

GAHC010034682025



2025:GAU-AS:3944

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

WP (C) No.920 OF 2025

Shri Apurba Dev Sarma,
Son of Late Keshab Chandra Sarma,
Resident of Flat No.B2, Second Floor, Orchid Residency,
House No.53, Milanpur, Guwahati, District: Kamrup
(Metro), Assam, Pin – 781021.

.....Petitioner

-Versus-

1. The District Magistrate, Kamrup (Metro),
Guwahati, Assam.
2. The Additional District Magistrate, New Guwahati Co-
District, Kamrup (Metro), Guwahati.
3. Hdfc Bank Limited, Hdfc Bank House, Senapati Bapat
Marg, Lower Parel (West), Mumbai – 400013.
4. Hdfc Bank Limited, Retail Portfolio Management,
Swagota Enivision, Khanapara, opposite Agriculture
Office, G.S. Road, Six Mile, Guwahati – 781022.
5. The Authorised Officer, Hdfc Bank Limited, Retail
Portfolio Management, Swagota Enivision, Khanapara,
opposite Agriculture Office, G.S. Road, Six Mile,
Guwahati – 781022.
6. Shri Dibyajyoti Pathak,
Resident of Jnb Road, House No.126, Pension Para
Road, Care of Late Mahendra Das, Near Maharshi Vidya
Mandir, Silpukhuri, Assam – 781003.

7. Sri Ramdhan Pathak,
Resident of House No.126, Mrd Road, Chandmari,
Goswami Service, Guwahati – 781003.

8. Ester Rupa Sahu Jyrwa,
Wife of Rupam Das, Resident of House No.1,
Madhuban, Government Press, Guwahati – 781021.

9. M/s H.B. Developers, a Partnership Firm, having its
Registered Office at House No.28, Chandan Nagar, Vip
Road, Six Mile, PS: Dispur, Guwahati – 781022.

.....Respondents

– BEFORE –

HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE N. UNNI KRISHNAN NAIR

For the Appellant(s) : Mr. D. Das, Senior Advocate, assisted by Mr. T. Chakraborty, Advocate.

For the Respondent(s) : Mr. N. Das, Junior Government Advocate, Assam for respondent Nos.1 & 2.
: Mr. K.P. Pathak, Advocate for respondent Nos.3, 4 & 5.

Date of Hearing : 24.03.2025.

Date of judgment : **03.04.2025.**

JUDGMENT & ORDER (CAV)

(Vijay Bishnoi, CJ)

The petitioner has filed this writ petition seeking the following relief:-

“In the premises aforesaid, the petitioners pray that Your Lordships may be pleased to call for the records, issue Rule calling upon the respondents to show cause as to why

1. *A writ in the nature of Mandamus shall not be issued declaring that the respondent authorities have no jurisdiction, authority and sanction under law to initiate proceeding under SARFAESI Act, 2002 against the flat purchased by the petitioner vide Deed No.19669 dated 27.09.2023.*

2. *A writ in the nature of Certiorari shall not be issued setting aside and quashing the entire proceeding initiated by the respondent authorities under SARFAESI Act, 2002 so far relating to the flat of the petitioner.*

3. *A writ in the nature of Certiorari shall not be issued setting aside and quashing the notice dated 01.02.2025 issued by the Addl. District Magistrate, New Guwahati Co-District, Kamrup (M) under the provision of the SARFAESI Act, 2002.*

4. *A writ in the nature of Mandamus shall not be issued directing the respondent bank not to disturb the possession of the petitioner in respect of flat in question.*

-AND-

Upon cause or causes being shown and after hearing the parties make the Rule absolute and/or pass such further or other order(s) as Your Lordships may seem fit and proper in the facts and circumstances of the instant case.”

2. This writ petition came up for consideration before this Court for the first time on 19.02.2025, when this Court, after hearing the learned senior counsel for the petitioner, opined that the petitioner is having an alternative and efficacious remedy to approach the Debts Recovery Tribunal under Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter to be referred as the “SARFAESI Act”) against the measures taken by the respondent bank under the provisions of the SARFAESI Act.

3. At that time, Mr. D. Das, learned senior counsel appearing for the petitioner argued that the petitioner is not covered under the expression “any person” used in Section 17(1) of the SARFAESI Act and, therefore, he cannot avail the remedy of approaching the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. In the alternative, Mr. Das also submitted that the remedy under Section 17 is not an efficacious remedy and, therefore, the only remedy available with the petitioner is to approach this Court by way of filing a writ

petition under Article 226 of the Constitution of India. Mr. Das also argued that in the facts and circumstances of the present case, the provisions of the SARFAESI Act has no application in the case of the petitioner and on this ground also the matter requires consideration by this Court under Article 226 of the Constitution of India.

