

(2016) 01 BOM CK 0041

In the Bombay High Court

Case No : Writ Petition Nos. 222, 1150 and 2486 of 2015; Notice of Motion Nos. 37 and 311 of 2015; Chamber Summons (Lodging) No. 310 and 247 of 2014; Notice of Motion (Lodging) Nos. 713 of 2014 and 256, 261, 476, 206 and 371 of 2015 and Chamber Summons No. 320 of 2

Blue Coast Hotels Limited

APPELLANT

Vs

IFCI Limited and another.

RESPONDENT

Date of Decision : 27-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 13(4)(a), 13(6), 14, 14(1), 17, 17(3), 31

Citation : (2016) 3 AIRBomR 769

Hon'ble Judges : Anoop V. Mohta; A.A. Sayed, JJ.

Bench : Division Bench

Advocate : Rafiq Dada, Senior Advocate with Umesh Shetty, Manish Desai, Sowjanya Menon, Shakib Dhorajiwala, Harsh Magia i/by Vidhi Partners, Advocates, for the Appellant; R.M. Kadam, Senior Advocate with Rajni Iyer, Senior Advocate and Rohit Gupta, Vinod Kothari and

Final Decision : Disposed Off

Judgement

Anoop V. Mohta, J. -

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All the Writ Petitions are heard finally by consent. The issues are common and interconnected therefore, by this common Judgment, all Petitions are disposed of based on common facts and circumstances.

2. We have decided these Petitions after dealing with the issues so raised by titling and indexing accordingly based upon the pleadings and oral and written

submissions of the learned Senior Counsel/Advocates appearing for the respective parties.

EVENTS:

(A) The Petitioner-Borrower-Blue Coast Hotels Limited (BCHL)"s case.

3. On 17 February 2010, Respondent No. 1 IFCI (Secured Creditor), issued a sanction letter to BCHL for loan of Rs. 150 crore viz. (i) Rs. 70 crores to pay off BCHL's erstwhile lenders, (ii) Rs. 80 crores to be invested by the in the equity of the Joint Venture Company i.e. Silver Resort Hotel India Private Limited ("SRHIPL") that was to undertake the Aerocity project of Delhi, India's First Hotel District. On the same day, IFCI issued a sanction letter for loan of Rs. 85 crore. IFCI agreed to participate in the equity on private placement basis and to partner in a Joint Venture with BCHL in the said Aerocity project. SRHIPL, a special purpose vehicle was incorporated to undertake the Project. About 85000000 equity shares of the face value of Rs. 10 each was issued to IFCI. On 26 February 2010, the Corporate Loan Agreement was executed for Rs.150 Crores. On 4 May 2012, an order was passed by the State Government of Goa, by which the conversion of land of BCHL from agricultural to non-agricultural was put on hold.

4. On 26 March 2013, a notice under Section 13(2) of The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 (for short, "the SARFAESI Act") issued by IFCI with respect to Corporate Loan, demanding payment of Rs.135,15,97,443/, threatening to enforce its rights, inter alia, against the movable and immovable property so mortgaged/ charged, including agricultural property also. On 27 May 2013, a representation was made by BCHL to the above notice. IFCI failed to respond to the same. On 18 June 2013, IFCI took symbolic possession of the property (Hotel Park Hyatt) (Goa Hotel), including the agricultural land. According to BCHL the symbolic possession was taken without delivering the possession notice as required under Rule 8(1) of Security Interest (Enforcement) Rules, 2002, (for short, "Enforcement Rules"). On 20 June 2013, IFCI communicated having taken the symbolic possession of the property on 18 June 2013.

5. On 31 July 2013, BCHL filed Securitisation Application No. 33 of 2014 in Debts Recovery Tribunal (DRT)III, Mumbai. On 4 September 2013, IFCI published first sale notice and the reserve price of Rs. 403 crores was fixed. On 8 October 2013, the sale was postponed. On 9 January 2014, IFCI published second sale notice and the same reserve price was fixed. On 6 February 2014, DRT passed an interim order, directing IFCI to defer acceptance of bid and directed not to take any further steps for sale of the property for next 60 days. Subsequently, no bids were received and the auction failed. On 7 March 2014, IFCI challenged DRT order before Debts Recovery Appellate Tribunal (DRAT). DRAT directed DRT to dispose of the SA, by the end of the month and the Appeal was disposed of.

6. On 31 March 2014, DRT set aside 13(2) notice dated 26 March 2013, interalia

on the ground of noncompliance of Section 13(3A) and that the Demand Notice was issued jointly for agricultural land to which the provisions of the SARFAESI Act did not apply as per Section 31(i). On 2 May 2014, IFCI filed an Appeal. On 10 September 2014, DRAT allowed the Appeal and set aside the order of DRT. Therefore, BCHL filed the present Writ Petition No. 222 of 2015, on 4 October 2014.

7. On 8 October 2014, IFCI issued third auction notice and the reserve price of Rs. 542.57 crores was fixed. On 11 November 2014, this Court passed an order allowing IFCI to receive bids but to retain them in a sealed cover and not to open the same. On 31 December 2014, IFCI published fourth auction notice and the reserve price of Rs. 515.44 crores was fixed. On 5 February 2015, this Court passed an order directing IFCI to retain the bids in a sealed cover and not to open them. This relief was subject to BCHL, depositing Rs. 10 crores with the Registry of this Court, by next date i.e. 20 February 2015. The amount was not deposited by BCHL. On 6 February 2015, IFCI published notice dated 5 February 2015, changing the date of submission of bids and opening of bids from 6 February 2015 to 23 February 2015. On 16 February 2015, BCHL filed Securitisation Application (SA) No.44 of 2015 in DRT. On 23 February 2015, matter was listed for hearing before DRT. The Advocate appearing for IFCI made a statement that IFCI will not confirm the sale till the matter is heard. The matter was parheard in the morning and was taken up in the afternoon session, when Advocate for the auction purchaser (ITC) (Respondent No. 2) appeared and tendered a letter that they have deposited Rs. 129 crores, constituting 25% of the reserve price of Rs. 515.44 crores and as declared a successful bidder in the auction. The interim relief was rejected by DRT.

