IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO. 360 OF 2017
IN
NOTICE OF MOTION NO.1208 OF 2017
IN
SUIT NO.62 OF 2017

Axis Bank Limited ...Appellant
Versus
Madhav Prasad Aggarwal & Ors. ...Respondents

WITH
APPEAL NO.361 OF 2017
IN
NOTICE OF MOTION NO.1207 OF 2017
IN
SUIT NO.60 OF 2017

Axis Bank Ltd. ...Appellant
Versus
Manisha Saraf & Anr.. ...Respondents

WITH
APPEAL NO. 362 OF 2017
IN
NOTICE OF MOTION NO.1206 OF 2017
IN
SUIT NO.8 OF 2017

Axis Bank Ltd. ...Appellant
Versus
Padma Ashok Bhatt & Ors. ...Respondents

WITH

COMMERCIAL APPEAL NO. 171 OF 2017
IN
COMM.NOTICE OF MOTION NO.323 OF 2017
IN
COMM.SUIT NO.192 OF 2017

Axis Bank Ltd. ...Appellant

Versus

Om Project Consultants & Engineers Ltd. & Anr. ...Respondents

WITH
COMMERCIAL APPEAL NO. 172 OF 2017
IN
COMM.NOTICE OF MOTION NO.377 OF 2017
IN
COMM.SUIT NO.450 OF 2017

Axis Bank Ltd. ...Appellant

Versus

Niraj Dilip Jiwrajka & Ors. ...Respondents

Mr.Rafique Dada, Senior Advocate with Mr.Karl Tamboly, Mr.Bhalchandra Palav, Ms.Shreya Jha i/b. Cyril Amarchand Mangaldas, for Appellants in Com.Ap.171/17.

Ms.Sapana Rachure i/b. T.N.Tripathi for Official Liquidator in Com.Ap.171/17 and ComAp.172/17, APP 361/17, 362/17..

Mr.Navroj Seervai, Senior Advocate with Ms.Ankita Singhania, Mr.Adhish Sharma i/b. Khaitan & Khaitan, for Respondent No.1 in Com.AP 171/17 and for Respondent no.3 in Com.AP 172/17.

Mr.Karl Tamboly with Mr.Bhalchandra Palav i/b. Cyril Amarchand Mangaldas, for the Appellants in ComAP 172/17.

Mr.Alok Mishra i/b. T.N.Tripathi & Co., for the Official Liquidator.

Ms.Naira Jejeebhoy with Danesh Mehta i/b. M.Mulla Associates, for Respondent No.1 in COMAP 172/17.

Mr.Sarosh Bharucha with Ms.Naira Jejeebhoy, Ms.Khusboo Malvia, Ms.Siddha Pamecha I/b. M.Mulla Associates, for Respondent in Comap 172/17.

Mr.R.A.Dada, Senior Advocate in APP 360/17, Mr.Prasad Dhakephalkar, Senior Advocate in APP 361/17, Mr.Virag Tulzapurkar, Senior Advocate in APP 362/17 with Mr.Karl Tamboly, Mr.Bhalchandra Palav, Ms.Shreya Jha I/b. Cyril Amarchand Mangaldas, for the Appellants.

Mr.Navroz Seervai, Senior Advocate with Ms.Ankita Singhania, Mr.Adhish Sharma i/b. Khaitan and Khaitan, for Respondent no.14 in APP 362/17 @ Darshana Bargode in APP 171/18 for Respondent no.1, in Appeal no.172/17 for Respondent no.3.

Mr.S.N.Vaishnav with Ms.Nupur J.Mukherjee, Mr.Kunal S.Vaishnav, Ms.Kirtika Kothari i/b. N.N.Vaishnav & Co., for Respondent No.1 in App 361 and 362 of 2017 and for Respondent nos.1 and 2 in APP 360 of 2017.

CORAM : NARESH H. PATIL ACTING C.J. & G.S. KULKARNI, JJ.

Reserved on : 24th July, 2018

Pronounced on : 26th October, 2018

Judgment (Per G.S. Kulkarni, J.):

1. The point which falls for consideration in this batch of appeals is as to whether the plaints against the appellant/defendant-Axis Bank Limited (for short '**the Bank**') are required to be rejected under the provisions of Order 7 Rule 11(d) of the Code of Civil Procedure, in view of the bar created by section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, " **Securitisation Act**").

2. These appeals arise from a common order passed by the learned Single Judge on five Notice of Motions which were filed by the bank in the five Civil Suits in question, invoking the provisions of Order VII Rule 11(d), seeking rejection of the plaint qua the Bank. By the

impugned order, the Notice of Motions are rejected by the learned Single Judge.

3. The contesting respondents in these appeals are the original plaintiffs (referred as "**plaintiffs**"). The other respondents are the developers M/s.Orbit Corporation Ltd. (for short, "**Orbit**").

4. Succinctly put, the material facts giving rise to the present appeal are as under :-

The plaintiffs in these five suits have a common cause and interest. The plaintiffs case as set out in the plaint is that they desired purchasing of luxurious flats in a project known as 'Orbit Heaven' (for short "**the project**") which was being developed by Orbit at Nepean Sea Road in Mumbai. The case of the plaintiffs is that they have parted with huge amounts of money as paid to Orbit for purchase of these flats. The amounts are substantial ranging in several crores. Notwithstanding the fact that the plaintiffs merely have allotment letters issued by Orbit and in two cases a Memorandum of Understanding (MOU), and although none of the plaintiffs have a registered agreement/document for purchase of the flats, the plaintiffs say that they have valuable rights on the project property. It is not necessary to delve into the details of payment made by the plaintiffs from time to time to Orbit, suffice it to

state that the payment of the amounts is not disputed by Orbit.

5. The facts in each of the plaints are quite similar. The plaintiffs' prayers as made in the plaints, are primarily against Orbit namely the plaintiff's *interalia* seeking specific performance of the alleged agreements entered with them by Orbit for sale of the suit flats.

6. In the year 2009 the bank had granted loan facilities to Orbit aggregating to a principal sum of Rupees 150 Crores. To secure the said lending Orbit by registered deed(s) of mortgage created security interest in favor of the bank in the said project (land and the building), in which flats were proposed to be sold to the plaintiffs.

7. The case of the bank is that in or around January, 2016, Orbit committed defaults in re-payment of the amounts advanced by the bank. Despite repeated reminders, Orbit failed and neglected to repay the interest and principal amount due under the credit facilities. A notice dated 3 August 2016 was addressed to Orbit, its guarantors and its mortgagors, recalling the credit facilities. Guarantees were also invoked and the guarantors were called upon to pay entire outstanding amounts due under the credit facilities. Despite these efforts, Orbit and its guarantors/ mortgagors failed and neglected to pay the dues.

Consequently, the bank resorted to enforce the security interest created over the secured assets which included the project, by issuing a notice dated 19 August 2016 under Section 13(2) of the Securitisation Act to Orbit, seeking recovery of an amount of Rs.161,03,92,020.26 as on 12 August 2016 together with interest. The bank also issued public notices dated 10 August 2016 and 13 September 2016 *interalia* cautioning the public that all charges/claims on the project shall be subject to the rights of the bank as mortgagee. Some claims were received from plaintiffs, however, the bank by its letter dated 4 October 2016 denied the said claims. As there was non-compliance of the notice issued by the bank under Section 13(2) of Securitisation Act, by Orbit, its guarantors and mortgagors, on 7 November 2016, the bank took symbolic possession of the project, namely the semi-constructed Orbit Haven Project. Thereafter an application was filed by the bank under Section 14 of the Securitisation Act, before the learned Metropolitan Magistrate at Mumbai, who passed an order dated 8 March 2017 allowing the bank to take forcible possession of the suit project. Also an original application No.1453 of 2016 was filed by the bank before the Debt Recovery Tribunal at Mumbai, for recovery of the said dues of Rs.165,96,91,559.26 payable by Orbit. In the said proceeding, by an order dated 29 November 2016 interim reliefs were granted against Orbit, its guarantors and its mortgagors.

8. The plaintiffs in or about December 2016 to January 2017 claiming to be allottees of the flats/ suit premises in the said project, filed the suits in question (except Commercial Suit No.450 of 2017 which was filed on 13-6-2017), *interalia* seeking a declaration that there is a valid and subsisting agreement executed between plaintiff and Orbit in respect of the suit premises and praying for specific performance of the agreement between the plaintiffs and Orbit and praying for handing over vacant possession of the suit premises to the plaintiff. An alternative prayer for damages against Orbit is also made. We shall make a reference to the prayers as made in each of the plaints in the later part of this judgment. Though there was no privity of contract between the plaintiffs and the bank, however it appears that as the project was mortgaged to the bank and as the plaints in these suits disclose that measures under section 13(4) Securitisation Act, were adopted by the bank, the bank stood impleaded as a defendant in these suits.

9. On the above backdrop, the bank being aggrieved by its impleadment as a defendant in the suit(s), moved notice of motions in question, in each of these suits, invoking the provision of Order VII Rule 11(d) of the CPC, interalia contending that the suit(s) as instituted against the bank were barred under the provisions of Section 34 of the

Securitisation Act and thus qua the bank the plaint was liable to be rejected.

10. The contention of the bank was of a statutory bar created by Section 34 of the Securitisation Act, for the Civil Court to entertain the suits against the bank. This principally for the reason that the project was a 'secured asset' within the meaning of section 2(1) (zc) of the Securitisation Act, in view of the registered equitable mortgage created in its favour, which would enable the bank to realize the dues/ debt payable to it by Orbit. The bank contended that the advances as made to Orbit were secured by a 'Registered Supplemental Indenture of Mortgage' dated 17th September 2013, for the over draft facility of Rs.30 Crores and by another Supplemental Indenture of Mortgage dated 17th June 2015 for a over draft facility of Rs.17 Crores.

11. In the notice of motions filed by the bank under Order 7 Rule 11(d) of the Code of Civil Procedure 1908, the bank contends that a reading of the plaint demonstrates that the cause of action to implead the bank is principally on the project being mortgaged to the bank and the bank taking measures under Section 13(4) and 14 of the Securitisation Act, which according to the bank are being indirectly questioned by the plaintiffs in the suits, despite a specific remedy being available to the plaintiffs under Section 17 of the Securitisation Act

namely of a right to file an appeal before the Debts Recovery Tribunal (for short DRT). It is contended that such a right is conferred on *any person* who is aggrieved by any of the measures referred to in Sub-Section (4) of Section 13, taken by a secured creditor, by making an application to the DRT. The bank contended that it would be the jurisdiction of the DRT to determine as to whether any of the measures referred to in Sub-Section (4) of Section 13, taken by the secured creditor for enforcement of securities are validly taken. The bank contended that Section 34 of the Securitisation Act barred the jurisdiction of Civil Court to entertain a suit and proceedings in respect of any matter which the DRT or the Appellate Tribunal were empowered to determine under the Securitisation Act. It was contended that also Section 35 of the Securitisation Act provided for an overriding effect of the Securitisation Act over other laws. The bank accordingly contended that on a reading of the plaints, it was clear that the suits were not maintainable against the bank, even considering the alleged case of the plaintiffs on the so called allegations of fraud. Notice of Motions as filed by the bank and as decided by the learned Single Judge, by the impugned order, prayed for rejection of the plaint qua the bank.

12. The plaintiffs resisted the bank's notice of motions *interalia* contending that the plaintiffs having parted substantial amounts as paid

to Orbit for purchase of the flats in the said project, valuable rights in the project were created in favour of the plaintiffs. The bank could not have advanced loan to Orbit by receiving equitable mortgage of the project property. It was contended that due diligence was not undertaken by the bank before extending the credit facilities. It was contended that once the rights were created by Orbit in favour of the plaintiffs, the project assets were not available to be mortgaged to the bank. The plaintiffs contended that the plaintiffs charge on the suit property was a prior charge to that of the bank's charge, which was required to be legally recognized. It was contended that there was collusion between the officers of the bank and Orbit in creating mortgage in respect of the project assets and thus the mortgage was bad and illegal and not binding on the plaintiffs. It was contended that it could not be overlooked that substantial amounts were paid by the plaintiff to Orbit and consequently the bank cannot deal with the suit property without due consideration to the rights created in favour of the plaintiffs. It was thus contended that the plaintiffs were entitled to a decree of specific performance of the agreement entered by them with Orbit and in these circumstances the bank was a necessary party to the suit. It was contended that the cause of action for the plaintiffs to file the suit was not the measures taken by the Axis Bank under Section 13 of the Securitisation Act, but the plaintiffs entitlement to have specific

performance of the agreement against Orbit and for which the bank was a necessary party, as it would be required to confirm the transfer of the said flats in favour of the plaintiffs. It was also contended that the plaintiffs were protected under the provisions of The Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short "**the MOFA"**). Referring to the provisions of Section 4, 4A, 5 and 9 of the MOFA Act, it was contended that by virtue of these provisions protection is granted to the purchasers of the flats being constructed for the plaintiffs. In view of these provisions the bank cannot claim any higher rights than that of the flat purchasers.

13. Considering the rival pleas the learned Single Judge by the impugned order rejected the bank's notice of motions *interalia* holding that there were sufficient averments in the plaint of collusion between the officers of bank and Orbit, which supports a case of fraud as pleaded by the plaintiff and falling within the exception as culled out in the decision of the Supreme Court in Maradia Chemicals warranting trial. It is held that under the provisions of MOFA the bank was under an obligation to undertake due deligence and the issues as falling under MOFA cannot fall with the jurisdiction of the DRT.

Submissions on behalf of the Bank/Appellants

14. Mr.Rafiq A.Dada, Mr.Tulzapurkar, Mr.Dhakephalkar, learned Senior Counsel, and Mr.Tamboli have represented the bank in these appeals.

Submissions in Appeal no.360 of 2017

15. Mr.Rafiq Dada, learned Senior Counsel appearing for the Bank in Appeal no.360 of 2017 contended that the plaint in its entirety is liable to be rejected against the bank, in view of the specific bar created by Section 34 of Securitisation Act, and a remedy being available to an aggrieved person/ plaintiffs, against the bank under Section 17 of the Securitisation Act. Referring to the decisions of the Supreme Court in **Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors**.[1] and **Jagdish Singh versus Heeralal & Ors.**[2] it is submitted that law in regard to the jurisdiction of the DRT and the bar to the jurisdiction of the Civil Court as created by Section 34 of the Securitization Act is well settled in these decisions. It is submitted that in view of the mortgage of the project as created by Orbit in favour of the bank, the bank has superior rights, and if the plaintiffs contend that they have higher rights over the bank, then as a requirement of law, it was necessary for the plaintiffs to invoke the jurisdiction of the DRT under Section 17 of the Securitisation Act. It is then contended that the plaint is required to be read in its entirety as

1 (2004)4 SCC 311

2 (2014) 1 SCC 479

framed against the bank and on such reading of the plaint it is clearly revealed that the suit directly concerns the security rights of the bank qua the project and the measures which are adopted by the bank under the Securitization Act. It is submitted that entertaining such a suit against the bank, would be defeating the legislative intent of a remedy which being provided by Section 17 of the Securitisation Act. It is submitted that by clever drafting of the plaint the bar as created under section 34 of the Securitization Act cannot be defeated. It is submitted that the plaintiff's contention that a case of fraud has been alleged in the plaint against the bank is untenable as according to the bank, a plain reading of the averments relating to fraud as made in the plaint, can by no stretch of imagination and even remotely can be accepted and understood as a case of fraud played by the bank, as per the requirement of the provisions of Order VI Rule 4 of the CPC. It is submitted that also there is no plea of fraud with regard to the creating of security interest in banks favour. It is submitted that the bare plea, that bank is hand-in-glove with Orbit, is not sufficient to maintain the suit against the Bank. On merits it is contended that an unregistered MOU as entered by Orbit with the plaintiffs to purchase the flat would not create any right of the plaintiff in the project so as to affect the security interest of the bank. In any case, even going by the MOU once the plaintiffs have concurred in the MOU and acknowledged the

mortgage as made in favour of the Axis Bank, it cannot be said that any fraud is played by the bank, so as to carve out an exception for maintaining a civil suit on the **Mardia** principle and overcome the bar created by Section 34 of the Securitisation Act. Referring to the prayers in the plaint, it is pointed out that there is no prayer in the alternative against the bank and the averments which are made against the bank in the plaint are not in aid of any relief. It is submitted that there is no claim for damages which is made against the bank and the only prayer for damages is against Orbit. It is submitted that in any case the legality of the mortgage in favour of the Axis bank cannot be decided by the civil court and it is only the Debt Recovery Tribunal which can decide such issue and this position is accepted by the learned Single Judge as observed in paragraph 13 of the impugned order. It is submitted that the adjudication on priority of the rights of the parties in the mortgaged property, can only be subject matter of adjudication before the DRT and if the plaintiffs succeed to establish that their rights are prior to that of the bank, only in that case the sale can be confirmed in favour of the plaintiffs. It is next submitted that the adjudicating machinery created under the Securitisation Act is the only remedy provided by law for determination of all the issues qua the rights of the bank in regard to the advances made. In the statutory scheme the bank cannot be dragged into a prolonged litigation before the civil court, frustrating its rights on

the secured assets thereby causing a serious prejudice to the financial interest of the bank and the security rights created in the said assets in favour of the bank by the borrowers under registered. It is for these reasons that the provisions of Section 17 of Securitisation Act confers a right *"in any person"* to approach the DRT. Even the argument of due diligence not being complied by the bank, is misconceived, as there is no claim for damages against the bank. It is submitted that as there is no registered agreement entered into between the plaintiffs and Orbit as per the requirement of Sections 4 and 9 of the MOFA. Thus, MOFA was clearly not applicable. The protection under Section 9 of the MOFA would be available only when there is an agreement between the parties and the agreement is registered. It is submitted that in the present case the MOU was executed on a stamp paper of Rs.100/- and the said agreement is neither registered nor stamp duty has been paid. It is next submitted that as clear from the recitals of the MOU, the plaintiffs were aware that the project is mortgaged by Orbit in favour of the Bank, however, despite such awareness, no steps whatsoever were taken by the plaintiff to register the flat purchase agreement between the plaintiff and Orbit. The validity of the mortgage is also not questioned in the plaint, and thus, the plain consequence of Sections 4 and 9 of the MOFA cannot be avoided, in the absence of a registered agreement. Section 9 of the MOFA cannot be pressed into service in vacuum and without any

sequitur. In support of his submission, Mr.Dada has placed reliance on the decision of Madras High Court in ***Arasa Kumar & Anr. Vs. Nallammal & Ors***.[3]*; (ii)* the decision of the Supreme Court in ***Hansa V. Gandhi Vs. Deep Shankar Roy & Ors.***[4]*; (iii)* the decision of the Division Bench of this Court in ***State Bank of India Vs. Jigishaben B.Sanghavi & Ors.***[5]*; (iv)* the decision of the Supreme Court in the case ***Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors***.(supra)