4. Having considered those submissions of Mr. D. Das, learned senior counsel appearing for the petitioner and taking into consideration the fact that the petitioner did not avail loan facility from the HDFC Bank for purchasing a flat located at 2nd Floor of Orchid Residency, situated at Milanpur Road, Chandmari, Guwahati, Kamrup (Metro), Assam and he purchased the property from the respondent No.8, which as per the petitioner, was free from all encumbrances, we decided to issue notice to the respondent Nos.3, 4 & 5, i.e. the authorities of the HDFC Bank, seeking clarification from them.

5. The brief facts of the case are that the respondent Nos.6 & 7 applied for availing a home loan of Rs.36,50,000/- from the HDFC Bank Limited (respondent No.3) for purchasing a flat located at the 2nd Floor of Orchid Residency, situated at Milanpur Road, Chandmari, Guwahati, Kamrup (Metro), Assam (hereinafter to be referred as the "property in question"). The respondent Nos.6 & 7 submitted application before the HDFC Bank stating that 90% of the work of the said building, in which the property in question is situated, is already completed and the HDFC Bank would be able to obtain first mortgage of the dwelling unit. The respondent Nos.6 & 7 also submitted a registered agreement for sale dated 28.06.2015 executed between the respondent No.6 and the builder of the property in question, i.e. the respondent No.9. Along with the application, the respondent Nos.6 & 7 had also submitted

an allotment letter dated 16.08.2015 issued in favour of the respondent No.6 allotting the property in question which they sought to purchase from the builder.

6. A letter dated 18.08.2015 written by the builder to the Bank was also submitted, wherein it was stated that the builder had no objection if a loan is advanced by the HDFC Bank to the respondent Nos.6 & 7 mortgaging the aforesaid property in question.

Vide letter dated 18.08.2015, the builder has also confirmed that the transfer or exchange of the aforesaid property in question would not take place unless written consent of the HDFC Bank is obtained and the deed of conveyance, as and when executed between the builder and the respondent No.6, would be forwarded to the HDFC Bank directly.

7. Before sanctioning the loan, a tripartite agreement dated 20.08.2015 was executed between the respondent No.6, the builder and the HDFC Bank, wherein the respondent No.6 and the builder unequivocally agreed that the loan advanced to the respondent Nos.6 & 7 would be secured against the first and exclusive mortgage of the property in question. The respondent Nos.6 & 7 also agreed to repay the loan advanced to them by way of Equated Monthly Installments (EMIs) on the first day of the following the month in which the disbursement of the loan is completed. In the said tripartite agreement, the builder promised that in the event of failure of the borrower to repay the loan or in the event of death of the borrower or cancellation of allotment of the flat, the builder will refund the entire amount advanced to it by the HDFC Bank forthwith and also agreed to indemnify the HDFC Bank against all losses, costs and expenses that may incur in the event it does not complete the development and

construction of the Project.

8. As per the HDFC Bank, the respondent Nos.6 & 7 as well as the builder clearly conferred an enforceable security interest in favour of the Bank and, therefore, the Bank decided to sanction an amount of Rs.36,50,000/- as loan to the respondent Nos.6 & 7. The said loan was to be repaid in EMIs of Rs.34,982/- payable over 240 months and, as such, the security for the principal sum of loan, interest, commitment and other charges and uses under this agreement, an enforceable security interest was created on the property in question. Further, an agreement dated 25.08.2015 was executed between the respondent Nos.6 & 7 and the HDFC Bank and a promissory note was also executed in favour of it promising to pay an amount of Rs.36,50,000/- along with interest.

9. After sanction of the loan, an amount of Rs.31,90,000/- was deposited by the HDFC Bank in the bank account of the builder through Cheque on 25.08.2015. A further amount of Rs.2,30,000/- was also paid to the builder on 08.01.2016. Along with the aforesaid amount advanced to the respondent Nos.6 & 7 as house loan, another sum of Rs.1,21,680/- was advanced as premium for Insurance Policy to secure repayment of the loan in the event of death, disability, etc., and a promissory note dated 30.09.2015 was also executed by the respondent Nos.6 & 7 promising to pay the amount of Rs.1,21,680/-.