8. On 26 February 2015, the District Magistrate (DM), South Goa, Margao passed an order under Section 14, directing possession of immovable and movable properties of Hotel Park Hyatt. On 3 March 2015, BCHL filed a Writ Petition before the Goa Bench of this High Court, challenging the above order. On 3 March 2015, this Court passed an order directing the parties to maintain status quo and posted the matter on 23 March 2015. On 3 March 2015, meanwhile, according to BCHL, the Mamlatdar came along with the police and a lady officer of IFCI to the Hotel and exchanged a document within a span of 510 minutes, based on which IFCI claims to be in physical possession of the property.

(B) IFCI-Respondent No. 1's case

9. On 17 February 2010, letters were issued by IFCI sanctioning the aforementioned Corporate Loan. On 26 February 2010, a Loan Agreement executed by BCHL, which required it to pay Rs. 70 Crores in quarterly instalments, commencing from March 2011. Balance of Rs. 80 Crores was to be paid in one bullet payment after a period of one year from the date of first disbursement. On 12 March 2010, similarly in terms of the sanction, share subscription Agreement was executed where BCHL agreed to buyback the shares with an assured rate of return @ 23% per annum; pursuant to the share

subscription Agreement, a share buyback Agreement was entered into between the Parties and the repayment under the transaction was to start from 15 June 2012 and last instalment being 15 March 2015. On 26 February 2010, BCHL executed a Deed of Hypothecation and hypothecated all the movable properties at Goa Hyatt Hotel in favour of IFCI. On 9 March 2010, a Memorandum of Entry was recorded, evidencing an equitable mortgage in favour of IFCI on the Goa Hyatt Hotel to secure, the Corporate Loan and obligation under the buyback transaction. A declaration and undertaking was also executed by BCHL, continuing the mortgage.

10. On 15 March 2012, BCHL within a period of one year only started defaulting and failed to regularise the account even till September 2012. At the same, BCHL also committed default in repayment of share buyback commitment. From 9 April 2012 to 3 September 2012, pursuant to default committed by BCHL, IFCI by its various letters, issued from time to time, called upon BCHL to regularise the account. On 15 September 2012, in view of default committed by BCHL in repayment of principal, as well as, interest amount due, the account of BCHL became Non Performing Asset (NPA) in the books of IFCI. On 23 November 2012, in view of default by BCHL and declaration of account as NPA, IFCI recalled the entire loan amount of Rs. 133.18 Crores. BCHL did not dispute the recall or declaration as NPA. In fact, by its proposal/representation letter dated 28 November 2012, BCHL sought time for 3 to 4 months to repay the amount. On 7 March 2013, IFCI by letter called upon BCHL to remit Rs. 51 Crores before 15 March 2015 being its liability/debt due to IFCI under the buyback agreement. On 26 March 2013, IFCI after giving several opportunities to BCHL and after waiting for almost 9 months from the default, initiated action under the provisions of SARFAESI Act, 2002 and issued notice under Section 13(2) of the SARFAESI Act, whereby BCHL was called upon to pay the amount of Rs. 135,15,97,443/-. On 27 May 2013, BCHL by its letter gave yet another proposal/representation seeking re-schedulement of payments which was received by IFCI on 28 May 2013. On 18 June 2013, IFCI took symbolic possession of the Goa Hotel under Section 13(4). A Notice was published in newspaper as per the provisions laid down under the Act. On 20 June 2013, also served notice under Rule 8(6) of the Enforcement Rules to BCHL, communicating the fact that possession of the Goa property had been taken under Section 13(4). On 21 June 2013, even after receipt of notice dated 20 June 2013, BCHL did not make any objection. BCHL informed IFCI that funds were being mobilised and further furnished six cheques amounting to Rs. 33.16 crores to IFCI.

11. On 30 July 2013, BCHL filed SA No. 33 of 2014 before DRT, Mumbai to challenge the measures taken under Section 13(4). On 4 September 2013, the Public Notice of Sale by auction was published by IFCI fixing the date of auction as 9 October 2013. On 19 September 2013, BCHL for the 5th time requested for time to repay the outstanding liability. BCHL offered to clear the entire outstanding by 31 December 2013. On 3 October 2013, BCHL yet again, by a letter to IFCI sought time to repay the outstanding by 31 December 2013

towards facility (A) and balance by 31 March 2014 and expressing its gratitude to IFCI for its support and deferment of the sale of the Goa hotel. On 29 October 2013, IFCI acceded to BCHL's request and granted time to repay the outstanding amounts. The letter provides that, in the event of default, IFCI would be entitled to take steps under SARFAESI Act, including sale. On 25 November 2013, BCHL gave an undertaking, agreeing that IFCI would be entitled to take proceedings for sale of the assets in the event of default by BCHL. On 15 December 2013, BCHL defaulted in meeting its commitments as per sanction dated 29 October 2013. On 9 January 2014, IFCI issued a fresh Notice of sale by public auction fixing the auction on 10 February 2014. On 31 March 2014, DRT allowed Securitization Application filed by BCHL. On 10 September 2014, DRAT allowed the Appeal filed by IFCI against DRT order. On 30 September 2014, as mandated by Rule 8(5) of the Rules, IFCI obtained a private valuation report from a Government registered and approved valuer for the immovable and movables of Park Hyatt, who fixed the valuation.