Submissions in Appeal No.362 of 2017

16 Mr.Tulzapurkar, learned Senior Counsel for the bank in Appeal No.362 of 2017 has made the following submissions:

(I) The plaint is clearly barred by the provisions of section 34 of the Securitisation Act. The plaintiffs have no case to sustain the plaint against the bank. It is difficult to believe that the plaintiffs are bonafide flat purchasers as for years together the plaintiffs never demanded an agreement from Orbit though extraordinary/substantial money of about 9 crores is claimed to have been parted for the purported purchase of the flats. Referring to the amended plaint in Suit No. 8 of 2017 by insertion of Rider No.4 (Page 115 of the paper-book), it is submitted that the bank is casually roped in as a defendant.

(II) On the issue of fraud our attention is drawn to the averments

3 2004(4)CTC 261
4 (2013)12 SCC 776
5 2011(3) BCR 187

as contained in paragraphs 24(a) to (c) at page 105 of the paper-book which are the averments on amendment. It is submitted that the only averment of a fraud is to be found in paragraph 24(b) and there is no other averment. Paragraph 24(b) reads thus:-

> "24(b) The Defendant No.15 further knew that the land and the building is required to be conveyed free of encumbrances to the body of flat purchasers. Thus the mortgage and the loan obviously appears to be fraudulently and in collusion and in connivance between Defendant No.1 and Defendant No.15."

(III) It is submitted that the bank at all times has acted fairly , the mortgage as created in favour of the bank at material times was disclosed, as clear from the contents of the MOU/ agreement entered by Orbit with some other purchasers. Reference in this regard is made to an agreement dated 31 July 2014 entered by Orbit with Mr. Bhaderesh Mehta and Mrs. Heena Mehta, whereas in the case of the present plaintiff, there was no agreement sought by the plaintiffs from the builder much less any agreement as per the requirement of law/MOFA, requiring registration and payment of stamp duty. It is submitted that there is not a single letter from the plaintiff demanding an agreement from Orbit, which according to the learned Senior Counsel is very peculiar and would speak volumes in regard to the genuineness of the purported flat purchase transaction between the plaintiffs and the Orbit. It is submitted that a plain reading of the plaint would, in fact, creates an impression that the amount which was paid by the plaintiffs to Orbit was not in respect of the transaction for purchase of flats but was a

money lending transaction. It is submitted that the suit was instituted on 17 December 2016. It is submitted that the first payment is stated to be made by the plaintiffs in the year 2009 and thus for a period of eight years the plaintiff did not ask for an agreement from Orbit. By referring to page 129 being an annexure to the plaint, by which the plaintiff shows the details of the payments made of an amount of Rs.1,76,00,000/- the dates being 16 April 2009, 28 April 2009, 16 May 2009 and 16 May 2009, it is submitted that no receipts were issued by Orbit or taken by the plaintiff immediately. This clearly shows that this is not a conduct of a bonafide purchaser. No bonafide purchaser would wait for a receipt to be given at the sweet will of a developer. It is submitted that the allotment letter also appeared to be anti-dated and the same was procured later, this for the reason that payments did not tally with the allotment letter. It is submitted that though the allotment letter records that an agreement would be entered within six months, however, no such agreement was executed. These were clear traits of a financial transaction of loan being advanced to Orbit by the plaintiff and the deal was far from a bonafide transaction for purchase of flat. It is further submitted considered from this background this is a clear case of clever drafting of the plaint whereby a plaint which otherwise is barred by law against the bank is being impressed to be valid and that too by subsequently incorporating amendments by making averments of fraud

against the bank. A reference in this regard is made to prayer clause (a) as amended. Learned senior counsel referring to the provisions of the MOFA, contends that in the facts of the case, the provisions of MOFA are wholly inapplicable to the bank and there is no obligation on the bank towards the plaintiffs under any of the provisions of MOFA. It is thus submitted that prayer clause (a) of the plaint which *interalia* prays for a decree that Orbit and the bank shall jointly and severally be ordered to comply with all the obligations under the MOFA is *per se* not maintainable. In this regard our attention is also drawn to Section 4 of the MOFA which while giving an overriding effect over the provisions of any other law *interalia* postulates that a promoter who intends to construct or constructs a block or building of flats, shall, before he accepts any sum of money as advance payment or deposit, enter into a written agreement for sale with each of such persons who are to take or have taken, such flats, the agreement to be registered under the Registration Act,1908 and to be in the prescribed form. It is contended that when the mandate of the provision requires that a written agreement should be entered into and registered on receiving not more than 20% of the sale price of the consideration, and when in the present case no such agreement being entered by Orbit and more particularly after eight long years the suit being filed, takes the matter beyond a pale of doubt, that it is not an agreement for purchase of a

flat. The provisions of MOFA thus can never be invoked by the plaintiff is the contention on behalf of the bank. Further referring to Section 9 of the MOFA it is contended that this provision is specific which provides that no promoter after he executes an agreement to sell any flat, "*mortgage or create a charge on the flat or the land*", without the previous consent of the persons who take or agree to take the flats, and if any such mortgage or charge is made or created without such previous consent '*after the agreement referred to in Section 4 is registered*', it shall not affect the right and interest of such persons. It is thus contended that in the absence of a registered agreement between Orbit and the plaintiffs, the plaintiffs cannot claim a protection of section 9 of the MOFA. It is submitted that bank has meticulously followed the law, there is no illegality which can be found in the loan granted by the bank to Orbit and the measures as available to the bank under the Securitisation Act being resorted on default in repayment of the advances by Orbit. It is contended that in the fact situation, the rights of the plaintiff in any case cannot be subservient to the rights of the bank as the bank has followed the law by advancing the loan under a valid mortgage agreement entered with Orbit. It is submitted that in any case the plaintiffs would not succeed in getting any relief unless the mortgage as entered by the bank with Orbit is declared to be unenforceable, for which the only forum to assail any rights preventing

the bank from resorting to the measures under Securitisation Act was to approach the DRT under Section 17 of the Securitisation Act. The DRT is not precluded from considering the arguments of the plaintiffs under MOFA, while considering whether the measures as adopted by the bank under Section 13 of the Securitisation Act, could be resorted or not. A reference is made to Section 5(b), (c), 5A and Section 6 of the Banking Regulation Act,1949 to submit that these provisions are clearly indicative of the kind of business the bank can undertake. It is submitted that as regards the maintainability of the appeal, the decision in ***Wander Ltd. And Anr. vs Antox India P. Ltd***.[6] as referred on behalf of the plaintiffs, is not applicable in the facts of the present case as there can be no question, of a possible or a plausible view of the court, in passing an order on an application under Order 7 Rule 11 (d) of the CPC. It is then contended that ouster of jurisdiction has to be strictly construed. It is next contended that the contention of the plaintiffs that Section 55(6)(b) of the Transfer of Property Act is applicable cannot be accepted as the said provision is only applicable for refund of the money. It is submitted that there is no money claim made against the bank. In support of his submissions Mr. Tulzapurkar learned senior counsel for the bank has placed reliance on the following decisions:- (i) ***Punjab National Bank Vs. J.Samsath Beevi***[7]***; (ii) T.Arivandandam Vs.***

61990 (supp) SCC 727

7 2010(3) CTC 310

T.V.Satyapal[8]*; (iii)* ***Begum Sabiha Sultan Vs. Nawab Mohd. Mansur Ali Khan***[9]*; (iv)* ***Ranganayakamma & Anr. Vs. K.S.Prakash(Dead) By LRS & ors.***[10]*; (v)****Authorised Officer, Kotak Mahindra Bank Ltd, Pune. Vs. M/s.Brahmo ConstructionPvt.Ltd., Pune***[11]*; (vi)* ***K.S.Dhondy Vs. Her Majesty The Queen of Netherlands***[12]*; (vii)* ***Church of Christ Charitable Trust & Educational Charitable Society vs. Ponniamman Educational Trust***[13]*; (viii)* ***Hiralal Parbhudas Vs. Ganesh Trading Co. & Ors.***[14]*; (ix)* ***National Chemicals and Colour Co. & Ors. VS. Reckitt and Colman of India Ltd. & Anr.***[15]

Submissions in Appeal No.361 of 2017

17. Mr.Dhakephalkar, learned Senior Counsel appearing for the bank has made the following submissions:-

(I) It is submitted that Axis Bank is not a party to the agreement entered between the plaintiffs and Orbit and only by virtue of clever drafting a case is sought to be made out against the bank. Our attention is drawn to prayer clause in the plaint (in Commercial Suit No.60 of 2017). It is submitted that the real prayer is to prevent the bank from proceeding under the Securitisation Act. It is submitted that such a relief against the bank only can be sought under Section 17 of the

8 (1977)4 SCC 467
9 (2007)4 SCC 343
10 (2008)15 SCC 673
11 2015(3) ABR 783
12 2013(4) Mh.LJ 64
13 (2012)8 SCC 706
14 AIR 1984 Bom 218
15 AIR 1991 Bom 76

Securitisation Act by approaching DRT. It is submitted that the only exception available to the plaintiff to bring a civil suit against the bank is only when a clear case of fraud is made out against the bank as per the **Mardia** principle. Our attention is drawn to paragraphs 23 and 28 to contend that the averments as contained in these paragraphs is the only case of fraud which is pleaded against the bank. It is submitted that a plain reading of these averments can never be accepted to be a case of a fraud as played by the bank in advancing loan. The plaintiffs by merely saying that no public notice was given by the bank before advancing of loan facilities, cannot amount to a fraud by the bank. Our attention is drawn to the prayer clause in the plaint in Suit no.60 of 2017 and more particularly to prayer clause (c)(iii) which is a relief that the plaintiffs have the first charge in respect of the suit property, it is submitted that this only prayer, as made against the bank, clearly falls within the jurisdiction of DRT under Section 17 of Securitisation Act.

Submissions in Appeal Nos.171 of 2017 and 172 of 2017

18. Mr.Tamboli, learned Counsel for the appellant/Axis Bank in Appeal Nos.171 of 2017 and 172 of 2017 would submit that the case of the plaintiffs against the bank is completely on apprehension and presumption. It is submitted that the due diligence cannot be measured in the manner suggested by the plaintiffs. It is submitted that the averments in regard to the fraud as made in the plaint is only a piece of

clever drafting to bring the suit within the jurisdiction of this Court, when the suit against the bank is barred by Section 34 of the Securitisation Act. It is submitted that there is no obligation in any law for the bank to have due diligence. In support of his submissions, reliance is placed on the decisions in (i) ***Chandrakant Kantilal Jhaveri Vs. Madhuriben Gautambhai***[16] *and (ii)* ***Sopan Sukhdeo Sable & ors. Vs. Assistant Charity Commissioner & ors.***[17]

Submissions on behalf of the Plaintiff

19. On behalf of the plaintiff, we have heard Mr. Navroj Seervai, learned senior counsel, Mr.S.N.Vaishnav and Mr.Sarosh Bharucha, who have opposed these appeals in supporting the impugned order.

(i) It is submitted that the impugned order which is passed on an application under Order 7 Rule (11) (d) of the Code of Civil Procedure 1908 is a discretionary order and the learned single Judge has appropriately exercised the discretion in rejecting notices of motions, filed by the bank. It is submitted that the appellate Court would interfere in the impugned order only, when it would come to a conclusion that the view taken by the learned single Judge is not a possible, probable or a plausible view even, if it could not be an absolutely correct view. The view taken by the learned single Judge is a probable and a plausible view and thus the appeals, need not be

16 AIR 2011 Guj 27
17 (2004)3 SCC 137

entertained. To support this proposition reliance is place on the decision of the Supreme Court in the case of **Wander Ltd & anr vs Antox India P.Ltd.** (supra). On merits, it is submitted that it was not necessary for the plaintiffs to have a registered agreement as contemplated by the provisions of MOFA Act. It is enough that there was some agreement between the parties and that money was paid as a consideration for purchase of flats. The plaintiffs having paid large amounts to Orbit Corporation for purchase of flats in respect of which allotment letters were issued and/or MOU executed, the plaintiff would nonetheless have appropriate protection under the provisions of MOFA Act. In this regard reliance is placed on section 4A of the MOFA and rule 10 of the MOFA rules. It is submitted that all these issues are required to be gone into at the trial of the suit and for adjudication of these issues bank is a necessary party. It is contended that DRT is not a civil court and it cannot entertain proceedings for a relief of specific performance of the agreement against Orbit Corporation, who has entered into a collusive mortgage with the bank, without undertaking any due diligence. The bank is thus a necessary party to the suit. Thus, the subject matter of the suit cannot be decided by D.R.T. under section 17 of the Securitisation Act. It is submitted that fraud is only one of the aspects and there are several other aspects which would be relevant when an entitlement of a party to file a suit which is subject matter of consideration.

(ii) Referring to the plaint in Commercial Suit No.192 of 2017 it is submitted that there are sufficient averments of fraud and/or collusion made in the plaint against the bank and thus, applying the principles of law as laid down in the decision of the Supreme Court in **Mardia Chemicals vs Union of India** *(supra),* the plaint against the bank is maintainable and not barred by law. Referring to the provisions of section 13 (4) (b) of the Securitisation Act it is submitted that it would be an obligation of the bank to complete construction of the project and recognize the rights of the plaintiff. It is submitted that once the flats in the project were sold to the plaintiff by issuance of allotment letters, the said project could not have been mortgaged to the bank by Orbit. The bank also could not have accepted such mortgage where third party rights were already created. The bank ought to have taken inspection of the records and accounts of Orbit which would have clearly revealed that flats were sold to the plaintiff. A reference in this regard is made to Rule 10 of the MOFA Rules. Thus, with all knowledge about the sale of the flats to the plaintiffs, a collusive mortgage was created in favour of the bank by Orbit Corporation. It is submitted that section 9 of MOFA Act also recognizes the rights of the flat purchasers. Attention of the Court is also drawn to section 55 (6) (b) of the Transfer of Property Act, 1882 to submit that the plaintiffs being the flat purchasers would have a prior charge and hence there was a

requirement of due diligence, before loan was advanced by the bank to Orbit Corporation. It is submitted that there is no material to accept the submission as advanced on behalf of the bank that the plaintiffs are mere investors and not genuine flat purchasers. Referring to section 56 (b) of the Transfer of Property Act,1882, section 8 of the MOFA Act, it is next submitted that the plaintiffs could have approached DRT under section 17 of the Securitisation Act only if possession of the flats was to be with the plaintiffs and not otherwise, as section 34 of the Securitisation Act would recognize only possessory rights. It is submitted that contribution of the plaintiff and other flat purchasers towards construction of the building was about Rs.83 crores of rupees and thus, there was not only a legitimate expectation of Orbit completing the project but also of putting the plaintiff in possession of the respective flats which were being sold to the plaintiff. Considering all these circumstances, the remedy of approaching the DRT was not an appropriate remedy, and suit as filed against the bank was maintainable. It is submitted that incidental reliefs can also be granted by a Civil Court and thus the reliefs which are prayed are incidental to the main reliefs. The bank would be a necessary party as and when a conveyance is required to be executed by Orbit in case a decree for specific performance was to be granted. It is thus, necessary that the bank is a necessary party to the suit.