10. It appears that the respondent Nos.6 & 7 failed to continue payment of the EMIs despite repeated requests, reminders and demands made by the HDFC Bank and in such circumstances, the loan account was classified as Non Performing Assets (NPA). Accordingly, the entire loan amount, including principal, interest, cost and charges were recalled and a notice was issued by

the Bank to the respondent Nos.6 & 7 to repay the entire outstanding amount.

11. When no response was received from the said respondents, the Bank issued a notice dated 05.12.2017 to the respondent Nos.6 & 7 under Section 13(2) of the SARFAESI Act with a caution that if the amount is not repaid, measures envisaged under Section 13(4) of the SARFAESI Act would be taken. In that process, the HDFC Bank also wrote a letter to the builder on 28.02.2018 highlighting that as per the provisions of the tripartite agreement dated 20.08.2015, the allotment of the property in question made in favour of the respondent Nos.6 & 7 be cancelled and the money advanced by the Bank be deposited.

12. The HDFC Bank got another notice dated 09.03.2018 issued under the head of authorized officer, which was published in both English and vernacular newspapers on 11.03.2018 stating that the HDFC Bank has a security interest over the property in question. Thereafter, on 07.09.2022, the HDFC Bank also wrote a letter to the builder informing about the default in repayment of the loan sanctioned to the respondent Nos.6 & 7 and they were also asked to inform the Bank about the issuance of the Sale Deed in favour of the defaulters and also as to whether possession of the flat had been given to them or not.

13. It appears that even after publication of the notice in the newspapers as well as after receipt of the letter dated 07.09.2022, the builder sold the property in question to one Ester Rupa Sahu Jyrwa (respondent No.8) vide Sale Deed dated 18.09.2022, which was subsequently registered on 30.09.2022, whereas, as per the Bank, they have security interest over the property in question. The Bank is claiming that though the builder already made a commitment to the respondent Bank that it would have the first charge over the

property in question, over which a security interest was created, however, in violation of the agreement executed between the HDFC Bank, respondent Nos.6 & 7 and the builder, the said property was sold to the respondent No.8 by the builder.

14. The respondent No.8, in turn, sold the property in question to the petitioner herein on 27.09.2023 by a registered Sale Deed. It is the case of the Bank that they were not aware about the said fact that the builder had sold the property in question to the respondent No.8 and, later on, the respondent No.8 sold the property in question to the writ petitioner.

15. On 20.07.2024, the authorized officer of the Bank wrote a letter to the District Authorities for taking possession of the property in question under Section 14 of the SARFAESI Act and, pursuant to that, the Additional District Magistrate, New Guwahati Co-District, Kamrup (Metro) has passed an order dated 01.02.2025, which is under challenge in this writ petition.

16. Mr. D. Das, learned senior counsel for the petitioner has argued that on the basis of the agreement for sale, no security interest can be created over the property in question nor can the same be treated as a commitment for creation of a security interest in favour of the respondent Bank. It is contended that it is not in dispute that the property in question was never sold by the builder to the respondent No.6 at any point of time, however, only an agreement for sale was executed between them. It is settled law that no title of the property can be conferred on any of the parties only on the basis of the agreement for sale. It is contended that in the absence of a registered Sale Deed, no immovable property can be said to be transferred and, as such, no security interest is created in favour of the respondent Bank in relation to the property in question.

Referring to Section 54 of the Transfer of Property Act, 1882, learned senior counsel for the petitioner has argued that a contract for sale of an immovable property is a contract evidencing the fact that the sale of such property shall take place on the terms settled between the parties but it does not create any interest or charge on such property. It is contended that unless a registered Sale Deed is executed in favour of the respondent Nos.6 & 7, the title of the property in question cannot be conferred on the said respondents.

In support of the above contention, Mr. Das has placed reliance on the decisions of the Hon'ble Supreme Court rendered in ***Rambhau Namdeo Gajre -Vs- Narayan Bapuji Dhotra (dead) through Lrs.***, reported in ***(2004) 8 SCC 614***; ***Bank of India -Vs- Abhay D. Narottam & Ors.***, reported in ***(2005) 11 SCC 520***; ***Suraj Lamp & Industries Private Limited -Vs- State of Haryana & Anr.***, reported in ***(2012) 1 SCC 656***; ***Shakeel Ahmed -Vs- Syed Akhlaq Hussain***, reported in ***(2023) SCC OnLine SC 1526*** and ***Cosmos Co. Operative Bank Limited -Vs- Central Bank of India & Ors.***, decided on 04.02.2025 in ***Civil Appeal No.1565/2025***.