12. On 8 October 2014, IFCI issued fresh Public Notice of sale of Goa property fixing a reserve price of Rs. 542.57 crores and the last date of receipt of bids was 12 November 2014. On 11 November 2014, this Court directed IFCI to invite the bids, as per the schedule but IFCI was directed not to open the bids. On 12 November 2014, no bids were received under Public Sale Notice dated 8 October 2014 fixing Reserve Price at Rs.542.57 Crores. On 31 December 2014, IFCI after reducing the reserve price by 5% from the earlier reserve price, issued a fresh notice for conducting Auction Sale of the Property (immovable and movables) on 6 February 2015, at a reserve price of Rs. 515.44 Crores. On 5 February 2015, BCHL applied in Writ Petition No. 222 of 2015 for stay of the sale scheduled on 6 February 2015. This Court directed BCHL to deposit a sum of Rs. 10 Crores, as a condition for stay of sale. On 5 February 2015, in view of the period of two weeks specified by this Court, IFCI by a public notice extended the date for receiving and opening of bids to 23 February 2015, subsequent to the order of the Bombay High Court dated 5 February 2015. On 16 February 2015, instead of depositing the sum of Rs. 10 crores, BCHL filed a fresh Securitization Application No. 44 of 2015 to challenge notices dated 31 December 2014 and 5 February 2015 to stall the sale. On 19 February 2015, no interim relief was granted by DRT. On 20 February 2015, this Court did not extend any interim relief to BCHL.

13. On 23 February 2015, ITC Limited submitted a bid for Rs. 515,44,01,000/- for the Goa Hotel and paid the EMD of Rs. 51,54,40,000/. ITC Limited was declared the highest bidder and paid Rs. 77,31,60,250/being 15% of the bid amount. Thus, ITC Limited paid by this date Rs. 128,86,00,250/. Accordingly IFCI issued a letter accepting its bid. On 23 February 2015, DRT Mumbai also rejected the interim relief sought by BCHL in SA No. 44 of 2015. On 25 February 2015, ITC Limited paid the balance 75% amount of the bid price i.e. an amount of Rs.386,58,00,750. On 25 February 2015, IFCI moved the (DM) District Magistrate, South Goa under Section 14 of SARFAESI Act for physical possession of the property. IFCI issued two Sale Certificates in favour of ITC Limited, one

towards sale of immovable property and the other towards movable property. BCHL, by its letter to the Sub-Divisional Magistrate, requested the SDM to not to take any application for possession till the sale certificate is produced. On 26 February 2015, Application of IFCI under Section 14, was allowed by the DM who directed the Magistrate to execute the same. BCHL filed Special Leave Petition Nos. 6929 and 6930 of 2015, challenging the interim orders dated 5 February 2015 and 20 February 2015, passed by this High Court. The SLP was withdrawn on 27 February 2015, after arguments. On 3 March 2015, after issuing final notice on 27 February 2015, directed BCHL to hand over the possession by 2 March 2015 at 10.20 a.m. by the Mamlatdar and handed over to IFCI. A certificate to that effect was also issued by the Mamlatdar to IFCI. At 12.10 p.m., after hearing the Writ Petition filed by BCHL, the Court (Goa Bench) vide its Order recorded, that IFCI had taken physical possession and handed over the possession to ITC Limited. This Court, (Goa Bench) thereafter, ordered the Respondents to maintain status quo with respect to Petitioner's possession of the property. On 19 March 2015, BCHL filed third Writ Petition before the Goa Bench, inter alia challenging the issuance of Sale Certificates to ITC Limited.

(C) ITC Limited the Purchaser's case

14. In the background of above noted facts, ITC Limited purchaser came into the picture, therefore, added as party Respondents also in the Writ Petition No. 222 of 2015, therefore, these events from its point of view in support of its case.

15. On 4 September 2013, a public notice of sale by public auction was published by IFCI in the newspaper fixing the date of auction on 9 October 2013. The reserve price was Rs. 403,00,00,000/-. On 19 September 2013, BCHL sent a letter to IFCI undertaking that they would pay all outstanding instalments by 31 December 2013. On 3 October 2013, BCHL sent a letter to IFCI offering another proposal for reschedulement of loan, offering to pay Rs. 44 Crores, by 31 December 2013, towards the first loan and Rs. 40 Crores towards the second loan by 31 December 2013, and undertaking to repay the balance of Rs. 40 Crore of second loan by 31 March 2014, and expressing its gratitude to IFCI for its support and deferment of the sale of the Goa hotel.

16. On 25 November 2013, a "Letter of Undertaking" was given by BCHL accepting the schedule given by IFCI on 29 October 2013, and also acknowledging the right of IFCI to sell the assets in case of default in adhering to the above schedule, without prejudice. On 15 December 2013, 30 December 2013 and 31 December 2013, BCHL committed default on rescheduled loan and did not pay the principal amount or the interest on the extended payment dates. BCHL submitted another extension proposal. On 8 January 2014, a letter from IFCI to BCHL was issued informing that due to its default IFCI was going ahead with steps to recover the dues and accordingly rejected their request letter dated 30 December 2013, for further extension. On 9 January 2014, IFCI issued a Notice of sale by public auction fixing the auction on 10 February 2014, at a reserve price of Rs. 403 Crores.

17. On 24 March 2014, BCHL filed a rejoinder in SA No. 33 of 2013 before DRT, Mumbai, interalia placing on record details of agricultural produce from the lands of the Goa Hotel, used in the kitchens of the Goa Hotel. Accordingly having realised that Exhibit BB (Colly.), annexed to SA No. 33 of 2013, would not establish that certain lands were used as agricultural, they relied on these documents to allege cultivation of crops. On 31 March 2014, DRT, Mumbai allowed the Securitisation Application filed by BCHL. On 10 September 2014, DRAT, allowed the above mentioned Appeal filed by IFCI and held that the SARFAESI proceedings were "in order" and that IFCI was at liberty to proceed with the matter "as per procedure laid down by law".

18. On 4 October 2014, BCHL challenged the Order of DRAT by way of Writ Petition No. 222 of 2015 before this Court, praying for the quashing of DRAT order dated 11 September 2014 and an amendment after the sale, has challenged all actions consequential to DRAT order. On 8 October 2014, IFCI issued a fresh Public Notice of sale of Goa property fixing a reserve price of Rs. 542.57 Crores and the last date of receipt of bids was 12 November 2014. On 11 November 2014, this Court allowed the bids to be received for the sale of the Hyatt Hotel to be held in sealed cover till next date of hearing, which was fixed for 12 November 2014. On 4 December 2014, a letter was issued by BCHL to IFCI stating that the Corporate Loan would be taken over by Hotel Park Hyatt. On 31 December 2014, a 4th and fresh Notice for conducting Auction Sale of the Goa Hotel was issued by IFCI for immovable and movables on 6 February 2015, setting the reserve price at Rs. 515.44 Crores. This notice resulted in the sale of Goa Hotel to ITC Limited.