20. In support of the submissions Mr. Seervai has placed reliance on the decisions in (i) **Nahar Industrial Enterprises Ltd vs Hongkong and Sanghai Banking Corporation.**[18]; (ii) **Indian Bank vs ABS Marine Products (P) Ltd.**[19]; (iii) **Arasa Kumar & anr vs Nallammal & ors.**[20]; (iv) **Jagdish Singh vs Heeralal & ors.** (supra); (v) **Saleem Bhai & ors vs State of Maharashtra**[21]; (vi) **Chhotanben & anr vs Kiritbhai Jalkrushnabhai**[22]; (vii) **Bhau Ram vs Janak Singh & ors.**[23]; (viii) **Gopal Srinivasan vs National Spot Exchange.**[24]; (ix) **National Spot Exchange vs P.D.Agro**[25]; (x) **State Bank of India vs Jigishaben Sanghavi**[26]; (xi) **Wander Ltd & anr vs Antox India P.Ltd.**[27]; (xii) **Avitel Post Studioz Ltd vs HSBC PI holdings**[28];

21. In support of the submissions Mr.Vaishnava, learned Counsel for the plaintiffs /respondents has placed reliance on the decisions in (i) **Master Circular by Reserve Bank of India on Management of Advances. Relevant para 8.2**; (ii) **Abdul Jabbar Ibrahim vs Serkop Builders & ors**[29] (Sec. 5 of MOFA).(Relevant para 9) (iii) **G.Swaminathan vs Shivram Co-op Hsg.Soc & ors** (Sec. 5 of MOFA.

18(2009) 8 SCC 646
19(2006) 5 SCC 72
20II (2005) BC 127
21 2002 (9) SCALE
22 2018 SCC online SC 352
23(2012) 8 SCC 701
24 2016 (4) Bom C.R.492
25 2015 SCC online Bom 6412
262011 (3) Bom.C.R.187
27 1990 (supp) SCC 727
28 2014 SCC online 929
29 1985 Mh.L.J. 163

(Relevant para 10)[30]; (iv) **Delhi Development Authority vs Skipper Construction Co.P.Ltd & ors.** (Sec. 55 (6) (b) of T.P.Act.Relevant para 29.)[31]; (iv) **Popat and Kotecha Property vs SBI Staff Association**[32] (O.7 R.11 (d). Relevant 14 to 22 & 25); (v) **Mayar (HK) Ltd & ors vs Owners & parties Vessel M.V.Fortune Express & ors.**[33] (Relevant para 12), (vi) **Kamala & ors vs K.T.Eshwara & ors.**[34] (O.7 R. 11 (d) Relevant para 21), (vii) **C.Natrajan vs Ashimbai & anr**[35], (viii) **Roop Lal Sathi vs Nachhattar Singh Gill**[36] (O.7 R.11 (d) Only a part of plaint cannot be rejected. Relevant para 20), (ix) **Cauvery Coffee Traders, Mangalore vs Hornor Resources (International) Co.Ltd.**[37] (Estoppel. Relevant para 33 & 34), (x) **Ramesh B.Desai & ors vs Bipin Vadilal Mehta & ors.**[38] (O.7 R.11 (d)and fraud.Para 15 on Order 7 R.11.Para 22 on fraud 8 to 13), (xi) **Harshal Developers Pvt.Ltd Pune & anr vs Manohar Gopal Bavdekar & anr**[39] **(Sec.4A over rides section 4 of MOFA. Para 8 to 13.)**

22. In support of the submissions Mr.Sarosh Bharucha, learned counsel for the respondents, has placed reliance on the decisions in

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30 1983 (2) Bom CR 548
31(2000) 10 SCC 130
32(2005) 7 SCC 510
33(2006) 3 SCC 100
34(2008) 12 SCC 661
35(2007) 14 SCC 183
36(1982) 3 SCC 487
37(2011)10 SCC 420
38(2006) 5 SCC 638
39 2013 (1) Mh.L.J. 855

Dwarka Prasad Singh & ors vs. Harikant Prasad Singh[40], **Rajanala Kusuma Kumari vs The State of Telangana**[41], **Ramniklal Tulsidas Kotak vs Varsha Builders**[42], **Kasiser Oils Pvt. Ltd. vs Allahabad Bank**[43], **Preamble.Maha Ownership Flats Act, 1963, Vishal N.Kalsaria vs Bank of India**[44], Sejal Glass Ltd vs Navilan Merchants Pvt. Ltd.[45]

Discussion and Conclusion

23. We have heard learned counsel for the parties. We have perused the record of these appeals and the impugned order.

24. We first deal with the submission as urged on behalf of the plaintiffs that these appeals do not require interference as the impugned order passed by the learned single judge exercising jurisdiction under the Order 7 Rule 11 (d) is a discretionary order, and the view taken by the learned single judge being a plausible view, the appellate court in such a situation would not interfere, with the exercise of the discretion by the court, and substitute its discretion. We do not agree.

25. This submission as made on behalf of the plaintiffs that the impugned order is a discretionary order, cannot be accepted. This for the reason that Rule 11 of Order 7 of CPC does not confer a discretion

40. (1973) SCC 179
41. 2018 SCC online Hyd 33
42. 1993 Mh.L.J. 323
43. MANU/WB/0713/2017 (High Court of Calcutta)
44. (2016) 3 SCC 762
45. Civil Appeal No.10802 of 2017

on the court, moreover it creates an obligation on the Court to reject the plaint if the requirements as set out in the rule are satisfied. The provisions of Order 7 Rule 11 of CPC are mandatory. The opening words of Rule 11 are material which say that "The plaint **shall** be rejected in the following cases", this clearly indicates that it is an obligation on the Court to reject a plaint in the event the requirement of clauses (a) to (f) are satisfied. It also cannot be disputed that such an application would require adjudication. Thus, when there is an adjudication by the court in this context and if the requirements as provided in the different clauses in the rule are satisfied, then, there is no occasion for any discretion to be exercised by the Court and more so it is an obligation on the Court to reject the plaint. In making these observations, we are also supported by the following observations of the Supreme Court in ***Popat and Kotecha Property Vs. State Bank of India Staff Association***[46].

> "23. Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13." (emphasis supplied)

26. A Division Bench of Calcutta High Court in "***Allahabad Bank***

46 (2005)7 SCC 510

Vs. Shank's (Steel Fab Pvt.Ltd.& Ors.)"[47] held that the provision is mandatory and no discretion is left with the Court, as can be seen from the following observations in paragraph 10:-

> "10. Order VII Rule 11(d) authorizes a Court to reject a plaint, where the suit appears from the statements made in the plaint to be barred by any law. In order to invoke Order VII Rule 11(d) of the Code, the Court must restrict its scrutiny only to the averments made in the plaint and at that stage, it cannot take into consideration the defence of the defendant nor can it seek assistance of any evidence from the parties. If it appears from the averments made in the plaint itself that the Court cannot entertain the suit because of any bar created by law, the Court is left with no other alternative but to reject the plaint by taking recourse to Rule 11(d). In other words, at the time of invoking the jurisdiction under Order VII Rule 11(d) of the Code, the Court shall presume all statements made in the plaint to be true and even if on that basis, it appears that the suit is barred by any law for the time being in force, the plaint shall be rejected. The provision is mandatory and no discretion is left with the Court." (emphasis supplied)

27. In this context the submission as urged by the learned Senior Counsel for the bank, that discretion is distinct from adjudication and once there is an adjudication of such an application, there is no question of Court exercising discretion under Order 7 Rule 11 of CPC, relying on the observations of the Division Bench of this Court in the case "***Hiralal Parbhudas Vs. Ganesh Trading Company & Ors***."(supra), is well founded. The following observations of the Division bench in paragraph 21 of the decision would also support our conclusion:

> "21. It was finally urged by Mr. Kale that the discretion exercised by the Deputy Register under Section 56 of the Act in the respondents' favour should not be lightly disturbed and the appellate Court should therefore not disturb the judgment and order of the learned single Judge. We ask ourselves. Pray where at all arises the question of discretion. To start with, the Deputy Registrar did not exercise any discretion under Section 56 in rejecting the appellants' application for

47 AIR 2008 Cal 96

> rectification. It must be remembered that the concept of discretion is distinct from that of adjudication. When the Deputy Registrar rejected the appellants' application for rectification on the ground that the two marks are not deceptively similar, she did not use any discretion but adjudicated upon the rival contentions of the parities. It would be trite to say that exercise of discretion can arise in favour of a party when adjudication by the Registrar is against that party. In the present case, the Deputy Registrar's adjudication was in fact in favour of the respondents, with the result that there was no occasion for the Deputy Registrar to exercise any discretion. If the Deputy Registrar had held that the two marks were deceptively similar (which she did not) but that in exercise of her discretion she did not consider it necessary to pass an order for rectification, it could be said that the Deputy Registrar having exercised the discretion in favour of the respondents, interference with such discretion was not called for. Nothing of the kind can be said in the present case where in fact the Deputy Registrar has held that the two marks are not deceptively similar. In any event, this court having come to the conclusion that the two marks are deceptively similar, this cannot be a case for the exercise of discretion in favour of the respondents as their case is not founded on truth and also in view of the uncontroverted evidence of actual deception perpetrated and confusion caused."

28. Similar view was taken by the Division Bench in "***National Chemicals and Colour Co. & Ors. VS. Reckitt and Colman of India Ltd. & Anr.***"(supra)

29. The plaintiffs reliance on the decision in ***Wander Ltd. And Anr. vs Antox India P. Ltd.*** (supra) to support the contention that an order passed by the Civil Court on an application under Order 7 Rule 11(a) is a discretionary order, is not well founded. In *Wander Ltd.* (supra) the issue which fell for consideration of the Court arose from an injunction order which was reversed by the Division Bench of the High Court. It is in this context, the Court made the observations in paragraph 14 of the judgment, that if the discretion was exercised by the trial court

reasonably and in a judicial manner, the fact that the appellate court would have taken different view may not justify interference with the trial court's exercise of discretion. These observations in paragraph 14 were made by the court in the light of the principles referred by Mr.Justice Gajendragadkar in "***Printers (Mysore) Private Ltd. v. Pothan Joseph***"[48] which was also a case of the Court considering discretion to be exercised by the Court under Section 34 of the Arbitration Act,1940 and the power to stay legal proceeding when there was an arbitration agreement between the parties.

30. The decision of the Division Bench in "***Avitel Post Studioz Ltd. & Ors. Vs. HSBC PI Holdings (Mauritius) Ltd.***" *(supra)* which in the facts of the case referred to the principles as laid down in *Wander Ltd. And Anr. vs Antox India P. Ltd*. (supra), is also not applicable as this was also a case where the Court was considering an injunction order passed by the learned Single Judge, under Section 9 of the Arbitration and Conciliation Act,1996.

31. Reliance on behalf of the plaintiffs on the decision of the learned Single Judge of Rajasthan High Court in "***Sahina w/o. Aslam vs. Returning Officer (Panchayat) Gram Panchayat Jhiwana; District Election Officer Alwar, Jeenat***"[49] is also not well founded. This decision

48 AIR 1960 SC 1156
49 2017 LawSuit (Raj) 569

cannot be said to be an authority on the proposition that the orders which would be passed by the Court under Order 7 Rule 11 of CPC, are discretionary orders. In this case, the Court refused to entertain a second application under Order 7 Rule 11 of CPC, in view of rejection of the first application filed on the same ground. It is in that context the Court made an observation that the learned trial Judge has exercised discretion in rejecting the second application. There was no adjudication on the application. Further the decision of the learned Single Judge of this Court in "***Naginchand s/o. Devichand Buccha vs. Vinod s/o.Tarachand Gupta***" is of no assistance to the plaintiffs. In this case the learned trial Judge had held that the issue of limitation is mixed question of law and facts and therefore, rejected an application made under Order VII Rule 11(d). We thus find no merit in the contention as urged on behalf of the plaintiffs that the appeals do not warrant any interference as the impugned order passed the learned single judge is a discretionary order taking a possible view.

32. We now proceed to examine the merits. As the issue which falls for consideration arises under the provisions of Order 7 Rule 11 (d) of the Code of Civil Procedure, 1908 namely as to whether the plaint against the bank is barred by law, the same would be required to be determined by examining the plaint in its entirety. A holistic and meaningful reading of the plaint is what is called for and not a

superficial or a perfunctory reading in segment or in parts, so as to find out the real cause of action. There cannot be any compartmentalization, dissection, segregation and inversions of the language of various paragraphs in the plaint nor is it permissible to cull out a sentence or a passage and to read it out of the context in isolation. The pleading needs to be construed as it stands without addition or subtraction of words or change of its apparent grammatical sense. No other pleading can be taken into consideration. The law in this regard is well-settled. [See ***Sopan Sukhdeo Sable & ors vs Assistant Charity Commissioner & ors***. (supra)]. The real object of Order 7 Rule 11 of the Code is to keep out of Courts irresponsible law suits. [See ***Popat and Kotecha Property*** (supra)]

33. It is not in dispute that the project assets have been mortgaged by Orbit in favour of the bank. The bank as a mortgagee thus has legal rights as conferred under section 13 of the Securitization Act to realize its dues, on a default by Orbit and its guarantors, in repayment of the money so advanced. The bank has already resorted to enforce these legal rights by issuing a notice under section 13 (2) and subsequently, taking measures under section 13(4) of the Securitization Act. It is significant that the suits in question are principally filed seeking specific performance of the alleged agreement to purchase flats between the plaintiffs and Orbit, however, the suits are filed only after the bank

adopted the measures under the Securitization Act, to realize its dues from the mortgaged property, in which security interest was created in the bank by Orbit. In such a situation, if rights of the bank to resort to such measures under the Securitization Act are to be contested or some other rights as against the bank are required to be asserted by the plaintiffs, then the law clearly confers a jurisdiction on the D.R.T. under section 17 of the Securitization Act. On a plain reading of the said provision it is clear that '*any person*' can invoke the remedy under section 17 of the Act. It is not in dispute that the bank is impleaded and brought into picture only due to the mortgage of the project assets in its favour by Orbit and for no other reason. The plaintiffs have no direct legal connection of any nature or privity with the bank.

34. In **Mardia** (supra), the Supreme Court considering the rights of the secured creditors under section 13 (4) and the implications of the provisions of section 34 of the Securitization Act, held that to a very limited extent, the jurisdiction of the civil Court can 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. It would be apposite to note the observations of the Supreme Court in paragraphs 50 and 51 of the decision which read

thus :

"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of section 13 are taken and section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus, before any action or measure is taken under sub-section (4) of section 13, it is submitted by Shri.Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore. it cannot be said that no remedy is available to the borrowers. We however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or an appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act.". That is to say the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to a tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of section 13."

"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 un-tenable 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 two-fold 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 a mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought. 'Adams vs Scott: (1859) 7 WR 213.249. 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.)" (emphasis supplied)

35. On the above backdrop, and having noted that the suits are filed only after the bank has resorted to recover its dues from Orbit by taking recourse to the provisions of Section 13(2) and 13(4) of the Securitisation Act, it would be necessary to examine from the reading of the plaints, in each of the five suits, so as to ascertain whether the plaint is barred against the bank under the provisions of section 34 of the Securitisation Act. In so doing we would examine as to what in reality is the cause of action pleaded against the bank and as to what is the nature of the averments of 'a fraud' as made against the bank in the plaint and the acceptability of these averments when tested on the anvil of the provisions of Order VI Rule 4 of the CPC.

I. Commercial Appeal No.360 of 2017 arising from Suit No.62 of 2017 (Madhav Prasad Agarwal & anr vs Axis Bank Ltd)

36. We set out the facts in some detail as the other plaints have somewhat similar factual matrix.

37. This appeal arises from the impugned order to the extent it deals with the plaintiff's case in Suit No.62 of 2017. The plaintiffs in this suit are one Madhav Prasad Aggarwal and Mrs.Sushma Madhav

Aggarwal. Orbit is defendant no 1 and the bank is defendant no.2. The case of the plaintiff is that in the year 2009 the plaintiffs were looking out for suitable luxurious spacious accommodation in the vicinity of Nepean Sea Road. Having received knowledge that Orbit has launched a project namely 'Orbit Heaven' at Nepean Sea Road, the plaintiffs approached the directors of Orbit. The plaintiffs exhibited their interest to purchase a duplex apartment on the 16th and 17th floor consisting of five bedrooms of an area approximately of 7608 sq.ft. and carpet area of 4169 sq.ft. and a terrace area of approximately 2487 sq.ft. alongwith six car parking spaces at total price of Rs.38.25 crores, and agreed to purchase from Orbit this duplex flat. In pursuance of the concluded negotiations between the plaintiffs and Orbit, an amount of Rs.21,03,75,000/- was paid by the plaintiffs to Orbit towards part consideration of the purchase price. This payment was acknowledged by issuance of a receipt by Orbit. The amounts were paid by cheques between 3 August 2009 to 25 June 2010. A letter of allotment dated 26 June 2010 was issued for sale of the said flat. The allotment letter recorded that the plaintiffs have agreed to pay Orbit, the balance price as per the agreement for sale '*to be executed*'. Thereafter, Orbit by its letter dated 23 December 2010 demanded from the plaintiffs an amount of Rs.1,91,25,000/-. The said amount was paid by the plaintiffs to Orbit. On 25 February 2011 a further amount of Rs.1,91,25,000/- was

paid as demanded by Orbit. An amount of Rs.9,84,938/- was also paid as service tax on 20 July 2011.