17. The learned senior counsel for the petitioner has further submitted that the respondent No.8 had purchased the property in question from the builder through a registered Sale Deed and thereafter, the petitioner has purchased the said property in question from the respondent No.8, that too, through a registered Sale Deed and, as such, at present the title of the property in question vests on the petitioner and in the above-referred circumstances, the action of the Additional District Magistrate of passing the order dated 01.02.2025 deputing the Executive Magistrate to oversee the law and order situation during taking over of possession of the property in question by the Bank authority is absolutely without jurisdiction and is liable to be interfered

with.

18. Mr. D. Das, learned senior counsel for the petitioner has submitted that the respondent No.8 purchased the property in question by obtaining house loan from the Punjab National Bank and subsequently the loan was duly repaid by the petitioner on 23.08.2023. It is contended that the Punjab National Bank sanctioned the housing loan to the respondent No.8 after applying due diligence and obtaining charge report of the property in question and this fact demonstrates that no prior charge whatsoever was created over the property in question by any person in favour of any other bank, including the HDFC Bank. It is further reiterated on behalf of the petitioner that on the basis of the agreement for sale, no security interest can be created nor the same can be treated as a contract for creation of security interest in favour of the HDFC Bank.

19. The sum and substance of the arguments of Mr. D. Das, learned senior counsel for the petitioner is that simply on the basis of an agreement for sale, no security interest can be created in respect of the property in question in favour of the HDFC Bank and, therefore, the exercise undertaken by the Bank against the petitioner, who is the lawful owner of the property in question, under the provisions of the SARFAESI Act are absolutely illegal and without jurisdiction.

20. Refuting the stand of the petitioner, Mr. K.P. Pathak, learned counsel appearing for the respondent HDFC Bank has vehemently contended that a security interest was created in favour of the HDFC Bank the moment the tripartite agreement was executed between the respondent No.6, the builder and the HDFC Bank. Referring to the definition of "security interest" provided in

Section 2(1)(zf) of the SARFAESI Act, Mr. Pathak has submitted that the security interest in a property can be created even on the basis of an agreement. The learned counsel has submitted that prior to the amendment in the definition of term "security interest", it was only confined up to mortgage, charge, hypothecation and assignment only. However, with the substitution of new definition of "security interest" by Act No.44 of 2016, i.e. with effect from 01.09.2016, the scope of the definition has been widened and it also covers an agreement which secures obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset.

21. The learned counsel has further submitted that the statement of objects and reasons of the SARFAESI Act clearly provides that the said Act is enacted with the intention to empower the banks and the financial institutions to take possession of the securities and to sell them without intervention, and taking into consideration the said fact, it is wrong to say that simply by entering into an agreement, no security interest was created in favour of the bank in respect of the property in question.

22. The learned counsel has further contended that the HDFC Bank has already issued a warning on 11.03.2018 by publishing a notice in the newspapers, both English and vernacular languages, clearly stating that the Bank has a security interest over the property in question and intends to enforce the security interest in case of non-payment of the loan by the respondent Nos.6 & 7. It is further contended that in the present case, the builder, in sheer violation of the commitment made through the agreements has illegally sold the property in question to the respondent No.8 without any authority of law.

However, such an action of the builder cannot undermine the security interest created in favour of the respondent bank in respect of the property in question. It is further submitted that it is obligatory upon a person, who buys such encumbered property, to get verified the facts and thereafter purchase the property in which a security interest has already been created in favour of a bank or a financial institution.

23. The learned counsel has submitted that in the facts and circumstances of this case, the respondent bank is well within its rights to invoke the provisions of the SARFAESI Act and the challenge of the petitioner to the same is without any basis and is liable to be dismissed.

In support of his contention, Mr. Pathak, learned counsel for the respondent HDFC Bank has placed reliance on a decision of the Division Bench of the High Court of Madras rendered in ***Vishwanath M. Pai & Anr. -Vs- Corporation Bank (A Government of India Enterprise) & Ors.***, reported in **2019 SCC OnLine Mad 29493**.