19. On 30 January 2015, a letter sent by Hotel Hyatt to IFCI making it abundantly clear that Hotel Park Hyatt does not intend to take up BCHL's debt and all amounts, if any, that were to be put in Escrow, would be released back to Park Hyatt on 31 March 2015. On 5 February 2015, this Court passed the ad interim order in WP No. 222 of 2015.

20. IFCI by a public notice, extended the date for receiving and opening of bids to 23 February 2015 subsequent to the order of this Court dated 5 February 2015. No deposit of Rs. 10 crores or any other amount was made by BCHL, until 20 February 2015 as directed by this Court on 5 February 2015. This Court, while hearing on 20 February 2015, did not extend the ad interim order dated 5 February 2015 and by consent of the parties, listed the Writ Petition for hearing for admission on 9 March 2015. On 23 February 2015, ITC Limited submitted its bid for Rs. 515.44,01,000/- (which was Rs. 1000 above the Reserve Price) for the property along with Earnest Money Deposit of Rs. 51,54,40,000/-. IFCI, on opening of the bid, declared ITC Limited as the highest bidder. ITC Limited paid 15% of the bid amount, amounting to Rs. 77,31,60,250/thereby, depositing total 25% of the bid amount on the same date.

21. On 23 February 2015, IFCI issued a letter to ITC Limited confirming the sale of the property in its favour, subject to the payment of the balance 75% of the

bid amount within a period of 15 days. DRT rejected a new/further interim application of BCHL, by which BCHL primarily challenged the extension of time by IFCI for receiving bids, pursuant to the public notice of sale. DRT held that the extension of bid opening date to 23 February 2015, was valid. On 24 February 2015, at a joint meeting of the secured lenders of BCHL, the other secured creditors of BCHL, i.e., SBI-Cap-Trustee and State Bank of Mysore, along with IFCI agreed that their dues could be appropriated from the sale proceeds of Rs. 515,44,01,000/to settle the debts of BCHL together with interest, costs and expenses aggregating to above Rs. 500 Crores (Minutes of Meeting mentions IFCI dues as Rs. 315 Crores, PACL/SBI-Cap dues as Rs. 192 Crores and State Bank of Mysore dues as around Rs. 11 Crores.). On 25 February 2015, ITC Limited paid the balance 75% amount of the bid price i.e., an amount of Rs. 386,58,00,750/-. On 25 February 2015, IFCI made an Application under Section 14 of the SARFAESI Act before the DM, Margao, South Goa to take physical possession of the Goa property. IFCI issued two Sale Certificates in favour of ITC Limited, one towards sale of immovable property i.e. Park Hyatt Hotel and the other towards movable property at the Goa property. BCHL sent a letter to the Sub-Divisional Magistrate with a copy to the Mamlatdar, inter alia, stating that:

"In view of the above, you are requested not to entertain any request/petition, seeking the assistance of your office to take over possession till such time that the sale is confirmed and the Sale certificate is issued and the relevant documents are furnished."

22. On 26 February 2015, vide the Order the DM authorised the Executive Magistrate of Margao, to take possession of the Goa property and to handover the same to IFCI. BCHL filed a Special Leave Petition Nos. 6929-6930 of 2015 on 26 February 2015, challenging interim orders dated 5 February 2015 and 20 February 2015, passed by this Court. On 27 February 2015, a "Final notice" was issued by Mamlatdar of Marmugao Taluka, directing BCHL to handover the property to IFCI by 2 March 2015. After arguments, BCHL sought leave to withdraw the SLP in order to approach this High Court. The Supreme Court granted permission to BCHL to withdraw the SLP. On 2 March 2015, BCHL filed present Writ Petition No. 1150 of 2015 before Goa Bench of this Court impugning the Order of the District Magistrate dated 26 February 2015 and the "Final Notice" of the Mamlatdar dated 27 February 2015.

23. It is stated that, on 3 March 2015, at 10.15 a.m., the Mamlatdar entered the Goa property along with the police and handed over physical possession of the Goa Property to IFCI and issued the Certificate of Handing Over/Taking Over to IFCI signed by both the Mamlatdar and IFCI. At 10.20 p.m., IFCI handed over the physical possession of the Goa property to ITC Limited at the site of the Goa Hotel and issued a Possession Certificate to ITC Limited. At around 12.10 p.m., after hearing Writ Petition No. 1150 of 2015 filed by BCHL, the Goa Bench of this Court, recorded the submissions of the parties and passed the ad interim order of status quo with respect to possession of the Goa property to be maintained by

the Respondents. ITC Limited was also added as a Respondent on 3 March 2015, to the Writ Petition. On 6 March 2015, BCHL for alleged breach of the Order of status-quo dated 3 March 2015, filed Contempt Petition No. 6 of 2015 against ITC Limited and its officials before the Goa Bench of this Court. BCHL filed a Chamber Summons in WP No. 222 of 2015 and sought to add ITC Limited as a party including additional prayer for quashing of "and all actions taken in pursuance of and consequential to the same." (i.e DRAT order dated 11 September 2014). The same was granted.

High Court Proceedings:

24. On 9 March 2015, Contempt Petition No. 6 of 2015 filed by BCHL was heard by the Goa Bench of this Court under urgent circulation. The Court refused to grant interim reliefs and instead issued preliminary notice on contempt and granted humdast. IFCI and ITC Limited were made parties to this Petition.

25. WP No. 1150 of 2015 and Contempt Petition No. 6 of 2015 (now renumbered as Contempt Petition No. 37 of 2015) have been transferred to the Principal Bench of this Court by order dated 10 March 2015. On 19 March 2015, BCHL filed Writ Petition No. 864 of 2015 before the Goa Bench of this Court, challenging the issuance of Sale Certificates to ITC Limited and the extension of time of submission of bid until 23 February 2015. On 20 March 2015, the Hon'ble the Chief Justice of this Court allowed the request of BCHL for transfer to the Principal Bench, (subsequently renumbered as WP No. 2486 of 2015). On 23 March 2015, WP No. 222 of 2015 and WP No. 1150 of 2015 were adjourned to 10 April 2015 and the interim relief of statusquo granted on 3 March 2015 by the Goa Bench of this Court in WP No. 1150 of 2015 was continued. The same has been continuing till this date.