In or about 2013 the plaintiffs were informed by Orbit that it had obtained loan from Axis Bank and that there was term loan agreement dated 21 January 2013, an indenture dated 20 February 2013 under which the project property was mortgaged to the bank. However, Orbit assured the plaintiffs that the rights of the plaintiffs in the suit project shall not be diluted in any manner. It "*appeared*" to the plaintiffs that Orbit had informed the bank about allotment of the said premises to the plaintiffs. By letter dated 17 July 2013 the bank gave its no objection to the sale of the suit premises to the plaintiffs. However, it appears that through inadvertence the name of the first plaintiff was only mentioned as a purchaser of the duplex flat. As there was mis-description of the flat in the said letter, the plaintiffs approached Orbit for rectification. A memorandum of understanding dated 20 August 2014 was executed between Orbit and the plaintiffs *inter alia* confirming the said allotment letter dated 26 June 2010. The bank is not a party to the said MOU, also the said document is not a registered document and is not adequately stamped as per requirement of law.

38. The plaintiff has stated that on 13 September 2016 the bank issued a public notice in the Economic Times recording that the said project (Orbit Heaven) is mortgaged to the Bank and informing that any

person dealing with the said property without the consent of the bank shall, do so, on its own risk and any such dealing shall not in any manner alter/affect the rights of the mortgagee bank over the said property. The plaintiffs by their letter dated 19 September 2016 replied to the said notice and recorded the facts, of the sale of one of the flats to the plaintiffs and payments made to Orbit in that regard. The bank replied by its letter dated 4 October 2016 *interalia* stating that the letter of allotment cannot be considered as sufficient document of any ownership right over the mortgaged property. The plaintiffs thereafter noticed that on 7 November 2016 a possession notice was affixed on the project site *interalia* announcing that the bank had taken possession of the said project under Section 13(4) of the Securitisation.

39. On the assertion that the said flat was sold to the plaintiffs by Orbit and accordingly rights are created in favour of the plaintiffs, the suit in question was filed *interalia* contending that the Orbit had agreed to sell the premises under the provisions of MOFA, and the actions of Orbit and the bank were contrary to the provisions of MOFA. The plaintiffs contended that Orbit ought to have mortgaged the said property only after prior consent of the plaintiffs and that due diligence ought to have been carried out by the bank to ascertain the rights of the plaintiffs. The only averments as made in the plaint against the bank (defendant no.2) can be found in paragraphs 16, 23 and 28 of the plaint

which read thus:-

> 16. The plaintiffs state that the defendant no.2 issued a public notice in the Economic times dated 13th September 2016 whereby the defendant no.2 informed the public that the residential project named Orbit Haven formerly known as Avasi House has been mortgaged with the defendant no.2 and that any person dealing with the said property without the consent of the 2nd defendant shall be doing so at their sole risk and that such dealing shall not in any manner affect the rights of the 2nd defendant over the said property. Hereto annexed and marked Exhibit L is a copy of the said public notice."
>
> "23. Without prejudice to the aforesaid the Plaintiffs state that at the request of the Defendant No.1, the Defendant no.2 has already granted it's no objection for sale of the said premises in favour of the 1st Plaintiff. The Defendant No.2 cannot now back out from its commitment for the reasons alleged in the said letter dated 4th October,2016 or otherwise. In any event the Plaintiffs submit that the mortgage created in favour of 2nd Defendant, is subject to the Plaintiffs' rights in the said premises. The Plaintiffs state that the Defendant No.2 has advanced the loan and have taken the said property as charge with the knowledge of the Plaintiffs rights in the said premises. [It is obvious that prior to advancing loan of such a huge amount the Defendant No.2 ought to have carried out due diligence and ought to have ascertained the rights of the 1st Defendant and ought to have accepted the liability of the 1st Defendant for allotment of the said premises to the Plaintiffs.] Even the 2nd Defendant did not invite claims and objections of the public by publishing public notice before granting loan for such a huge amount.
>
> .....
>
> 28. The Plaintiffs submit that the Defendant No.1 and Defendant No.2 are hands in gloves and they have in connivance and in conspiracy with each other attempted to deprive the Plaintiffs from their valuable rights in the said premises." (emphasis supplied)

40. On the above backdrop, the plaintiffs have prayed in the suit for relief of a declaration that there is valid and subsisting agreement for sale of the flats in favour of the plaintiffs and a further prayer for specific performance of the agreement and in the event the relief of

specific performance cannot be granted, then, for a money decree and damages. The only relief as prayed against the bank can be found in prayer clause (b) namely that in case, the prayer for specific performance is allowed, the bank be directed to confirm the sale of the suit premises in favour of the plaintiffs. Prayer clause (b) reads thus:-

> "(b) That the Defendant No.1 may be ordered and directed to specifically perform the said Agreement and to do all such acts, deeds, things and matters and such other matters as per the Plaintiffs' Agreement and sign, execute and register the Agreement for sale in respect of suit duplex flat described in Exhibit "A" hereto as required under the provision of Maharashtra Ownership Flat Act and to execute documents, papers, letters, writings, affidavits and undertakings etc. as may be necessary to and in favour of the Plaintiffs and the Defendant No.2 may be directed to confirm the sale of the said premises to the Plaintiffs and the Defendant No.1 may be directed to hand over quiet, vacant and peaceful possession of the said premises to the Plaintiffs within the time that may be fixed by this Hon'ble Court and to do all such other acts, deeds, and things as may be necessary for the specific performance of the Plaintiffs' Agreement."

II. Commercial Appeal No.361 of 2017 arising out of Suit No.60 of 2017 (Mrs.Manisha Saraf vs M/s Orbit Corporation & anr)

41. This appeal arises from the impugned order dealing with the plaintiff's case in suit no.60 of 2017. The plaintiff is Mrs.Manisha Saraf. M/s. Orbit Corporation is defendant no.1 and the bank is defendant no.2. The plaintiff in this case is similarly situated like the plaintiffs in the above suit. The plaintiff approached Orbit and its directors intending to purchase duplex flats on the 28th and 29th floors of the said project consisting of a living room, five bed rooms and a attached terrace aggregating 7,555 sq.ft saleable area, comprising 4,168 carpet area and a terrace area of 2481 sq ft alongwith five car parking spaces, for an

aggregate sum of Rs.24 crores. In token of purchase of said duplex flats, the plaintiff paid Rs.2,70,00,000/- by cheque dated 25.7.2009 which issued by the plaintiff's husband. A Memorandum of Understanding (MOU) dated 28.9.2009 was executed between Orbit, the plaintiff and her husband Sanjay Saraf, as flat purchasers. On a oral demand by Orbit, the plaintiff's husband made payment of an aggregate sum of Rs.14,65,00,000/- which was equivalent to 61% of the total consideration. Thereafter by a gift/declaration-cum-confirmation dated 3.11.2014 the plaintiff's husband gifted his interest in favour of the plaintiff. A copy of the same is not annexed to the plaint. The other contents and averments of the plaint are quite similar to those as made in the plaint in other suit of Mr.Madhav Agarwal, which we have in extenso referred above. In regard to the bank (defendant no.2), the limited averments can be found in paragraph 22, 23 and 28 of the plaint which read thus:

> "22. The plaintiff submits that neither the defendant no.1 nor the defendant no.2 informed about creation of the mortgage. The plaintiff came to know about the same only on publication of the public notice in the Economic Times published dated 13th September 2016. The defendant no.1 demanded payment of sum of Rs.1,00,00,000/- on or about in March 2014 and at that time also the defendant no.1 kept the plaintiff in dark about the creation of the mortgage in favour of the 2nd defendant. Even thereafter also the defendant no.1 demanded from the plaintiff further part payment towards the said purchase price and accordingly the plaintiff paid an aggregate sum of Rs.25,00,000/- in the month of September 2014 to the defendant no.1. The plaintiff states that the defendant no.1 has violated rules and regulations of the Maharashtra Ownership Flats Act. The 1st defendant being promoter ought not to have mortgaged the said project without written consent of the plaintiff."
>
> 23. The plaintiff submits that the mortgage created in favour of 2nd

> defendant is subject to the plaintiff's rights in the said premises. The plaintiff states that the defendant no.2 has advanced the loan and has taken the said property as charge with the knowledge of the plaintiff's rights in the said premises. It is obvious that prior to advancing loan of such a huge amount the defendant no.2 ought to have carried out due diligence and ought to have ascertained the rights of the 1st defendant and ought to have accepted the liability of the 1st defendant for allotment of the said premises to the plaintiff. Even the 2nd defendant did not invite claims and objections of the public by publishing public notice before granting loan for such a huge amount."
>
> 28. The plaintiff submits that the defendant no. 1 and defendant no.2 are hand in glove and they have in connivance and in conspiracy with each other attempted to deprive the plaintiff from her valuable rights in the said premises."

42. Although the plaint contains no specific prayers against the bank, however, learned counsel for the plaintiff has referred to prayer clause (a) and prayer clauses (c-iii) to be relevant against the bank (defendant no.2). These prayers read thus :

> (a) this Hon'ble Court be pleased to declare by an order and decree that there is a valid and subsisting plaintiff's agreement dated 28th September 2009 for the said premises more particularly described in Exhibit A hereto and the same is binding on the defendants;
>
> …. …..
>
> (c-iii): It may be declared that the plaintiff is having first charge on the said premises for payment of the said sum of Rs.22,81,19,396/- together with interest on Rs.14,65,00,000/- at the rate of 9% per annum as per the particulars of claim in Exhibit I hereto and Rs.51,55,00,000/- as per the Particulars of claim in Exhibit J hereto together with interest thereon @ 24% p.a. from the date of suit till payment and/or realization as prayed in prayers (c) (i) and (ii) above and in the event of the defendant would fail and neglect to pay the said aggregate sum of Rs.74,36,19,396/- and/or interest or any part thereof within the time to be fixed by this Hon'ble Court,the said premises to the plaintiff be directed to be sold by an under decree and/or directions of this Hon'ble Court and out of the net sale proceeds thereof payment be made to the plaintiff towards the satisfaction

of the plaintiff's claim.

III. <u>Commercial Appeal no.362 of 2017 in Suit no.8 of 2017.(Padma Ashok Bhatt vs M/s Orbit Corporation & ors).</u>

43. This appeal arises from the impugned order dealing with the plaintiff's case in Suit no.8 of 2017. The plaintiff is Mrs.Padma Ashok Bhatt. M/s Orbit Corporation is defendant no.1.Defendant nos.2 to 14 are respective flat purchasers. The bank is defendant no.15. In this case, the plaintiff says that the plaintiff agreed to purchase flat no.2302 and 2402 at a total consideration of Rs.12,45,00,000/- and as part consideration had made a payment of Rs.9,23,50,000/- to Orbit. The plaintiffs' averments in relation to the information received by the plaintiff, that the bank is taking measures under the Securitisation Act are similar to the one pleaded in the other plaints and as noted by us in the foregoing paragraphs. Orbit had issued allotment/confirmation letter dated 16.11.2009 agreeing to sell the said flats to the plaintiff for a modified consideration of Rs.17,34,00,000/- for flat no.2302 and 2402. On 15.3.2015 an amount of Rs.3,21,00,000/- had remained due and payable by the plaintiff to M/s Orbit Corporation. The plaint recites the amount paid by various other defendants who are similarly situated. As to what is the relevance in impleading other flat purchasers as defendants is not known. The averments as made against the bank (defendant no.15) are found in paragraph 16, 17, 18, 19, 24 (a) (b) and

(c) and in paragraph 28 inserted by amendment which read thus :

> "16. Meanwhile the plaintiff and other flat owners learnt that defendant no.15 have issued a public notice on 13th September 2016 in Economic Times informing public at large that the project named Orbit Haven has been mortgaged. Hereto annexed and marked Exhibit F is the public notice dated 13th September 2016. On learning the same, the flat owners by their respective letters giving the details of the allotment letter by defendant no.1 to them and the details of the payment made each of them to the defendant no.1. Hereto annexed and marked Exhibit G is the copy of letter dated 29th September 2016 sent by plaintiff to defendant no.15.
>
> 17. On receipt of the said letter, the defendant no.15 intimated that that they would look into the matter and revert back in due course. Hereto annexed and marked Exhibit H is the copy of the said letter dated 29th September 2016 issued by defendant no.15. The defendant no.15 ultimately by their letter dated 4th October 2016 stated that they do not recognize any such transaction as there is a mortgage created by defendant no.1 in their favour and that the allotment letter cannot be considered as a sufficient document as an evidence of ownership over the mortgaged property unless sufficient and documentary evidence such as registration of sale deed prior to mortgage date submitted to the bank. The defendant no.15 ultimately through their attorneys sent a letter dated 1st December 2016 that they be given a notice of any suit or proceeding. Hereto annexed and marked Exhibit I is the copy of the said letter dated 1st December 2016."
>
> 18. The plaintiff states that defendant no.15 claim to have advanced loan to the defendant no.1 around in the year 2013, which is much after the defendant no.1 agreed to sell the flats to most of the purchasers. The defendant nos.2 to 5 has booked the flats in 2010 and 2011 and have got in registered in July 2014. The defendant no.1 neither disclosed to the defendant nos. 2 to 5 nor intimated nor disclosed in the agreement about any mortgage with the defendant no.15. Even when the agreement was registered, there was no such endorsement with the office of Sub-Registrar to show that there was any such mortgage."
>
> 19. The plaintiffs has learnt that the defendant no.15 have not carried out any due diligence search while granting loan to defendant no.1. Certainly, if the due diligence search would have taken, it would show in the record of defendant no.1 that they have received substantial money from various purchasers who have booked flats in Orbit Haven. To the knowledge of the plaintiff, it seems that even public notice was issued by defendant no.15 before advancing loan to the defendant no.1. It is common to the knowledge of everybody that the moment the building construction start, people book the flat to take advantage of reduced price and save themselves from escalation in prices. It is also evident and common that an individual applies for loan from the bank though due diligence search

is carried out by the bank whereas in the present case to the plaintiff's knowledge, no such due diligence search at all has been carried out by defendant no.15 before advancing money as is claimed by defendant no.15. In any event, the mortgage in favour of defendant no.15 is with the rights and obligations created by defendant no.1 in favour of the plaintiff which is also protected by law.

… … …

24. The plaintiff and Defendants no.2 to 14 have put in their hard earned money with a hope to get flats in the building Orbit Haven and at the relevant time, the flat was booked and allotted to them there was no mortgage of any nature whatsoever by Defendant No.1 and it was free from all encumbrances and the title of the flat was marketable. The Plaintiff submit that it seems that the Defendant No.1 in collusion with the officers of Defendant No.15 Bank have mortgaged the said property in spite of having no right to mortgage the same. It is also pertinent to note that the Defendant No.15 have also not carried out any due diligent search as on enquiry by the Bank with Defendant No.1 and from their records it would certainly disclose that all the flats are sold and that no flat is available to be mortgaged with the Defendant No.15. The Defendant No.15 Bank is also aware about the factum of the flats being allotted by virtue of allotment letters as is also evident from the fact that Flat No.2501 is not registered and to the knowledge of the Plaintiff, there is only a letter of allotment/booking in respect of Flat No.2501 and Defendant No.11 in their Public Notice have clearly stated that they have mortgaged the suit property except the Flat Nos.2301, 2401 and 2501. The Defendant No.15 were certainly aware about the pre-existing rights of all flat purchasers.

24(a) "The Plaintiff states that the alleged mortgage as claimed by Defendant No.15 is contrary to law and it is contrary to the provisions of Maharashtra Ownership Flats Act. The mortgage is also unenforceable in law being contrary to the provisions of Section 9 of Maharashtra Ownership Flats Act, as also several other flat purchasers including Plaintiff have paid consideration for acquisition of their respective flats in excess of 20% prior to the purported mortgage. The Defendant No.15 did not take any search of the flat purchaser's register as required to be mandatory maintained by Defendant No.1 in which names and addresses of all flat purchasers alongwith the flat numbers are required to be mentioned and also of separate Account in Bank mandatorily required to maintained for any sum received by the Defendant No.1. The Defendant No.15 knew it too well that the building to be constructed by Defendant No.1 was for sale of the flats to various members of public under the provisions of Maharashtra Ownership Flats Act. The Defendant No.15 thus cannot claim to be that they are bonafidy mortgagee of the said property.