24. Heard the learned counsel appearing for the parties and perused the material available on record.

25. The core question which is to be answered by this Court in this writ proceeding is that “*whether in the facts and circumstances of the case, any security interest is created in favour of the HDFC Bank in respect of the property in question or not?*”

26. If we go through the statement of objects and reasons of the SARFAESI Act, it is seen that the legislature felt that in India the banking and financial sector do not have a level playing field as compared to the other

participants in the financial markets in the world. It was noticed that there was no legal provision for facilitating securitization of financial assets of bank and financial institution, whereas the international banks possessed the power to take possession of the securities and sell them. It was also considered that the existing legal framework in India relating to the commercial transactions was not enough to keep pace with the changing commercial practices and the financial sector reforms, which resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Keeping in view the above referred circumstances and considering the recommendations made by the Narasimham Committee I and II and Andhyarujina Committee, the SARFAESI Act has been enacted to enable the banks and financial institutions to realize long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery and reconstruction.

27. The terms "securitization"; "security agreement"; "secured asset"; "secured creditor" and "secured interest" have been defined in Sections 2(1)(z); (zb); (zc); (zd) and (ze), respectively, of the SARFAESI Act. The term "security interest" is defined in Section 2(1)(zf). Prior to 2016, i.e. 01.09.2016, the definition of the term "security interest" was as under:-

“(zf) ‘Security interest’ means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31.”

However, by Act No.44 of 2016, which came into force with effect from 01.09.2016, the definition of "security interest" is substituted as under:-

“(zf) ‘Security interest’ means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes –

(i) Any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) Such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.”

28. From the above, it is clear that earlier the term “security interest” includes only mortgage, charge, hypothecation and assignment, whereas now the definition of “security interest” is widened and it also includes any other contract, which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset.

29. In the present case, the respondent Nos.6 & 7 took a loan from the HDFC Bank for the purpose of acquiring a tangible asset. A tripartite agreement was also executed between the respondent Nos.6 & 7, the builder and the HDFC Bank. The respondent Nos.6 & 7 had also executed a promissory note promising to repay the loan. The builder of the property in question had also made a promise that in the event of failure of the borrower to repay the loan or in the event of death of the borrower or cancellation of allotment of the flat, the builder will refund the entire amount advanced to it by the HDFC Bank

forthwith.

30. From the above facts and circumstances of the case and from the definition of "security interest", provided in Section 2(1)(zf) of the SARFAESI Act, it is clear that in the present case, a security interest was created in favour of the HDFC Bank and, therefore, the claim of the petitioner that no security interest was created in favour of the HDFC Bank in respect of the property in question cannot be accepted.

From the averments of the writ petition, it is also clear that the petitioner has placed reliance on the old definition of "security interest" as provided under Section 2(1)(zf) of the SARFAESI Act, which was in vogue before substitution of the new definition of "security interest" in Section 2(1)(zf) by Act No.44 of 2016, i.e. with effect from 01.09.2016.

31. The High Court of Madras in *Vishwanath M. Pai* (supra) in a similar situation has held that a security interest can be created on a property which was not in existence on the basis of a tripartite agreement as per Section 2(1)(zf) of the SARFAESI Act. Relevant portion of the said judgment is reproduced hereunder:-

"4. The petitioners challenged the possession notice issued to the respondents 2 & 3 before the Debts Recovery Tribunal, Bangalore on the ground that they are the owners of the property on the basis of the registered Sale Deed dated 21.05.2010 and are in actual possession of the property. Further, the petitioners contended that they are neither borrowers nor guarantors of the loan. The petitioners contended that they obtained loan for the purchase of the property from Syndicate Bank on 06.02.2010 and thereafter, the loan was taken over by the 4th respondent - Bank. The Debts Recovery Tribunal set aside the possession notice observing that on the basis of the Tripartite Agreement, there cannot be a secured mortgage, particularly, the property in question was not even in existence. The 1st

respondent - Bank contended that the Debts Recovery Tribunal had failed to consider the element of security interest according to Section 2(1)(f) of the SARFAESI Act.

4.1. *In these circumstances, it is appropriate to extract the definition of 'security interest' as per Section 2(1)(zf) of the SARFAESI Act, which reads as follows:*

'Section 2(1)(zf) of the SARFAESI Act defines Security Interest as follows:

'Security Interest' means right, title and interest of any kind, other than those specified in Section 31, upon property created in favour of any secured creditor and includes—

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset.