26. On 24 June 2015, ITC Limited filed Notice of Motion (L) No. 371 of 2015, along with an affidavit in WP No. 1150 of 2015, seeking reliefs pertaining to the registration of the Sale Certificates for the sale of the movable and immovable properties of the Goa Hotel, due to the impending expiry of the period of limitation for the registration of the Sale Certificates. After recording submissions of the parties, this Court passed an order granting ad interim relief and adjourned the Notice of Motion on 24 June 2015. The relevant part of which is reproduced as under:

"?.

5 At this stage, we do not opine upon the respective submissions made by the parties including the factual dispute about having presented or not the document for Registration. We will consider the merits of the Motion after the BCHLs file its reply to the present Motion. However, in the meantime there will be ad interim relief in terms of prayer clause (C).

6 The Notice of Motion is adjourned to 9 July 2015. The ad interim relief granted by order dated 22 June 2015 to continue till 23 July 2015."

27. The Hon^{ble} the Chief Justice, by order dated 1 September 2015, specifically assigned these matters to this Bench. The order reads as, "To be listed before the Bench of Hon^{ble} Shri Anoop V. Mohta, J. on 2.9.2015 for Directions." Accordingly, all these matters were listed on board of this Bench. The matters were on board and heard from time to time, accordingly.

28. However, due to change of judicial assignment, the learned counsel appearing for the parties moved a precipe and therefore, the learned Acting Chief Justice by order dated 5 January 2016, has constituted the same Bench from 15 January 2016 to 22 January 2016 and again by order dated 22 January 2016 , from 3 February 2016 to 5 February 2016, for final hearing. Ultimately, the hearing of all these matters were concluded on 5 February 2016. The interim order, already granted has been extended from time to time and lastly on 5 February 2016 till disposal of the Writ Petitions as all the matters were closed for Judgments/Orders. Written notes, have been filed by the parties, as directed on 18 February 2016 and by the intervenors on 8 March 2016.

Relevant provisions:

29. The basic provisions are:

The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Sarfaesi Act):

Section 2. Definitions: ?....

"(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);"

"(j) "default" means nonpayment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as nonperforming asset in the books of account of the secured creditor;"

"(l) "financial asset" means debt or receivables and includes-

(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or

(ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or

- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (vi) any financial assistance;"

"(o) "nonperforming asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as substandard, [doubtful or loss asset,

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;]"

"(t) "property" means

- (i) immovable property;
- (ii) movable property;
- (iii) any debt or any right to receive payment of money, whether secured or unsecured;
- (iv) receivables, whether existing or future;
- (v) intangible assets, being knowhow, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;"

"(zc) "secured asset" means the property on which security interest is created;"

"(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

"(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;"

"(2) Words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of 1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meanings respectively assigned to them in those Acts."

"Section 13. Enforcement of security interest.

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of Court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

(3) ?..

(3A) If, on receipt of the notice under subsection (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate (within fifteen days) of receipt of such representation or objection the reasons for nonacceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in subsection (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be

exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) ?.....

(6) Any transfer of secured asset after taking possession thereof or take over of management under subsection (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset."

"Section 14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.

(1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within

the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a nonperforming asset;

(vi) affirming that the period of sixty days notice as required by the provisions of subsection (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for nonacceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of subsection (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

[(1A)The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,

(i) to take possession of such assets and documents relating thereto and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of subsection (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any

officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority."

"Section 17. Right to appeal

(1) Any person (including borrower), aggrieved by any of the measures referred to in subsection (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 measure 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 subsection.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in subsection (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 subsection (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 of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in subsection (4) of section 13 taken by the creditors assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under subsection (4) of section 13."

"Section 18. Appeal to Appellate Tribunal.

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

"Section 31. Provisions of this Act not to apply in certain cases.

The provisions of this Act shall not apply to

(a) ?...

(i) any security interest created in agricultural land;"

Section 36 of the SARFAESI Act:

"36 Limitation.No secured creditor shall be entitled to take all or any of the measures under subsection (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).

"Section 37. Application of other laws not barred.

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

The Security Interest Enforcement Rules, 2002

Rule 3. Demand notice

(1) The service of demand notice as referred to in subsection (2) of section 13 of the (Act) shall be made by delivering or transmitting at the place where the borrower or his agent, empowered to accept the notice or documents on behalf of the borrower, actually and voluntarily resides or carries on business or personally works for gain, by registered post with acknowledgment due, addressed to the borrower or his agent empowered to accept the service or by Speed Post or by courier or by any other means of transmission of documents like fax message or electronic mail service:

Provided that where authorised officer has reason to believe that the borrower or his agent is avoiding the service of the notice or that for any other reason, the service cannot be made as aforesaid, the service shall be effected by affixing a copy of the demand notice on the outer door or some other conspicuous part of the house or building in which the borrower or his agent ordinarily resides or carries on business or personally works for gain and also by publishing the contents of the demand notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality.

(2) Where the borrower is a body corporate, the demand notice shall be served on the registered office or any of the branches of such body corporate as specified under sub-rule (1).

(3) Any other notice in writing to be served on the borrower or his agent by authorised officer, shall be served in the same manner as provided in this rule.

(4) Where there are more than one borrower, the demand notice shall be served on each borrower.

Rule 4. Procedure after issue of notice.

If the amount mentioned in the demand notice is not paid within the time specified therein, the authorised officer shall proceed to realise the amount by adopting any one or more of the measures specified in subsection (4) of section 13 of the (Act) for taking possession of movable property, namely:

(1) Where the possession of the secured assets to be taken by the secured creditor are movable property in possession of the borrower, the authorised officer shall take possession of such movable property in the presence of two witnesses after a Panchnama drawn and signed by the witnesses as nearly as possible in Appendix I to these rules.