24(b) The Defendant No.15 further knew that the land and the building is required to be conveyed free of encumbrances to the body of flat purchasers. Thus the mortgage and the loan obviously appears

to be fraudulently and in collusion and in connivance between Defendant No.1 and Defendant no.15.

24(c) Without prejudice to the aforesaid and in alternative, it is submitted that the Defendant No.15 by claiming to be mortgagee and permitting the Defendant No.1 to develop and construct the said property subsequent thereto have assumed character of a promoter as defined under Maharashtra Ownership Flat Act and is equally bound and liable to perform all the obligations of the provisions of Maharashtra Ownership Flats Act and are accordingly bound and liable to perform delivery of possession of the respective premises free from all encumbrances and to perform all other obligation towards the flat purchasers being Plaintiff and Defendants Nos.2 to 14. The purported mortgage is even otherwise contrary to Registration Act and Stamp Act and is enforceable in law."

…. ….

28. In any event, the Defendant No.1 have issued allotment letters/booking letters and receipts from time to time when the respective flat purchasers booked their flats. The plaintiff states that all the said payment receipts show the contractual obligations upon the Defendant No.1 to complete sale of the flat and hand over vacant and peaceful possession and also to enter into Agreement as provided under MOFA. Merely because Defendant No.1 have not executed a regular Agreement with some of the flat owners and have not registered the same, would not permit them to mortgage the flats without the written consent of the flat owners as the rights were already created in favour of the plaintiff prior to the so called mortgage. The plaintiff states that there is absolute collusion between the Defendant No.1 and the officers of Defendant No.15 in allegedly mortgaging the said property. If the Defendant No.15 would have verified the records, they would certainly be able to get the details from Defendant No.1 that the flats are encumbered and that the Defendant No.1 have sold the flats to the respective flat purchasers. The Plaintiff has always been ready and willing to perform her part of contract and is still ready and willing to perform her part of contract and obligation. The plaintiff further state that the mortgage if any with Defendant No.1, cannot take away the pre-existing rights of the flat purchasers including Plaintiff protected by the provisions of law."

The prayer in the plaint as made against the bank (defendant no.15) is prayer clause (b) which read thus :

(b) that the plaintiff is also entitled for a declaration that there is no legal, valid enforceable lien, charge or mortgage in favour of defendant no.15 in respect of the building or any part thereof known as Orbit Haven,situate at Darabshaw Lane, Napeansea Road, Mumbai-400 036.

IV. Commercial Appeal No.171 of 2017 in Suit no.192 of 2017 (Om Project Consultants and Engineers Limited vs Orbit Corporation).

44. This appeal arises from that part of the impugned order dealing with the plaintiff's case in suit no.192 of 2017. The plaintiff is Om Project Consultants and Engineers Limited. Defendant no.1 is Orbit Corporation Ltd and defendant no.2 is the bank. The case of the plaintiff is that Mr.Ratan Jindal Director of the plaintiff is an old acquaintance of Mr.Sujit Agarwal as also Mr.Ravi Kiran Agarwal Promoters of Orbit Corporation. In the year 2009, the promoters had approached Mr.Ratan Jindal informing about the said project and in view of the long association, the plaintiff decided to purchase duplex flat nos.3001 on the 30th and 31st floor. The premises being allotted to Mr.Ratan Jindal consisted of five bed rooms admeasuring 7344 sq.feet with six car parking spaces. Mr.Ratan Jindal in the year 2009-10 made substantial payments amounting to Rs.20,75,75,000/- in respect of the said premises being more than 65% of the total agreed consideration for the said premises. Later on in 2014, Mr.Ratan Jindal decided to acquire the said premises through the family owned company of the plaintiff wherein Mr.Ratan Jindal was himself a Director. Accordingly, the plaintiff on 30.5.2014 is stated to have paid a further amount of Rs.2 crores to Orbit for the said premises and further amount of Rs.27,22,00,000/- was paid between the period 30.5.2014 to 14.7.2014

in respect of which a "consolidated receipt" dated 9.7.2014 was issued by Orbit. A separate receipt was issued in favour of the plaintiff for Rs.2 crores paid on 30.5.2014. Thus, the total consideration of Rs.29,2,79,00,000/- was paid by plaintiff to Orbit which included an amount of Rs.1,02,79,000/- as service tax and Rs.78,00,000/- as TDS. Thereafter, a Memorandum of Understanding (MOU) dated 5.9.2014 was entered into between the plaintiff and Orbit for sale of the said flats. Thus, almost 91% of the total consideration was paid, at which stage, the plaintiff was informed at the time of signing of the MOU that M/s Orbit Corporation had availed loan facility from the bank in 2013 for mortgaging the said project including its receivables. The plaintiff has stated that the suit premises were already allotted to Mr.Ratan Jindal Director of the plaintiff well before creation of the mortgage in favour of the bank. The plaintiff learnt about the bank's public notice dated 13.9.2016 of the mortgage of the suit project in favour of the bank. The plaintiff responded to the said public notice by its letter dated 9.11.2016 *inter alia* recording that the suit premises were allotted to the plaintiff well before the loan was availed by Orbit Corporation. The plaintiffs state that the bank however did not respond to the said letter and in fact went ahead by pasting a notice under section 13 (4) of the Securitisation Act at the said project. The averments made in the plaint, relevant to the bank (defendant no.2) and the alleged act of fraud,

stated to be committed by the bank, are contained in paragraph 13,14,15,16, 17 and 22 of the plaint which read thus:-

> "13. The plaintiff company after the perusal of the aforesaid public notice were surprised to read the contents thereof, which was completely contrary to the assurance of defendant no.1 in respect of the rights of the plaintiff company in respect of the said premises. The charge of the plaintiff company over the said premises is paramount as the said premises was allotted to Mr.Ratan Jindal in the year 2009, much before defendant o.1 had availed the loan facility from the defendant no.2.
>
> 14. The plaintiff company replied to the aforesaid public notice vide its response dated 9th November 2016 categorically stating that the said premises was allotted to the plaintiff well before the said loan was taken by defendant no.1 from defendant no.2. Copy of the response dated 5th November 2016 is exhibited with the present suit as Exhibit 'G'.
>
> 15. The defendant no.2 Bank did not pay any heed, whatsoever to the response dated 9th November 2016 but on the contrary the defendant no.2 has now affixed a possession notice at the site of the said project *inter alia* stating that it has taken the symbolic possession of the said project under section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Copy of the said possession notice is exhibited with the present suit as Exhibit 'H'.
>
> 16. It is a matter of common parlance and understanding that before granting any loan facility, as was granted to defendant no.1 banks of repute such as defendant no.2, conduct a detailed title search/due diligence on properties intended to be mortgaged as security for such loan, however, it is apparent that nothing of this sort had been done while the aforesaid loan had been granted to the defendant no.1 by the defendant no.2"
>
> 17. It is apprehended by the plaintiff company that certain employees of defendant no.2 bank are hand in glove with the representatives of defendant no.1 organisation and the said loan has been granted by the defendant no.2 bank for illegal and unlawful gains without any proper scrutiny or title search/due diligence."
>
> 22. No monetary compensation shall be adequate in lieu of the specific performance of the said MOU. It is further submitted that the defendant no.1 and defendant no.2 are hand in gloves and they are in connivance with each other for depriving the plaintiff from their valuable rights in the said premises."

45. The substantive prayer as made against the bank (defendant no.2) is prayer clause (c) and an interim prayer is prayer clause (f). These prayers read thus:

> "(c) the Defendant no.2 be specifically directed to confirm the sale of the said premises to Plaintiff and Defendant no.1 may be directed to hand over the vacant and peaceful possession of the suit premises to the Plaintiff within the specific timeline as defined by this Hon'ble Court and to do all such acts, deeds, things and such other matters as per the said MOU;
> … … …
> (f) that the Defendant No.1 & Defendant No.2 including its assignees, associates, servants, employees and other persons acting on its behalf be restrained by and under an order of this Hon'ble Court for taking possession of the said premises or any part thereof;"

V. **Commercial Appeal No.172 of 2017 arising in Commercial Suit no.450 of 2017 (Axis Bank Limited vs Niraj Dilip Jiwrajka & ors)**

46. The plaintiff is Mr.Niraj Dilip Jivrajka. Defendant no.1 is Orbit Corporation. The bank is impleaded as defendant no.3. Defendant no.2 is another flat purchaser. Defendant nos.4 and 5 are companies in whose favour security was created by Orbit by way of second charge on *pari-passu* basis in respect of the project rights as stated in paragraph 5 of the plaint. The case of the plaintiff is that in the beginning of the year 2010 the plaintiff agreed to purchase from Orbit a flat in the said project for a consideration of Rs.28.60 crores. An allotment letter dated 3.3.2010 was issued in favour of the plaintiff. Out of the total consideration, the plaintiff had already paid an amount of Rs.15 crores as on 3.3.2010. The plaintiff paid to Orbit the entire consideration of Rs.28,60,00,000/- which is not disputed by Orbit. Except the allotment letter, there is no

other document between the Plaintiff and Orbit. The only averments against the bank are contained in paragraph 20 and 24 which reads thus :

> "20. In the premises, it is submitted that the plaintiff is entitled to a declaration that the allotment letter dated 3rd March 2010 constitutes a valid, subsisting and binding contract between the plaintiff and the defendant no.1.The plaintiff is entitled to an order directing the defendant no.1 to take necessary steps so as to specifically perform its obligations under the allotment letter including but not limited to completing construction of the project and handing over possession of the suit property to the plaintiff free from all encumbrances whatsoever. The plaintiff is also entitled to an order directing the defendant nos.1 and 3 to 5 to jointly and/or severally comply with all the obligations, under the Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act 1963 and the Real Estate (Regulation and Development) Act 2016 including but not limited to (i) the execution of the necessary agreement in terms thereof (ii) completing the project (iii) to deliver vacant and peaceful possession of the suit property to the plaintiff and(iv) to give clear and marketable title in respect of the suit property free from all encumbrances whatsoever. The plaintiff is also entitled to an order directing the defendant o.1 to indemnify the plaintiff in respect of all claims, charges that may be made by anybody in respect of the suit property and keep the same indemnified till registration of the necessary agreements and conveyance of land in favour of any organization/association that may be formed/constituted by the plaintiff with the other persons who have purchased flats in the project.
>
> 24. The plaintiff having purchased the suit property in the project prior to the mortgage thereof by the defendant no.1 to the defendant no.3 the question of the defendant no.3 having a first charge in respect of the suit property does not arise. It appears that the defendant no.1 has not provided the defendant on.3 with complete and accurate information in respect of the project in which the suit property is comprised which would have enabled it to carry out proper due diligence in respect of the security for the loan viz., the project at the time of advancing monies to the defendant no.1 and executing the documents in respect of the mortgage so created. If the defendant no.3 had carried out the due diligence as required, it would have discovered the fact that the plaintiff and other flat purchasers had already purchased various flats in the project. The defendant no.1 having already sold the suit property to the plaintiff was no longer the owner of the suit property, had no right, title or interest therein and therefore could not have mortgaged the same to the defendant no.3. Further the defendant no.1 also could not have further encumbered the project in favour of the defendant nos.4 and 5.The plaintiff submits that the defendant no.1 would have surely disclosed the allotment letter executed between the plaintiff and defendant no.1 to the defendant no.3. The plaintiff submits that the defendant no.3 has

> therefore not acted in a prudent manner having express notice of the allotment letter. The defendant no.3 ought not to be permitted to take advantage of its own lack of due diligence. Without prejudice to the aforesaid in the event of the defendant no.1 not having disclosed the allotment letter to the defendant no.3 then and in such event the defendant no.1 cannot now take advantage of its own wrongdoing. Viewed from any angle the defendant no.1 is legally bound to complete the transactions of sale and specific performance of the allotment letter in favour of the plaintiff."

47. The only prayer against the bank (defendant no.3) is prayer clause (c) which reads thus:

> "(c.) that the defendant nos.1 and 3 to 5 be jointly and/or severally ordered and directed by this Hon'ble Court to comply with all the obligations, under the Maharashtra Ownership of Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act 1963 and the Real Estate (Regulation and Development) Act 2016including but not limited to (i) the execution of the necessary agreement in terms thereof (ii) completing the project (iii) to deliver vacant and peaceful possession of the suit property to the plaintiff and (iv) to give clear and marketable title.

48. In the light of the averments/statements as made in the plaint and the prayers as noted by us above, we now examine as to whether the plaint can be said to be barred by the provisions of Section 34 of the Securitisation Act as contended on behalf of the appellant- bank.

49. It is well settled that the jurisdiction of the Court to try suits of civil nature is expressive as seen from the clear language of Section 9 of the Code of Civil Procedure which is on the principle of *Ubi Jus Ibi Remedium.* The exception being suits of which their cognizance is either expressly or impliedly barred. For these category of suits the Civil Court

would lack jurisdiction to entertain and try such suits. It is further well settled that the exclusion of the jurisdiction of the Civil Court should be construed strictly. In ***Kamla Mills Vs. State of Bombay***[50], a Constitution Bench (Seven Judge's Bench) of the Supreme Court considered the question as to when and in what circumstances, can a suit of civil nature be said to be barred by a Special Statute. The court in paragraphs 30 and 32 held as under:-

> "30. ... . the question about the exclusion of the jurisdiction of civil courts either expressly or by necessary implication must be considered in the light of the words used in the statutory provision on which the plea is rested, the scheme of the relevant provisions, their object and their purpose. ... ...
>
> 32. ... ... Whenever it is urged before a civil court that its jurisdiction is excluded either expressly or by necessary implication to entertain claims of a civil nature, the Court naturally feels inclined to consider whether the remedy afforded by an alternative provision prescribed by a special statute is sufficient or adequate. In cases where the exclusion of the civil courts' jurisdiction is expressly provided for, the consideration as to the scheme of the statute in question and the adequacy or the sufficiency of the remedies provided for by it may be relevant but cannot be decisive. But where exclusion is pleaded as a matter of necessary implication, such considerations would be very important, and in conceivable circumstances, might even become decisive. If it appears that a statute creates a special right or a liability and provides for the determination of the right and liability to be dealt with by tribunals and specially constituted in that behalf, and it further lays down that all questions about the said right and liability shall be determined by the tribunal, so constituted, it becomes pertinent to enquire whether remedies normally associated with actions in civil courts are prescribed by the said statute or not." (emphasis supplied)

50. The objection as raised on behalf of the bank before the learned Single Judge was of the plaint being barred by Section 34 of the Secrutisation Act. The bank contended that qua any cause of action

50 AIR 1965 SC 1942

against the bank, the remedy of the plaintiffs would be to invoke the provisions of Section 17 by approaching the Debt Recovery Tribunal (DRT), this for the primary reason that there was no privity of contract between bank and the plaintiffs. The privity of the bank was only qua Orbit in view of the mortgage of the project assets in favour of the bank by Orbit as a security of the loan advanced by it. The bank was merely realising the security interest in the assets mortgaged to it by Orbit. To appreciate the contention of the bank it would be appropriate to extract some of the provisions of the Securitisation Act, relevant to the present controversy. Following are the provisions:-

> **"Section 2**
> (**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;
>
> (**f**) "**borrower**" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;
>
> (**ha**) "**debt**" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)
>
> (**k**) "**financial assistance**" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution;
>
> (**zc**) "**secured asset**" means the property on which security interest is created;
>
> **17. Application against measures to recover secured debts**-
> (1) Any person (including borrower), aggrieved by any of the

measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub section.]

1-A … … …

(2) 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.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved persons, it may by order,-

(a) declare the recourse to any one or more measures referred to in sub section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under Sub-section 1, as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section l3 to recover his secured debt.

[(4-A) Whether -

(i) any person, in an application under sub-section (1), claims any tenancy or lease hold rights upon the secured asset,

the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65-A of the Transfer of Property Act,1882 (4 of 1882) ; or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or lease hold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

… … ….

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).

35. **The provisions of this Act to override other laws**.-The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law." (emphasis supplied)

51. Section 13 of the Securitisation Act provides for enforcement of the security interest and the measures which can be taken by the secured creditors. Section 13 begins with a *non obstante* clause to provide that "notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act,1882, any security interest created in favour of any secured creditor may be enforced, without the

intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act." Section 69 of the Transfer of Property Act provides for general power of sale as conferred on the mortgagee. Section 69-A of the Transfer of Property Act provides for appointment of a receiver and such security interest would be enforced in accordance with the provisions of Secrutisation Act.