5. *The contention of the petitioners that a charge was never created on the property because it was not in existence on the date of Tripartite Agreement, cannot hold good as per the provisions of Section 2(1)(zf) of the SARFAESI Act.*

6. *It is also pertinent to note that on 16.09.2009, the 2nd respondent also acknowledged the debt outstanding of Rs. 48.18 lakhs and executed a demand pro-note and the 2nd respondent was also paying the monthly installments to the 1st respondent - Bank. The petitioners purchased the property from Mrs. Pratima Vijay Kumar and others on 06.02.2010 by availing loan from the Syndicate Bank, which was taken over by the State Bank of India subsequently.*

7. *From the materials available on record, it is clear that the 1st*

respondent - Bank had granted the loan of Rs. 48 lakhs based on the same property. The respondents 2 & 3 conveniently remained *exparte* before the Tribunal below. The 3rd respondent viz., M/s. Bhoomija Builders were given Power of Attorney by the owners of the land viz., Mrs. Pratima Vijay Kumar and others, who sold the property to the petitioners. It is also clear that in respect of the same property, the 1st respondent - Bank and also the 4th respondent - Bank, sanctioned loans to the tune of Rs. 90 lakhs. A sum of Rs. 42.28 lakhs was obtained by the petitioners from the Syndicate Bank, which was subsequently taken over by the 4th respondent and a sum of Rs. 48 lakhs was obtained by the 2nd respondent from the 1st respondent - Bank. At the time of availing the loan from the 1st respondent - Bank, the Tripartite Agreement, Construction Agreement and Agreement for Sale were given in respect of the property in question.

8. As per Section 58 of the Transfer of Property Act, where a person delivers to a creditor or his agent document of title to immovable property, should have intention to create a security thereon, the mortgage is created by deposit of Title Deeds. Therefore, with an intention to create mortgage in favour of the 1st respondent - Bank, the 2nd respondent had handed over the Tripartite Agreement, Construction Agreement and Agreement for Sale and also acknowledged the debt. The Sale Deed was executed in favour of the 1st respondent only on 21.05.2010. When the documents were handed over to the 1st respondent, which includes the Agreement for Construction of the property, with the consent of the land owners, now the petitioners cannot take a different stand and cause loss to the 1st respondent - Bank, which is dealing with public money.

9. The learned senior counsel appearing for the petitioners, in support of his contention, relied upon a judgment reported in (2012) 1 SCC 656 [Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana] wherein the Hon'ble Supreme Court held as follows:

‘... 18. It is thus clear that a transfer of immovable property by way of sale can only be a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 & 55 of the TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited

right granted under Section 53-A of the TP Act). According to the TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of the TP Act enacts that sale of immovable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject-matter.'

9.1. *The said judgment relates to Sections 54 & 55 of the Transfer of Property Act and that Agreement of Sale does not create any interest or charge on its subject matter.*

9.2. *There cannot be any dispute with regard to the ratio laid down in the judgment cited supra. However, as per Section 58 of the Transfer of Property Act, since the 2nd respondent had an intention to create mortgage by deposit of Title Deeds, the loan advanced by the 1st respondent - Bank which is a public money, cannot be allowed to go un-recovered. In these circumstances, the judgment relied upon by the learned senior counsel appearing for the petitioners is not applicable to the facts and circumstances of the present case."*

We are in perfect agreement with the view taken by the High Court of Madras.

32. There is no quarrel about the proposition laid down by the Hon'ble Supreme Court in the decisions on which the learned senior counsel for the petitioner has placed reliance. However, the same are not applicable to the facts and circumstances of the present case and, therefore, the same are of no help to the petitioner.

33. So far as the contention of the learned senior counsel for the petitioner that the petitioner is not covered by the expression "any person aggrieved", as used in Section 17(1) of the SARFAESI Act is concerned, we are of the view that the same has no merit. The expression "any person" used in Section 17(1) of the SARFAESI Act is wide enough to cover any person who is aggrieved by the measures adopted by a bank in terms of Section 13(4) and Section 17 of the

SARFAESI Act.

34. The Hon'ble Supreme Court in *United Bank of India -Vs- Satyawati Tondon*, reported in (2010) 8 SCC 110, has held as under:-

“42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression “any person” used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14.”

35. In view of the above discussions, we find no merit in this writ petition and the same is accordingly dismissed. However, the petitioner is at liberty to approach the Debts Recovery Tribunal under Section 17 of the SARFAESI Act against the action of the respondent Bank, if so advised.

JUDGE

CHIEF JUSTICE

Comparing Assistant