(2) After taking possession under sub-rule (1) above, the authorised officer shall make or cause to be made an inventory of the property as nearly as possible in the form given in Appendix-II to these rules and deliver or cause to be delivered, a copy of such inventory to the borrower or to any person entitled to receive on behalf of borrower.

(3) The authorised officer shall keep the property taken possession under sub-rule (1) either in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property:

Provided that if such property is subject to speedy or natural decay, or the expense of keeping such property in custody is likely to exceed its value, the authorised officer may sell it at once.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise

disposed of.

(5) In case any secured asset is:

(a) a debt not secured by negotiable instrument; or

(b) a share, in a body corporate;

(c) other movable property not in the possession of the borrower except the property deposited in or in the custody of any Court or any like authority, the authorised officer shall obtain possession or recover the debt by service of notice as under:

(i) in the case of a debt, prohibiting the borrower from recovering the debt or any interest thereon and the debtor from making payment thereof and directing the debtor to make such payment to the authorised officer; or

(ii) in the case of the shares in a body corporate, directing the borrower to transfer the same to the secured creditor and also the body corporate from not transferring such shares in favour of any person other than the secured creditor. A copy of the notice so sent may be endorsed to the concerned body corporate's Registrar to the issue or share transfer agents, if any;

(iii) in the case of other movable property (except as aforesaid), calling upon the borrowers and the person in possession to hand over the same to the authorised officer and the authorised officer shall take custody of such movable property in the same manner as provided in sub-rules (1) to (3) above;

(iv) movable secured assets other than those covered in this rule shall be taken possession of by the authorised officer by taking possession of the documents evidencing title to such secured assets.

Rule 8. Sale of immovable secured assets

(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) [The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

[Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.]

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,

(a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on

such terms as may be settled between the parties in writing.

Rule 9. Time of sale, issue of sale certificate and delivery of possession, etc.

(1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub rule (6) or notice of sale has been served to the borrower.

(2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) On every sale of immovable property, the purchaser shall immediately pay a deposit of twenty-five per cent. of the amount of the sale price, to the authorised officer conducting the sale and in default of such deposit, the property shall forthwith be sold again.

(4) The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale of the immovable property or such extended period as may be agreed upon in writing between the parties.

(5) In default of payment within the period mentioned in sub-rule (4), the deposit shall be forfeited and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) On confirmation of sale by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the Form given in Appendix-V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him;

[Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from

the date of finalisation of the sale.]

(8) On such deposit of money for discharge of the encumbrances, the authorised officer (shall) issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.

(10) The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not."

Appendix-IV

APPENDIX IV

(Rule 8(1))

Possession Notice

(for immovable property)

Whereas

?.....

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him/her under section 13(4) of the said (Act) read with rule 9 of the said Rules on this day of of the year..?... .

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the..... (name of the Institution) for an amount Rs. and interest thereon.

Transfer of Property Act, 1882 (TP Act)

Section 69. Power of sale when valid. 85((1)) 86(87)[***) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section have power to sell or concur in selling the mortgaged property or any part thereof, in default of payment of the mortgage-money, without the intervention of the Court, in the following cases and in no others, namely,

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammedan or Buddhist [or a member of any other race, sect, tribe or class from time to time specified in this behalf by (the State Government), in the Official Gazette];

(b) where [a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgagee is the Government];

(c) where [a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed and] the mortgaged property or any part thereof (was, on the date of the execution of the mortgage-deed), situate within the towns of Calcutta, Madras, Bombay, (***) [or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.]

((2)) (***) No such power shall be exercised unless and until

((a)) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

((b)) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

((3)) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorised or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

((4)) The money which is received by the mortgagee, arising from the sale, after discharge of prior encumbrances, if any, to which the sale is not made subject, or after payment into Court under section 57 of a sum to meet any prior encumbrance, shall, in the absence of a contract to the contrary, be held by him in trust to be applied by him, first, in payment of all costs, charges and expenses properly incurred by him as incident to the sale or any attempted sale; and, secondly, in discharge of the mortgagemoney and costs and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorised to give receipts for the proceeds of the sale thereof.

[(5) Nothing in this section or in section 69A applies to powers conferred before the first day of July, 1882.]

(***)"

Section 69A. Appointment of receiver-

"(1) A mortgagee having the right to exercise a power of sale under section 69 shall, subject to the provisions of subsection (2), be entitled to appoint, by writing signed by him or on his behalf, a receiver of the income of the mortgaged property or any part thereof.

(2) Any person who has been named in the mortgagedeed and is willing and able to act as receiver may be appointed by the mortgagee.

If no person has been so named, or if all persons named are unable or unwilling to act, or are dead, the mortgagee may appoint any person to whose appointment the mortgagor agrees; failing such agreement, the mortgagee shall be entitled to apply to the Court for the appointment of a receiver, and any person appointed by the Court shall be deemed to have been duly appointed by the mortgagee.

A receiver may at any time be removed by writing signed by or on behalf of the mortgagee and the mortgagor, or by the Court on application made by either party and on due cause shown.

A vacancy in the office of receiver may be filled in accordance with the provisions of this sub-section.

(3) A receiver appointed under the powers conferred by this section shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's act or defaults, unless the mortgage-deed otherwise provides or unless such acts or defaults are due to the improper intervention of the mortgagee.

(4) The receiver shall have power to demand and recover all the income of which he is appointed receiver, by suit, execution or otherwise, in the name either of the mortgagor or of the mortgagee to the full extent of the interest which the mortgagor could dispose of, and to give valid receipts accordingly for the same, and to exercise any powers which may have been delegated to him by the mortgagee, in accordance with the provisions of this section.

(5) A person paying money to the receiver shall not be concerned to inquire if the appointment of the receiver was valid or not.

(6) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges and expenses incurred by him as receiver, a commission at such rate not exceeding five per cent, on the gross amount of all money received as is specified in his appointment, and, if no rate is so specified, then at the rate of five per cent. on that gross amount, or at such other rate as the Court thinks fit to allow, on application made by him for that purpose.