52. In ***Mardia*** (supra), the Supreme Court was considering the challenge to the legality of the provisions of Sections 13, 15, 17 and Section 34 of the Securitisation Act. The Court examined the provisions of Section 34 which bars jurisdiction of the Civil Court to entertain any suit or proceedings, in respect of any matter which a Debt Recovery Tribunal or the appellate Tribunal is empowered under the Secrutisation Act to determine, in respect of any action taken or to be taken, in pursuance of any power conferred by or under the Secrutisation Act or under the Recovery of Debts Due to Banks and Financial Institutions Act,1993. The Court also examined the provisions of Section 35 of the Secrutisation Act, which provides for the Act to have an overriding effect all other laws, and as to why and in what circumstances it was thought necessary by the legislature to provide for a *non obstante* clause in sub-section (1) of Section 13 of the Secrutisation Act. It was observed that the situation as prevailed in

1882 when the Transfer of Property Act was enacted, has undergone a sea-change and what was conceived to be correct in the situation then prevailing, may not be so in the present day scenario. It was observed that functions of different institutions including the banking and financial institutions have changed and new functions have been introduced for financing the industries etc., and a new economic and fiscal environment exits, after more than 100 years after the enactment of the Transfer of Property Act was initially brought into force. The Court referred to the report of Rajamannar Committee appointed by Government of India which submitted its report in 1977 indicating the effect of the changed situation and the efficacy of the provisions of the Transfer of Property Act. The Court also examined the Narasimham Committee Report 1998 which advocates for a legal framework which should clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, being a sine qua non for efficient trade and commerce, especially for financial intermediation. A reference is also made to the guidelines of the Reserve Bank of India in relation to classifying the Non Performing Assets (NPA) and the appropriate remedies available to the borrowers. The Court noted the adequate safeguards which are available to the borrowers as provided under Section 13 of the Act. The court also considered the contention that an appeal under Section 17 would be entertainable

before the Debt Recovery Tribunal, only after such measures as provided under sub-section (4) of Section 13 are taken. The court held that a full reading of section 34 shows that the jurisdiction of the civil court is barred, in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine, in regard to any action taken or "to be taken" in pursuance of any power conferred under Securitisation Act and thus the prohibition under Section 34, covers even the matters which can be taken cognizance by the Debt Recovery Tribunal though no measure in that direction was taken under sub-section (4) of Section 13. It was held that the bar of jurisdiction of the civil court, applies to all such matters which may be taken cognizance by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13. The Court however held, that to a very limited extent jurisdiction of the civil court can also be invoked, where the action of the secured creditor is alleged to be fraudulent or their 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.

53. As there was much discussion in this context from both the sides and more particularly paragraphs 50 and 51 of the decision in

Mardia Chemicals Ltd.(supra), it would be appropriate to note the observations as made by their Lordships which read thus:-

> "50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.
>
> 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 p.135 at p.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, (1859) 7 WR 213, 249. 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, Fourth Edn., page 784)."

54. In Mardia (supra) Supreme Court has also held that the proceedings under Section 17 of the Securitisation Act in fact are not appellate proceedings and it seemed to be a misnomer. It was observed that it is the initial action which is brought before a forum as prescribed under the Securitisation Act, raising from the grievance against the action or measures taken by one of the parties to the contract. It is held that this is the stage of initial proceedings, like filing a suit in civil court and as a matter of fact the proceedings under Section 17 of the Securitisation Act are in lieu of a civil suit, which remedy is ordinarily available, but for the bar under Section 34 of the Securitisation Act.

55. In *M/s.Transcore Vs. Union of India & Anr.*[51] the Supreme Court again had an occasion to examine the provisions of Securitisation Act as also referring to the decision in *Mardia Chemicals Ltd.* (supra). The Supreme Court held that Securitisation Act was enacted to enforce the interest in the "financial assets" which belong to banks or financial

51 (2008) 1 SCC 125

institutions by virtue of contract between the parties or by operation of common law principles. It was held that the Securitisation Act enables the banks and financial institutions to realise long term assets, manage problems of liquidity, asset liability mis- match and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. One of the object of the Act was recovery by non-adjudicatory process by enforcement of security interest, on default of the borrower to repay the debt or failure to maintain the appropriate margin. It was observed that it was for this reason Section 13(1) and 13(2) of the Securitisation Act are imperative to enable banks and financial institutions to enforce expeditiously without the intervention of the court/tribunal, the security interest on the default of the borrower in repayment and the account of the borrower becoming a non performing assets. It was observed that powers conferred under Section 13(4) of the Securitisation Act comprehend the power to take actual and physical possession of immovable property. The Court in paragraph 41 and 43 has held as under:-

> "41. The heart of the matter is that NPA Act proceeds on the basis that an interest in the asset pledged or mortgaged with the bank or FI is created in favour of the bank/ FI; that the borrower has become a Debtor, his liability has crystallized and that his account with the bank/ FI (which is an asset with the bank/FI) has become sub-standard.
>
> … … …
>
> 43. Keeping in mind the above circumstances, the NPA Act is enacted for quick enforcement of the security. The said Act deals with enforcement of the rights vested in the bank/ FI. The

> NPA Act proceeds on the basis that security interest vests in the bank/FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI. Sections 5 and 9 of NPA Act is also important for preservation of the value of the assets of the banks/ FIs. Quick recovery of debt is important. It is the object of DRT Act as well as NPA Act. But under NPA Act, authority is given to the banks/ FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/ asset reconstruction company. In cases where the borrower has bought an asset with the finance of the bank/ FI, the latter is treated as a lender and on assignment the securitisation company/ asset reconstruction company steps into the shoes of the lender bank/ FI and it can recover the lent amounts from the borrower."

56. Adverting to the above position in law and the provisions of the Securitisation Act, we now discuss whether the suits in question can be said to be maintainable against the bank ? It is not in dispute that the substantial amounts were advanced by the bank to Orbit. It is stated that the liability of the Orbit towards Axis Bank is more than Rs.150 crores (i.e. term loan of Rs.85 crores, OD facilities of 130 crores and OD facilities of Rs.35 crores). These amounts as advanced are secured in favour of the Axis bank by a registered indenture of mortgage dated 28 February 2013 and subsequently by indenture of mortgage dated 17 September 2013 and the indenture of mortgage dated 17 June 2015. Thus, a 'security interest' as clearly falling within the meaning and purview of Section 2(zf) of the Securitisation Act, is created in favour of the bank in regard to these advances made in favour of Orbit. It is also not in dispute that the entire project in question (land and building) are the subject matter of the said mortgage. Once there is a valid and legal mortgage in operation and there is default on the part of Orbit in

repayment of the said advances and the account of Orbit becoming non-performing assets (NPA), there can be no fault or any impediment in law and/or any illegality on the part of the bank to take recourse to the provisions of the Securitisation Act namely by issuing notice under Section 13(2) and taking measures under Section 13(4) to enforce the security interest and realise the amounts due and payable to the bank by Orbit, from the mortgaged assets. The bank has resorted to these remedies and measures under the Securitisation act by issuance of notice under Section 13(2) dated 19 August 2016 issued to Orbit and thereafter by taking recourse to Section 13(4) and taking symbolic possession of the suit properties on 7 November 2016.

57. The averments as made in the plaint clearly indicate that the plaintiffs decided to purchase their respective flats on or about 2009-2010 and substantial payments were made to Orbit as stated to be part consideration of the purchase price. It is however astounding that despite parting with such huge amounts stated to be the consideration for purchase of the flats, the plaintiffs remained satisfied on a mere piece of paper namely allotment letters issued by Orbit and/or a merely MOU. The Plaintiffs are not the category of persons who can be said to be unaware of law or would have no means to seek legal advice. The plaintiffs never felt that Orbit should follow the process of law as

prescribed under the MOFA and enter into a registered agreement with them. It is also quite clear that in some of the cases even timely receipts in regard to payments were not accepted and the receipts were passed on subsequently. Not even in one case there is a registered agreement for purchase of flat as would usually and normally happen in a case of a bonafide purchase transaction of a flat and more so, when the flat in question is so valuable the price of which runs into several crores of rupees, ranging between Rs.18 crores to Rs.38 crores.

58. When it comes to purchase of flats and protection being conferred on the flat purchasers in the State, the provisions of MOFA are attracted which is an enactment to regulate promotion of construction, sale, management and transfer of flats on ownership basis. It is worthwhile to note the preamble of the Act so as to ascertain the intention of the legislature to have such an enactment. The preamble of the MOFA reads thus:-

> "WHEREAS, It has been brought to the notice of the State Government that, consequent on the acute shortage of housing in the several areas of the State of Maharashtra, sundry abuses, malpractices and difficulties relating to the promotion of the construction of, and the sale and management and transfer of flats taken on ownership basis exist, and are increasing;
>
> AND WHEREAS, the Government in order to, advise itself as respects the manner of dealing with these matters appointed a committee by Government Resolution in the Urban Development and Public Health Department No. S. 248-79599-F, dated the 20th May 1960, to inquire into and report to the State Government on the several matters referred to aforesaid with the purpose of considering measures for their amelioration;

> AND WHEREAS, the aforesaid Committee has submitted its report to Government in June 1961, which report has been published for general information;
>
> AND WHEREAS, it is now expedient after considering the recommendations and suggestions made therein, to make provision during the period of such shortage of housing, for the regulation of the promotion of the construction, sale and management and transfer, of fiats taken on a ownership basis in the State of Maharashtra; It is hereby enacted in the Fourteenth Year of the Republic of India as follows:.. … ."

The notes on the clauses of the provisions of MOFA reads thus:-

> "Clause 4- This contains the provision for compulsory registration of the agreement for sale of the flat.
> …. ….. …
> Clause 8- This clause provides for the refund of the amount paid, with interest at the rate of 9 per cent per annum, if the flat is not handed over by the date agreed upon or within further time allowed to him for reasons beyond the control of the promoter or his agents.
>
> Clause 9 – This clause provides that the promoter shall not, without the previous consent of the flat purchasers, mortgage or create a charge on the flat or the land after he has entered into an agreement to sell a flat. If he nevertheless does create mortgage or a charge without such consent after the agreement is registered it will not affect the rights and interests of such flat takers.

59. In the context of the present dispute, the relevant provisions of the MOFA are as under:-

> 2 **Definitions:**
> (c) ["**promoter**" means a person and includes a partnership firm or a body or association of persons whether registered or not] who constructs or causes to be constructed a block or building of flats [or apartments] for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both;
> … … ...
> 4. **Promoter before accepting advance payment or deposit to enter into agreement and agreement to be registered,-**
> (1) [Notwithstanding anything contained in any other law, a promoter who intends to construct or constructs a block or building of flats all or some of which are to be taken or are taken

on ownership basis, shall, before he accepts any sum of money as advance payment or deposit, which shall not be more than 20 per cent, of the sale price enter into a written agreement for sale with each of such persons who are to take or have taken such flats, and the agreement shall not be registered under 2[the Registration Act, 1908 (hereinafter in this section referred to as "the Registration Act")] 3[and such agreement shall be in the prescribed form.]

4[(1A) The agreement to be prescribed under sub-section (1) shall contain inter alias the particulars as specified in clause (a); and to such agreement there shall be attached the copies of the documents specified in clause (b) -

(a) particulars -

(i) if the building is to be constructed, the liability of the promoter to construct it according to the plans and specifications approved by the local authority where such approval is required under any law for the time being in force ;

(ii) the date by which the possession of the flat is to be handed over to the purchaser;

(iii) the extent of the carpet area of the flat including the area of the balconies which should be shown separately;

(iv) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which installments thereof may be paid;

(v) the precise nature of the organisation to be constituted of the persons who have taken or are to take the flats;

(vi) the nature, extent and description of the common areas and facilities;

(vii) the nature, extent and description of limited common areas and facilities, if any;

(viii) percentage. of undivided interest in the common areas and facilities appertaining to the flat agreed to be sold;

(ix) statement of the use for which the flat is intended and restriction on its use, if any;

(x) percentage of undivided interests in the limited common areas and facilities, if any, appertaining to the flat agreed to be sold;

(b) copies of documents, –

(i) the certificate by an Attorney-at-law or Advocate under clause (a) of sub-section (2) of section (3);

(ii) Property Card or extract of Village Forms VI or VII and XII or any other relevant revenue record showing the nature of the title of the promoter to the land on which the flats are constructed or are to be constructed;

(iii) the plans and specifications of the flat as approved by the concerned local authority.]

1[(2) Any agreement for sale entered into under sub-section (1) shall be presented, by the promoter or by any other person

competent to do so under section 32 of the Registration Act, at the proper registration office for registration, within the time allowed under sections 23 to 26 (both inclusive) of the said Act and execution thereof shall be admitted before the registering officer by the person executing the document or his representative, assign or agent as laid down in sections 34 and 35 of the said Act also within the time aforesaid:

Provided that, where any agreement for sale is entered into, or is purported to be entered into, under sub-section (1), at any time before the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983, and such agreement was not presented for registration, or was presented for registration but its execution was not presented before the registration officer by the person concerned, before the commencement of the said Act, then such document may be presented at the proper registration office for registration. and its execution may be admitted, by any of the persons concerned referred to above in this sub-section, on or before the 31st December 1984, and the registering officer shall accept such document for registration, and register it under the Registration Act, as if it were presented and its execution was admitted, within the time laid down in the Registration Act:

Provided further that, on presenting a document for registration as aforesaid if the person executing such document or his representative, assign or agent does not appear before the registering officer and admit the execution of the document, the registering officer shall cause a summons to be issued under section 36 of the Registration Act requiring the executants to appear at the registration office, either in person or by duly authorised agent, at a time fixed in the summons if the executant fails to appear in compliance with the summons, the execution of the document shall be deemed to be admitted by him and the registering officer may proceed to register the document accordingly. If the executant appears before the registering officer as required by the summons but denies execution of the document, the registering officer shall, after giving him a reasonable opportunity of being heard, if satisfied that the document has been executed by him, proceed to register the document accordingly.]

SECTION 4A: EFFECT OF NON-REGISTRATION OF AGREEMENT REQUIRED TO BE REGISTERED UNDER SECTION

4 - Where an agreement for sale entered into under sub-section 4, whether entered into before or after the commencement of the Maharashtra Ownership Flats (Regulation of the promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act, 1983, remains unregistered for any reason, then notwithstanding anything contained in any law for the time being in force, or any judgment, decree or order of any

Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1963, or as evidence of part performance of a contract for the purposes of section 53A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be effected by registered instrument.]

SECTION 8: REFUND OF AMOUNT PAID WITH INTEREST FOR FAILURE TO GIVE POSSESSION WITHIN SPECIFIED TIME OR FURTHER TIME ALLOWED. If -
(a) the promoter fails to give possession in accordance with the terms of his agreement of a flat duly completed by the date specified, or any further date or dates agreed to by the parties, or
(b) the promoter for reason beyond his control and of his agents, is unable to give possession of (he flat by the date specified, or a further agreed date and a period of three months thereafter, or a further period of three months if those reasons still exist, then, in any such case, the promoter shall be liable on demand (but without prejudice to any other remedies to which he may be liable) to refund the amounts already received by him in respect of the flat (with simple interest at nine percent per annum from the date he received the sums till the date the amounts and interest thereon is refunded), and the amounts and the interest shall be a charge on the land and the construction if any thereon in which the flat is or was to be constructed, to the extent of the amount due, but subject to any prior encumbrances.

SECTION 9: NO MORTGAGE ETC., TO BE CREATED WITHOUT CONSENT OF PARTIES AFTER EXECUTION OF AGREEMENT FOR SALE - No promoter shall, after he execute an agreement to sell any fiat, mortgage or create a charge on the flat or the land, without the previous consent of the persons who take or agree to take the flats, and if any such mortgage or charge is made or created without such previous consent after the agreement referred to in section 4 is registered, it shall not affect the right and interest of such persons."

60. It view of the above object and intention of the legislation, the above provisions of the MOFA as referred during the course of arguments are required to be considered in their application to the given facts, inasmuch as the plaintiffs contend that the legislation provides for valuable rights referring to Section 4, 4A, Section 5 and 9 of the MOFA.

61. We find it difficult to accept the said contention as urged on behalf of the plaintiffs that these provisions of the MOFA would in any manner assist the plaintiffs. The plaintiffs who have parted with substantial amounts, are not ordinary flat purchasers. For the reasons best known to them, the plaintiffs never felt to have a benefit of a registered agreement of sale of their respective flats which would require payment of proper stamp duty nor they called upon Orbit to do so. This possibly in view of the nature of the relations the plaintiffs stood with Orbit, the plaintiff thought it wiser to remain in that position. In the context of the MOFA Act the non-registration of an agreement to purchase/sale of a flat in fact goes to the root of the matter. Thus when we consider the argument of the applicability of the provisions of MOFA and a protection as claimed by the plaintiffs under the provisions of the said Act the basic compliance of the provisions MOFA would not only be germane but a requirement and a mandate of law.

