayed for is not passed, the petitioners will suffer irreparable loss and injury which cannot be compensated later on.

Accordingly prayers (a), (c) and (d) of the Masters Summons of **G.A. 7 of 2022** is **allowed**.

In view of the observation above, **G.A 8 of 2022** is dismissed.

(Krishna Rao, J.)

Later :

Counsel for the respondent no. 7 prays for stay of the operation of the order. Counsel for the plaintiffs has objected for the stay as prayed for. Considering the submission of the parties, prayer is refused.

(Krishna Rao, J.)