(7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent, if any, to which the mortgagee might have insured, and keep insured against loss or damage by fire, out of the money received by him, the mortgaged property or any part thereof being of an insurable nature.

(8) Subject to the provisions of this Act as to the application of insurance money, the receiver shall apply all the money received by him as follows, namely,

(i) in discharge of all rents, taxes, land revenue, rates and outgoings whatever

affecting the mortgaged property;

(ii) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver;

(iii) in payment of his commission, and of the premiums of fire, life or other insurances, if any, properly payable under the mortgagedeedy or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(iv) in payment of the interest falling due under the mortgage;

(v) in or towards discharge of the principal money, if so directed in writing by the mortgagee,

and shall pay the residue, of any, of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of which he is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The provisions of subsection (1) apply only if and as far as a contrary intention is not expressed in the mortgagedeedy; and the provisions of subsections (3) to (8) inclusive may be varied or extended by the mortgagedeedy; and, as so varied or extended, shall, as far as may be, operate in like manner and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the said subsections.

(10) Application may be made, without the institution of a suit, to the Court for its opinion, advice or direction on any present question respecting the management or administration of the mortgaged property, other than questions of difficulty or importance not proper in the opinion of the Court for summary disposal. A copy of such application shall be served upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court may think fit.

The costs of every application under this subsection shall be in the discretion of the court.

(11) In this section, "the Court" means the Court which would have jurisdiction in a suit to enforce the mortgage.]"

The submissions and Judgments by BCHL in WP No. 222 of 2015:

30. The submissions of the learned Senior Counsel appearing for BCHL in Writ Petition No. 222 of 2015, are that

I Section 13(2) notice is bad in law, as it includes agricultural property despite the bar contained in Section 31(i) of the SARFAESI Act.

1. State of Karnataka v. Shankara Textile Mills Ltd.(1995) 1 SCC 295.

2. Muhammed Bashir, K.P. S/o. Kuttlyali v. Kannur District Coop. Bank and Ors. Kerala High Court in W.A. No.155/2010

3. Sercon Pvt. Ltd., v. Commissioner of Income Tax, Gujarat (1981) 23 CTR (Guj) 303

4. Commissioner of Wealth Tax, Pune v. H. V. Mungale 1984 Mh.L.J. 56

II. Section 13(3A) of the SARFAESI Act is not complied with by IFCI.

1. Mardia Chemicals Ltd. v. Union of India (2004) (4) SCC 311 (dated 8 April 2004)

2. Transcore v. Union of India (2008) 1 SCC 125 (dated 29 November 2006)

3. Kiran Devi Bansal v. DGM SIDBI, AIR 2009 Guj 100 (DB)

4. Clarity Gold Pvt. Ltd. v. State Bank of India AIR 2011 Bom. 42 (DB)

5. Vinay Container Services Pvt. Ltd. v. Axis Bank 2011 (1) Mh. L. J. 882

6. Krushna Chandra Sahoo v. Bank of India AIR 2009 Orissa 35

7. Tensile Steel Ltd. and Anr. v. Punjab and Sind Bank and Ors. AIR 2007 Guj 126

8. M/s. Jayant Agencies v. Canara Bank and Ors. Jharkhand HC in WP (C) No.4084 of 2010

9. M/s. Tetulia Coke Plant Pvt. Ltd. v. Bank of India AIR 2013 Jhar 12

10. Mrs. Sunanda Kumari v. Standard Chartered Bank (2007) 135 Comp Cases 604 (Kar)

III. The letter dated 27 May 2013 is a re-presentaion within the meaning of Section 13(3A) of the SARFAESI Act.

1. Jaibharat Synthetics Ltd. v. State Bank of India (2010) Vol. 112 (5) Bom.L.R 2199

2. Jaideep Singh and Ors. v. Union of India and Anr. 2008 (2) GLT 91

3. Malabar Sand and Stones (Pvt.) Ltd. v. Catholic Syrian bank Ltd. and Ors. 2013 (1) ILR Ker 624

IV. BCHL never waived its rights under law and have in fact expressly retained their rights available to them in law.

1. Vasu P. Shetty v. Hotel Vandana Palace and Ors. (2014) 5 SCC 660

V. ITC not a bona fide purchaser (Collusion between IFCI and ITC).

VI. ITC's contention that sale in its favour cannot be disturbed is incorrect.

1. Authorised Officer, Indian Overseas Bank and Anr. v. Ashok Saw Mill (2009) 8 SCC 366

2. Ram Murty Pyara Lal and Ors. v. Central Bank of India and Ors. I (2011) BC 125

3. Hotel Sharda Paradise and Ors. v. The Secretary to the Govt. of India, Department of Finance and Ors. IV (2015) BC 307 (Kar)

VII. Possession taken on 18 June 2013 by IFCI is bad in law.

1. Swastik Agency v. State Bank of India AIR 2009 Orissa 147

2. Mathew Verghese v. M. Amrita Kumar (2014) 5 SCC 610

VIII. Provisions of the SARFAESI Act and the Rules are mandatory in nature.

1. Mathew Varghese(supra)

2. J. Rajiv Subramaniam and Anr. v. Pandiyas and Ors.(2014) 5 SCC 651

3. Swastik Agency (Supra)

IX. Loan of Rs. 80 crore was not due when 13(2) Notice was issued.

Events and submissions of BCHL in Writ Petition No. 1150 of 2015 referring to Section 14 Application?