62. We are unable to agree with the reasoning of the learned Single Judge on the applicability of the MOFA. Admittedly there is no compliance of the provisions of Section 4 of the Act which provides that a promoter who intends to construct a building or flats which are to be taken or already taken on ownership basis, shall before, he accepts any some of money as advance payment or deposit, which shall not be more

than 20% of the sale price, enter into a written agreement for sale with each of such persons, who are to take or have taken, such flats, and the agreement shall be registered under the Registration Act,1908. Sub-section 1A of Section 4 provides that the prescribed agreement shall contain all particulars as specified in clause (a) and such agreement shall be attached with the copies of the documents specified in clause (b) of the said provision. In the present case admittedly there is no agreement entered between the parties as prescribed under Section 4(1) and Section 4(1A) of the Act. In case of one plaintiff there is merely on MOU which is also not registered as per the provisions of the Registration Act.

63. Section 4A provides for effect of non registration of an agreement, this provision is also not available to the plaintiff, as Section 4A speaks of '*an agreement for sale entered under sub-section (1) of Section 4*' before or after the commencement of the Maharashtra Ownership Flats (Regulation of promotion of construction, sale, management and transfer) (Amendment and Validating Provisions) Act,1983 and which remains unregistered for any reason. It is only in such a situation notwithstanding anything contained in any law for the time being in force, or in any judgment, decree or order of any Court, it may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act,1963 or as

evidence of part performance of a contract for the purposes of Section 53A of the Transfer of Property Act,1882, or as evidence of any collateral transaction not required to be effected by registered instrument. We are afraid as to how the provisions of Section 4 and 4A , ex-facie, are of any avail to the plaintiffs.

64. Further Section 9 of the MOFA which provides that no mortgage etc. be created without consent of parties, after execution of agreement for sale, also can have no application in the facts of the present case. This for the reason that primarily there is no agreement for sale executed by Orbit in favour of the plaintiffs to sell any of these flats and when no such agreement to sale is executed, there was no embargo on Orbit not to mortgage the project to the bank and to receive the term loans and the other borrowings. Conversely in such a situation there was also no embargo on the bank to advance a loan and receive the project assets as a mortgage/security for repayment of loan from Orbit. As there was no registered agreement as prescribed under Section 4 of the MOFA, there was no question of the rights of the plaintiffs/purported flat purchasers being protected so as to legally override the charge created by the bank on the project assets. In the absence of the basic compliance under MOFA by Orbit and plaintiffs it cannot be presumed that the money which was received by Orbit from plaintiffs was towards purchase of flats for the applicability of the

MOFA. In ***Hansa V. Gandhi*** (supra), the Court examining the provisions of Section 4 of the MOFA held that the agreement executed between the plaintiff and the developer ought to have been registered with the Sub-Registrar and in the absence of such registered document, the plaintiff would not get any right in the flat which he intended to purchase. In paragraphs 19 and 20 the Court observed thus:-

> "19. It is a fact that the plaintiffs had not entered into any formal agreement with regard to the purchase of the flats with the Developer. The mere letter of intent, which was subject to several conditions, would not give any right to the plaintiffs for purchase of the flats in question till all the conditions incorporated in the letter of intent were fulfilled by the plaintiffs i.e. the proposed purchasers. It is also a fact that all the conditions, which were to be fulfilled, had not been fulfilled by the plaintiffs.
>
> 20. According to the provisions of Section 4 (1) of the Act, the agreement, if any, executed between the plaintiffs on one hand and the developer on the another, ought to have been registered with the sub-Registrar. In absence of such a registered document, the plaintiffs would not get any right in respect of the flats, which they intended to purchase. Moreover, in absence of the registration, the Subsequent Buyers could not have got an opportunity to inspect the agreement and there could not be any presumption that the Subsequent Buyers knew about the agreement. (emphasis supplied)

65. Thus, on the above conspectus it would not be correct to accept the case of the plaintiffs of any protection was available to them, under the provisions of MOFA and on that ground assert for impleadment of Axis bank as a defendant to the suit.

66. Further, even if the plaintiffs intend to rely on the provisions of Section 5 and 8 of the MOFA, these provisions are of no avail against the bank. The plaintiffs contention that in view of the specific provisions

under Section 4 and 9 of the MOFA , the plaintiffs would have a prior charge on the project as mortgaged to the bank and thus the bank becomes a necessary party to the suit, is required to be stated only to be rejected. As noted above it is quite clear that the plaintiffs transaction to purchase the flat, if any, had become quite old inasmuch as the amounts were paid by the plaintiffs to Orbit in or about 2009 or sometime thereafter. However, the fact remains that only after the plaintiffs became aware of the bank enforcing its security interest by taking measures under Section 13 of the Securitisation Act in the year 2017, the plaintiffs woke up and instituted these suits. It is surprising that despite such large amount being advanced, no steps whatsoever were taken by the plaintiffs, to resort to any legal remedy against Orbit, prior to institution of this suit, which a bonafide flat purchaser in the normal course would do. We see no correspondence entered between the plaintiffs and Orbit or any other material which would show that the plaintiffs had any grievance in Orbit not undertaking completion of the project or not registering an agreement with the plaintiffs for sale of the flats.

67. From the MOU entered by one of the plaintiffs (Madhav Prasad Aggarwal- plaintiff in Suit No.62 of 2017) it is clear that this plaintiff was made aware about the mortgage of the said project in

favour of the bank and this was accepted in totality by the said plaintiff. Thus there was a clear intention of the said plaintiff not to get the agreement registered and/or to take any steps to safeguard any of the legal rights which if at all had accrued to the plaintiff. It is also astonishing as to why before the bank adopted measures under the Securitisation Act, any of the plaintiff's for the long-long time available at their disposal, did not feel the need to seek specific performance of the so called agreements, entered by the plaintiffs with Orbit. This is surely very abnormal. This conduct of the plaintiffs casts a serious doubt of the real intention of the plaintiffs when we consider the plea of the bank for rejection of the plaint under Order VII Rule 11(d) of the CPC.

68. It is thus clear that the real cause of action to implead Axis bank as a party was to prevent the bank from enforcing its security interest as created by Orbit on the said project. This position is fortified by the fact, that in each and every plaint, there are clear averments in regard to the plaintiffs' grievance being echoed in regard to the measures taken by Axis bank under the Securitisation Act.

69. In support of the plaintiffs' contention that the bank would be required to be joined in the conveyance in case the plaintiff succeed in their prayer for a specific performance of the agreement against Orbit

and thus, bank is a necessary party to the suit, reliance is placed on the decision of the Supreme Court in **Dwarkaprasad Singh & Ors.** (supra). In our opinion, in the facts of the present case, the said decision is certainly not applicable. This is not the case where the bank is a purchaser of the property. We have already held that considering the prayers as made in these suits, the relief revolving around or in any manner touching the issue qua the legality of the bank exercising rights under the Securitisation Act as a mortgagee of the project, the civil court would have no jurisdiction. Thus when the adjudication of the rights of the bank to create the mortgage is not within the scope and cannot be subject matter of the suit, the bank cannot become a necessary party to the suit merely on the relief of specific performance being sought by the plaintiff against Orbit. We are of the clear opinion that if the plaintiffs wish to assert their rights against the bank which has a security interest in the project as recognized by the Securitisation Act, then the only remedy for the plaintiffs was to take recourse under Section 17 of the Securitisation Act.

70. We thus see much substance in the contention as urged on behalf of the bank, that the averments as made in the plaint are sufficient to reach to a conclusion that the plaint as against the bank is barred by the provisions of Section 34 of the Securitisation Act.

71. We now consider whether the plaint(s) in any of these suits fall within the exceptions as carved out in paragraph 51 of the decision of the Supreme Court in *Mardia Chemicals Ltd (supra),* namely whether the case of the plaintiffs as made out in the plaint is such that the action of the bank (secured creditor) can be said to be fraudulent or the bank's claim is so absurd and untenable that it may not require any probe whatsoever, so as to hold that the plaints in these suits are maintainable against the bank, by overcoming the bar of Section 34 of the Securitisation Act.

72. In the foregoing paragraphs we have categorically noted the averments in each of the plaints as made against the bank, which the plaintiffs *interalia* say, are allegations of fraud as played by the bank in granting loan to Orbit and accepting the mortgage of the project assets. It is well settled that the parties pleading fraud must set forth full particulars, general allegations are insufficient even to amount to an averment of fraud, however strong the language in which such averments are couched (see **Bishnudeo Narain Versus Seogeni Rai & Ors.** AIR 1951 SC 280). The provisions of Order VI Rule 4 postulate that when plaintiff alleges fraud the same is required to be pleaded with specificity, particularity and precision.(See **Afsar Saikh Versus Soleman BiBi** (1976 (2) SCC 142).

73. The bank would be justified in relying on the decision of the Single Judge of Madras High Court in **Punjab National Bank, represented by its Manager Vs. J. Samsath Beevi & Ors**.(supra) wherein the Court emphasized that it is the duty of the Court to see that the allegations of fraud are not thrown, just for the purpose of maintaining a Suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. Referring to the decision of the Supreme Court in **T.Arivandandam v. T.V. Satyapal** the celebrated judgment of Krishna Iyer, J. (supra) in **I.T.C. Ltd. v. Debts Recovery Appellate Tribunal**[52]**,** the Supreme Court held that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unraveled and exposed by the Court while dealing with an Application under Order 7, Rule 11. It is the obligation on the Court to examine if the allegations of fraud and collusion made in the Plaint, are themselves a product of "fraud and collusion", so as to prevent any action being taken by the bank on secured assets and whether the facts are such overwhelming so that the mandate, object and intention of Section 34 read with Section 17 of the Securitisation Act are required to be kept aside. The principles that particulars of fraud are required to be pleaded as per the requirements of Order VI Rule 4 of the CPC, the principles are succinctly elaborated in the decision of the Supreme Court

52**.1998 (2) SCC 70**

in **Ranganayakamma & Anr.** (supra). The Court held that when a fraud is alleged, the particulars thereof are required to be pleaded. The plea of fraud cannot be general in nature. It also cannot be vague.

74. Adverting to the above principles we do not find any substance in the contention of the plaintiffs that there is any case of fraud practised by the bank so that the plaints in these suits against the bank be sustained, on the exception as carved out in **Mardia** (supra). *Ex facie* allegations of collusion/fraud which have been made in each of these plaints and as noted above, to say the least are so vague, weak and ambiguous, to hold that these averments can at all be considered to be averments of fraud as played by the bank against the plaintiffs. We thus see much substance in the contention as urged on behalf of the bank that by clever drafting and by making unsubstantiated allegations of fraud, the bank has been impleaded as a party defendant to the suit. The bank would thus be correct in its contention that in the absence of an unsubstantiated plea of fraud against the bank, the plaint against the bank is liable to be rejected following the principles as laid down in paragraph 51 in ***Maradia Chemicals Ltd*** (supra). The nature of the prayer clauses as noted above in all these plaints also makes it clear that the principal relief is of specific performance of the agreement against Orbit. There is no case in the alternative of any damages or any mandatory claim being made against the bank. Thus, the statements

which are made in the plaint against the bank cannot be said to be in aid of any relief prayed against the bank.

75. The case as urged on behalf of the plaintiff that the bank ought to have undertaken due diligence, is also of no avail as there are no registered agreements between the plaintiffs and Orbit. In this situation, even if due diligence was to be undertaken nothing could have been revealed to the bank qua the alleged rights of the plaintiffs. The plaintiffs argument of 'due diligence' is very casual, as they are unable to explain as to what would be the outcome of due diligence, when there are no registered agreements. Such plea of the plaintiffs is thus absolutely hollow as it leads plaintiffs nowhere.

76. In the above context, the reliance on behalf of the plaintiff on the decision of the Single Judge of this Court in **Ramniklal Tulsidas Kotak vs. Varsha Builders** (supra) which considered an issue pertaining to the validity of a “certificate of title” issued by the advocates appended to the printed agreement of sale, is of no avail. Paragraph 28 of the decision records the requirements which should be borne in mind in attributing credence to such certificate. The Court emphasized the need of issuance of a public notice by the advocates before issuing a certificate of title. In the present case, there is no certificate of title as issued by the advocates. Further as observed by us,

even if the respondent was to undertake any due diligence, nothing would have surfaced as there were no registered agreements by Orbit entered with the plaintiffs and other flat purchasers, which can be said to be neglected/overlooked by the bank, in accepting mortgage of the project in advancing loans to Orbit.

77. The learned Senior Counsel for the bank in these appeals, would be correct in their contention referring to Section 5(b) and 5(c) and Section 6 of the Banking Regulation Act 1949, that the business of the bank is primarily accepting for the purpose of lending or investment, deposits of money from the public, *interalia* repayable on demand or otherwise and withdrawal of cheque, draft, order etc. The banking company as defined is a company which would transact business of banking, and thus, the plaintiffs cannot expect the bank to undertake the work of a 'promoter', in view of the specific definition of a“promoter”, as contained under Section 2(c) of the MOFA namely who constructs a building or flats and for the purpose of selling them to persons or co-operative society or association of persons, and thus the reliefs which the plaintiffs can seek against the promoters/Orbit cannot be availed against the bank in the civil suit in question.

78. As regards the plaintiffs contention that in view of Section 9 of the MOFA the plaintiffs would have prior rights to that of the bank qua

the project as mortgaged to the Axis bank, also cannot be accepted as noted above. In fact by this plea the plaintiffs indirectly question the security interest of the bank and the entitlement of the bank to resort to the measures under Section 13 of Securitisation Act. The plaintiffs therefore necessarily should have availed of a remedy under Section 17 of the Securitisation Act which permits "any person" who is aggrieved by any of the measures referred to in sub-section 4 of Section 13 taken by the secured creditor or his authorised officer, by making an application to the Debts Recovery Tribunal against such measures. As held by the Supreme Court in *Mardia Chemicals Ltd.*(supra), the proceedings in an appeal under Section 17 is that of a suit in the court of first instance under the Code of Civil Procedure, as observed in paragraph 59 and 62 of the said decision.

79. In supporting the contention that the bank would be required to be joined in the conveyance in case the plaintiffs succeeds in obtaining a decree of specific performance against Orbit, and thus, bank is a necessary party to the suit, the plaintiffs rely on the decision of Supreme Court in **Dwarkaprasad Singh & Ors.** (supra). In our opinion, the reliance on this decision in the facts of the present case is not well founded. This is not the case where the bank is a purchaser of the property. We have already held that considering the prayers as made in the suits in question, a relief that the mortgage created in

favour of the bank be declared as illegal, cannot be granted by the civil court. Once the adjudication of the rights of the bank qua the mortgage are outside the jurisdiction of the civil court, the bank does not become a necessary party, merely on the relief of specific performance being sought by the plaintiff against Orbit. In fact the plaintiffs are assuming a situation that the bank has no mortgage rights on the the project and thus they can seek a relief against the bank. Such a presumption is wholly baseless in the absence of the plaintiffs making any plea to challenge the rights of the bank to enforce its security interest by adopting proceedings before the DRT.

80. We may thus observe that considering the expediency, prudence and wisdom of the banking business and when in the facts of the case the dealings between the bank and Orbit purely pertain to a banking business, the consequence of the bank being dragged into this litigation is definitely not warranted. In fact this would adversely affect the banks commercial interest to recover the debts due and payable to it by adhering to the procedure as prescribed by law, namely under the Securitisation Act. In the facts of the present case it would definitely meet the ends of justice that the plaint against the bank although it is one of the defendant needs to rejected. It is permissible for the Court to reject the entire plaint so far as the bank is concerned which is one of

the defendants. In ***Mst.Phool Sundari Vs. Gurbans Singh & Ors***.[53] the Division Bench of Rajasthan High Court comprising '**Wanchoo C.J. & Dave J.**' had an occasion to consider the issue whether it is possible to reject the entire plaint in so far as one of the defendants is concerned and in such a situation, what would be a proper order under Order 7 Rule 11(a) or (d) of the Code of Civil Procedure. Chief Justice Wanchoo speaking for the Bench, taking review of law on the issue, in paragraph 9 and 14 observed thus:-

> "9. We have given our earnest consideration to this matter and we do not see why where a plaint discloses no cause of action against some of the defendants it cannot be rejected against those defendants. We can understand that a plaint has to be rejected in toto in the sense that a Court cannot reject one part of the plaint against all the defendants and carry on with the rest of the plaint against them, but we cannot understand why the Court cannot reject the entire plaint against a particular defendant and carry on with the entire plaint against others.
>
> In such a case, there is a total rejection of the plaint so far as a particular defendant is concerned. There being such a total rejection of the plaint so far as the particular defendant is concerned, we are of the opinion that such an order would be open to appeal as a decree.
>
> …..
>
> 14. We are, therefore, of opinion that in the first place, we do not see anything in O.7 R.11(a) or (d) which forbids a Court from rejecting the plaint as a whole against some of them. We are of the opinion that it is possible for the Court to reject the entire plaint so far as some of the defendants are concerned and that would be a proper order under O.7 R.11(a) or (d) and an appeal would lie in view of the definition of "decree" in S.2(2).
>
> In any case, we are further of opinion that even if this is not possible, an order by which the suit practically fails against some of the defendants amounts to a decree in favour of those defendants against the plaintiffs within the meaning of that word in S.2(2), Civil P.C. and an appeal lies.
>
> In any view of the matter, therefore, the order passed in this case was appealable. The plaintiff has not filed an appeal Against it. We are not prepared to grant him the benefit of S.5 of the Limitation Act and dismiss the revision. In view of the circumstances

53 AIR 1957 Raj 97

of this case, we order the parties to bear their own costs of this Court.

(emphasis supplied).

81. A similar view has been taken by the Supreme Court in **Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponnoamman Educational Trust** (supra), the specific point for consideration before the Supreme Court was whether the learned Single Judge of the High Court was justified in ordering rejection of the plaint in so far as the first defendant/appellant therein was concerned. The Court examining the provisions of Order 7 Rule 11 of CPC, held that the plaint was rightly rejected against the first defendant. The Court in paragraph 9, 29 & 30 held thus:-

> "9. The points for consideration in this appeal are:
> (a) Whether the learned Single Judge of the High Court was justified in ordering rejection of the plaint insofar as the first defendant (the appellant herein) is concerned ? And
> (b) Whether the Division Bench of the High Court was right in reversing the said decision ?
>
> 29. Finally, the learned Senior Counsel for the respondent submitted that in view of a decision of this Court in *Roop Lal Sathi V. Nachhatiar Singh Gill [(1982)3 SCC 487],* rejection of the plaint in respect of one of the defendants is not sustainable. We have gone through the facts in that decision and the materials placed for rejection of plaint in the case on hand. We are satisfied that the principles of the said decision do not apply to the facts of the present case where the appellant-first defendant is not seeking rejection of the plaint in part. On the other hand, the first defendant has prayed for rejection of the plaint as a whole for the reason that it does not disclose a cause of action and not fulfilling the statutory provisions. In addition to the same, it is brought to our notice that this contention was not raised before the High Court and particularly in view of the factual details, the said decision is not applicable to the case in hand.
>
> 30. In the light of the above discussion, in view of the shortfall in the plaint averments and statutory provisions, namely, Order 7 Rule 11, Rule 14(1) and Rule 14(2), Forms 47 and 48 in Appendix A of the Code which are statutory in nature, we hold that the learned Single Judge of the High Court has correctly concluded that in the absence of any cause of action shown as against the first

> defendant, the suit cannot be proceeded either for specific performance or for the recovery of money advanced which according to the plaintiff was given to the second defendant in the suit and rightly rejected the plaint as against the first defendant. Unfortunately, the Division Bench failed to consider all those relevant aspects and erroneously reversed the decision of the learned Single Judge. We are unable to agree with the reasoning of the Division Bench of the High Court.

82. Similar view was taken by the Division Bench of this Court in **K.S.Dhondy Vs. Her Majesty The Queen of Netherlands & Anr** (Supra). Dr.Justice D.Y.Chandrachud (as His Lordship then was) speaking for the bench held that the dismissal of the suit against the first defendant was in order.

83. In **Sejal Glass Ltd**. (supra) the Court was concerned with defendant's application under Order VII Rule 11(a) that there was no cause of action against defendant no.2 to 4 in the suit in question in the said decision. The Supreme Court held that it cannot be a rule of law that once a part of a plaint cannot proceed, the other part also cannot proceed, and the plaint as a whole must be rejected under Order VII Rule 11. The Court recognized that in cases where the plaint survives against certain defendants, against them Order VII Rule 11 will have no application.

84. To support the contention that the jurisdiction of the Civil Court is not completely ousted, on behalf of the plaintiffs, reliance is placed on the decision of the Supreme Court in **Nahar Industrial**

Enterprises Ltd. Vs. Hong Kong & Shanghai Banking Corporation (supra). In this case the Supreme Court was considering an issue arising out of an order passed by the High Court allowing the application of the bank, transferring the civil suit filed by the appellant therein from the Court of Civil Judge, Ludhiana to Debt Recovery Tribunal at Mumbai. The question which fell for consideration of the Supreme Court was 'whether the High Court or Supreme Court has the power to transfer a civil suit to Debt Recovery Tribunal; whether transfer of a civil suit from the civil Court to Debt Recovery Tribunal could be tried as counterclaim. It is in this context the Court examined the provisions of Section 9 of CPC and the Recovery of Debts due to Banks and Financial Institutions Act,1993. The Court held that the civil court indisputedly would have jurisdiction to try a suit and if the suit is vexatious or otherwise not maintainable action can be taken in terms of the Code. The Court also considered the decision in **Mardia Chemicals Ltd. & Ors.** (supra) *a*nd the observations as made in the said decision that the jurisdiction of the civil court can be invoked in case of fraud and misrepresentation. The Court held that the High Court could not have transferred the suit from the civil court Ludhiana to the DRT, Mumbai. We are afraid as to how this decision would assist the plaintiffs, when the question in the present proceedings is completely distinct, namely whether the jurisdiction of the civil court is barred in view of Section 34 of the Securitisation Act, as

a closer scrutiny of the plaints as framed against the bank indicates that the issue as set up in the plaint against the bank are the measures adopted by the bank under Section 13(4) of Securitisation Act.

85. The reliance on behalf of the plaintiffs on the decision in **Indian Bank Vs. ABS Maritime Products Pvt. Ltd.** (supra) is also not well founded. In the said case the issue before the Supreme Court was 'whether a civil suit filed against the bank in Calcutta High Court for recovery of certain amount as damages for non-disbursal of loan with interest, could be transferred to the Debt Recovery Tribunal in view of Section 19 of the the Debts Due to Banks and Financial Institutions Act. The plea of the bank was rejected by the High Court. The contention of the bank was that the recovery proceedings initiated by the bank against the respondent and the respondent's suit for damages, were inextricably connected and although the suit of the respondent was prior to the application of the bank filed before the Tribunal, it was required to be considered as a counterclaim and should be transferred to the tribunal. The Supreme Court, however, did not accept the plea of the bank and dismissed the appeals. It is in this context the Supreme Court examined the powers of the civil court under Section 9 of CPC and Sections 17 and 18 of the the Debts Due to Banks and Financial Institutions Act, in holding that the civil court's jurisdiction is barred only in regard to the

application by bank or financial institutions for recovery of its debt and that the jurisdiction of civil court is not barred in regard to any suit filed by the borrower or any other person against a bank for any other relief and it was held that the Calcutta High Court had jurisdiction to entertain and try a civil suit filed by the borrower. It was held that there is no provision in the Act for transfer of suits and proceedings, except section 31 which relates to suit/proceeding by a Bank or financial institution for recovery of a debt. Thus this decision would not assist the plaintiffs, as in the present case there are no proceedings which are filed by the bank before the Debt Recovery Tribunal and the issue is of jurisdiction of the civil court to entertain a suit after the bank has resorted to the measures under Section 13(4) of the Securitisation Act.

86. The plaintiffs' reliance on the decision of the Division Bench of this Court in "**Gopal Srinivasan vs National Spot Exchange**" (supra) is also not well founded, as in the facts of the said case, the Division Bench has come to a conclusion that it was a case of mass illegalities, siphoning of moneys, fraud etc and such being the allegations in the plaint, it was held that the plaint could not be rejected against the appellant/ defendant. However, such is not the case in these appeals before us.

87. The Division Bench of this Court in **State Bank of India Vs.**

Jigishaben B.Sanghavi & Ors. (supra) was considering an appeal against the dismissal of an application seeking rejection of the plaint under Order 7 Rule 11(d) of the CPC filed by the State Bank of India. The applicant-State Bank of India had contended that Section 34 of Securitisation Act created bar to the maintainability of the suit against the State Bank of India. The plaintiffs in the said case had raised a similar contention that there are no legal and valid mortgage in favour of the bank, nor any security created in favour of the bank as against rights of HUF of which plaintiffs were members. The Division Bench examining the provisions of Securitisation Act and the principles of law as laid down in **Mardia Chemicals Ltd.** (supra), held that Securitisation Act provides a comprehensive scheme. It was held that the provisions of Securitisation Act explicitly were applicable to challenge the measures taken under Section 13(4) of the Securitisation Act and the challenge thus fell necessarily before the tribunal by an appeal under Section 17 after the measures are taken. It was held that once the measures were adopted under Section 13(4), the statutory remedy is available not only to the borrowers but to "any person", aggrieved by the measures. Referring to the Decision of the Supreme Court in **Authorised Officer, Indian Overseas Bank Vs. Ashok Saw Mills** (supra), the Court observed that wide powers were conferred upon the banks and financial institutions and any person who is aggrieved by the measures taken

under Section 13(4) can approach the DRT. The Court observed that the intention of the legislation in making the said provision was that the banks and financial institutions be vested with stringent power for recovery of dues and safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting with the DRT powers of adjudication into such issues and to declare any such action taken as invalid and also to restore possession even though possession may have been made over to the transferee. The Legislature by including sub-section (3) in Section 17 has vested the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. It was observed that the action taken by a secured creditor in terms of Section 13(4) of the Securitisation Act is open to scrutiny and cannot only be set aside, but even the status quo ante can be restored by the DRT. The Division Bench accordingly, set aside the order passed by the learned Single Judge and rejected the plaint against the bank. The observations of the Court in paragraph 20 and 21A are required to be noted which read thus:-

> 20. Where as in the present case, the grievance by a third VBC 23 app244.10-8.12 person is that : (i) There was no mortgage; (ii) There was no mortgage by the HUF; (iii) The mortgage, if any, is illegal in relation to the share alleged to be that of the HUF; and (iv) No action had been instituted against the HUF before the Tribunal; hese are all grounds of challenge which, in substance, can be asserted before the Debts Recovery Tribunal. These are matters which the Debts Recovery Tribunal is empowered by or under the Act to determine. None of the grounds which are sought to be urged in the plaint fall outside the province and

jurisdiction of the Debts Recovery Tribunal. Once we come to that conclusion, the necessary corollary is that recourse to proceedings in the form of a civil suit is barred by Section 34.

… …

21A These observations of the Supreme Court emphasize that the exception which is carved out is a limited exception. Like all exceptions, this exception must be strictly construed. A borrower or a third party cannot be permitted to defeat or to render nugatory the provisions of the Act merely by a stray reference to an allegation of fraud or, as in the present case, by an averment in paragraph 15 of the plaint of "a systematic fraud". The entirety of the plaint has to be construed. Essentially, in the present case, the averments in the plaint are that: (i) The HUF was a co-owner/tenant in common of the residential flat; (ii) The Bank has taken recourse to proceedings for recovery to which the HUF was not a party; (iii) The Plaintiffs had, in the course of the recovery proceedings, raised an objection before the Recovery Officer to the tenability of the action taken by the Bank; (iv) The Bank had taken recourse to its remedy under the Securitization Act without awaiting the result of the objection raised by the Plaintiffs; (v) The action under Section 13(2) was initiated in disregard to the provisions of the Securitization Act; (vi) The mortgage executed by the Second, Third and Fourth Defendants was defective because the original Share Certificates were not with the Bank; (vii) The VBC 26 app244.10-8.12 First Defendant had no security interest and no secured assets and, therefore, was not entitled to invoke the provisions of Sub-section (4) of Section 13 against the right claimed by the HUF; (viii) A 'systematic fraud' was played by the First Defendant to pressurise the Plaintiffs; and (ix) There was an absence of legal necessity which would vitiate the mortgage alleged to have been created by the Second Defendant as Karta of the HUF. The reliefs which are sought in the suit have already been adverted to earlier. These averments, when construed in their entirety, would reveal that the grievance which the Plaintiffs have in the suit is in respect of the validity of the mortgage which is alleged to have been executed by the Second Defendant as Karta of the HUF and of the tenability of the action adopted by the Bank under the Securitization Act, so as to meet the interest of the HUF claimed in the residential flat. The Plaintiffs as third parties have sufficient recourse to challenge the lawfulness of the action of the Bank by invoking their remedies under Section 17. Thus, clearly within the meaning of Section 34, a suit in respect of any matter which the Tribunal is empowered by or under the provisions of Section 17 to determine is barred. The suit, therefore, in our view, was clearly barred by Section 34. The VBC 27 app244.10-8.12 stray reference to an allegation of fraud in paragraph 15 of the Plaint is not sufficient to bring the case within the scope of the exception carved out by the Supreme Court in Mardia Chemicals."

88. In "**Jagdish Singh vs Heeralal & Ors.**" (supra), the Supreme Court was examining the issue arising out of an order passed by the High Court in a first appeal whereby the Division Bench set aside the order passed by the trial court holding that a civil suit which was filed by respondent nos.1 to 5 (therein) before the Court of District Judge, Barwani, was not maintainable against the bank in view of the provisions of Section 13 read with Section 34 of Securitisation Act. The Supreme Court examining the ambit of the provisions of Sections 17 and 34 of the Securitisation Act set aside the orders passed by the High Court holding that the measures taken under Section 13 of Securitisation Act dealt with the enforcement of the security interest without intervention of the Court and any person aggrieved by any such measures referred in sub-section (4) of Section 13 has statutory right to appeal to the Debt Recovery Tribunal under Section 17. It was held that Section 34 clearly bars jurisdiction of civil court to entertain any suit or proceedings in respect of "any matter" which the DRT or the appellate tribunal was empowered by or under Securitisation act to determine, and the expression "*in respect of any matter*" referred to in Section 34 would take within its ambit the "*measures*" provided under sub-section (4) of Section 13 of the Securitisation Act. It was held that any grievance against any measures taken by the borrower under sub-section (4) of Section 13 of the Securitisation Act a remedy is open to the aggrieved party to approach the DRT or the appellate tribunal and not the civil court, as the civil court had no jurisdiction to entertain any suit or proceedings in respect of the matter which fall under Section 13(4) of the Securitisation Act and more particularly when Section 35 provides for overriding effect over

the other laws, if they are inconsistent with the provisions of the Securitisation Act, which takes within its purview Section 9 of the Code of Civil Procedure as well. It was held that the bank had proceeded only against the secured assets of the borrowers on which no rights of respondents therein have been crystallized, before creating security interest in respect of the secured assets.

89. In a recent decision of the Supreme Court in the case "**Authorised Officer, State Bank of India vs. Allwyn Alloys Pvt.Ltd. & Ors**."[54], the Supreme Court was considering the provisions of Section 13 and 34 of the Securitisation Act and the powers of DRT to adjudicate on the issues arising out of security interest created in respect of the bank. The Court held that mandate of Sections 13 and 34 clearly bars filing of civil suit and no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which the DRT or DRAT is empowered by or under the Securitisation Act. The Supreme Court set aside the decision of the High Court which permitted respondent nos.5 and 6 therein to approach the competent forum for adjudication of their right, title and interest in the premises in question. It would be profitable to note the observations of the Court in paragraphs 8 and 9 of the report. Mr.Justice A.M.Khanwilkar speaking for the Bench observed as under:-

> *"8. After having considered the rival submissions of the parities, we have no hesitation in acceding to the argument urged on*

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> *behalf of the Bank that the mandate of Section 13 and, in particular, Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002 (for short 'the 2002 Act'), clearly bars filing of a civil suit. For, no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered by or under this Act to determine and no injunction can be granted by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.*
>
> *9. The fact that the stated flat is the subject-matter of a registered sale deed executed by Respondents 5 and 6 (writ petitioners) in favour of Respondents 2 to 4 and which sale deed has been deposited with the Bank along with the share certificate and other documents for creating an equitable mortgage and the Bank has initiated action in that behalf under the 2002 Act, is indisputable. If so, the question of permitting Respondents 5 and 6 (writ petitioners) to approach any other forum for adjudication of issues raised by them concerning the right, title and interest in relation to the said property, cannot be countenanced. … … ….”*

90. In the light of the above discussion, we are of the clear opinion that the learned Single Judge was in an error in holding that the plaints against the bank were not barred under Section 34 of the Securitisation Act and consequently in rejecting the notices of motion and holding that the suits were not barred against the bank.

91. We accordingly set aside the impugned order and allow the notices of motion as filed by the plaintiffs. Ordered accordingly. No costs.

92. Our observations are limited in the context of the issues arising before us under the provisions of Order VII Rule 11 of C.P.C.

[G.S. KULKARNI, J.] **[ACTING CHIEF JUSTICE]**

93. The learned Counsel Mr.Vaishnawa for the respondents seeks stay of the order. The request is opposed by the other side. It is submitted that the next date of suit is after four weeks. The request for stay is rejected.

[G.S. KULKARNI, J.] **[ACTING CHIEF JUSTICE]**