31. IFCI took symbolic possession of Hotel Park Hyatt (Goa Hotel), including the agricultural portions, without delivering Possession Notice as required under Rule 8(1) on 18 June 2013. On 20 June 2013, IFCI communicated to BCHL, having taken symbolic possession of property on 18 June 2013. On 31 July 2013, BCHL filed SA in DRTIII Mumbai. On 4 September 2013, IFCI published 1st Sale Notice for sale of property on 9 October 2013, fixing reserve price of Rs. 403 crores. However, the sale was postponed. On 9 January 2014, IFCI published 2nd Sale Notice for sale of property on 10 February 2014, fixing reserve price of Rs. 403 crores. On 31 March 2014, DRT set aside Section 13(2) notice dated 26 March 2013 inter alia on the ground of noncompliance of Section 13(3A), that the Demand Notice issued jointly for agricultural land and otherwise, is against the provisions of SARFAESI Act. IFCI challenged DRT Order before DRAT. DRAT allowed the Appeal of IFCI and dismissed the SA filed by BCHL on 10 September 2014. BCHL challenged DRAT order before this Court by filing Writ Petition No. 222 of 2015 on 4 October 2014. On 8 October 2014, even before the Petition was listed for admission IFCI published a 3rd Sale Notice for sale of the property on 12 December 2014, fixing reserve price of Rs. 542.57 crores. No bids received by IFCI in respect of the said auction. On 31 December 2014, IFCI published 4th Sale Notice for sale of the property fixing reserve price at Rs. 515.44 crores and the date of opening of bids was fixed on 6 February 2015. On that day, IFCI published a notice dated 5 February 2015, changing the date of submission of bids and opening of bids from 6 February 2015 to 23 February 2015. On 16 February 2015, BCHL filed SA No. 44 of 2015, challenging the public notices dated 31 December 2014 and 5 February 2015, which was published on 6 February 2015 before DRT. On 23 February 2015, SA No. 44 of 2015 was listed

for hearing on urgent reliefs before DRT. The matter was mentioned by BCHL at 10.30 am, when the Advocate for IFCI made a statement that IFCI will not confirm the sale till the matter is heard. Matter was thereafter heard in the morning session and was kept back for further hearing in the afternoon session. When the matter was called out in the afternoon session, Advocate appearing for ITC tendered a letter dated 23 February 2015, purportedly stating that they have been declared as a successful bidder in respect of sale of hotel property. Interim relief rejected by DRT vide its order dated 23 February 2015. Later ITC in its affidavit-in-reply, produced another letter also dated 23 February 2015, purportedly issued by IFCI to ITC as confirmation of sale. This letter is different from the letter tendered by ITC before DRT on 23 February 2015. Sale Certificates in respect of property immovable and movable purportedly issued by IFCI to ITC on 25 February 2015. IFCI filed an application with the District Magistrate, South Goa, Margao, purportedly under Section 14 of SARFAESI Act inter alia seeking to take physical possession of the property and seeking direction to concerned police authorities to assist/give full protection for execution of the order. Affidavit of one Mr. Madhur Bajaj, purported to be Manager of IFCI is filed before District Magistrate, and the same is titled as "Affidavit in support of Application filed by Applicant. On 26 February 2015, District Magistrate, South Goa, Margao proceeded and passed the impugned Order directing possession of immovable and movable property of Hotel Park Hyatt to be taken by Executive Magistrate of Mormugao and hand over the same to the secured creditor. On 27 February 2015, BCHL for the first time became aware of the impugned order when it received a letter from the office of Mamlatdar of Mormugao Taluka, Vasco-Da-Gama titled as "final notice" intimating that the District Magistrate, South Goa, Margao has disposed of an Application filed by IFCI under Section 14 of SARFAESI Act and directed BCHL to hand over the peaceful possession of the property by 2 March 2015 at 10.30 a.m., failing which Tax Inspector of Office of Mamlatdar was directed to take over possession of the property. On 2 March 2015, BCHL filed the present Writ Petition before the Goa Bench of this Court, inter alia challenging the order dated 26 February 2015 passed by the District Magistrate and the letter dated 27 February 2015 issued by the office of Mamlatdar. Respondents were served with the petition and notice was duly given to Respondents on 2 March 2015 of the present petition to be moved for urgent reliefs on 3 March 2015 before the Goa Bench. On 3 March 2015, despite notice that the matter was going to be moved before the Goa Bench, Mamlatdar i.e. Respondent No.3, entrusted with the task of taking physical possession of the immovable and movable assets of the Respondents, came along with police and officers at 10.09 a.m. in the morning. A lady officer of IFCI also came to the site at 10.11 a.m. and a paper presumably the Handing Over/Taking Over Statement was exchanged between the officers of Mamlatdar and IFCI at 10.15 a.m. Officers of IFCI again exchanged a document with officers of ITC within a span of 510 minutes, presumably the Possession Certificate, based on which, ITC claims to be in physical possession of the property. Thereafter, taken physical possession and the documents being

Possession Certificates etc. have purportedly been issued by IFCI to ITC. At 12.10 p.m. when the matter was heard by the Goa Bench, both BCHL and ITC claimed to be in possession. The Goa Bench, expressed prima facie, that the considerations as provided in Section 14 of the SARFAESI Act as amended in 2013, have not been examined by District Magistrate. It further expressed that the propriety of the Respondents in trying to implement the Order after being served with the notice that the matter was posted for admission and interim relief also have to be considered. The Bench then passed the order directing the Respondents to maintain the status quo. The Petition was thereafter transferred to this Court. The status quo order passed by the Goa Bench on 3 March 2015 is operative till date. At 1.00 p.m. after passing of the status quo order, ITC and persons claiming to be its officials started hampering the normal operations of the hotel by threatening the hotel operators to handover the operations of the hotel to it and pulled down the signage of BCHL from the property and started putting up their sign ages and flag. About 30 members of ITC gathered in the Hotel premises to take forcible possession despite being intimated about the passing of the status quo order against the Respondents. These acts of ITC and its representatives compelled BCHL to file Contempt Petition No. 29 of 2015 before this Court (Goa Bench), in which notices were issued to the contempt nor and the said Contempt Petition has been transferred to this Court. ITC has been following a deceitful modus operandi. Certain employees of ITC booked 15 rooms on 3 March 2015 in the Hotel in individual names and as a part of the package for booking 15 rooms, they were allowed to use conference room as a group package. The said facility is now sought to be portrayed as if ITC was in possession of the hotel property. ITC's employees vacated the conference room and 12 other rooms on 6 March 2015.

Submissions and Judgments read and referred by the learned Senior Counsel on behalf of BCHL?

I Conditions precedent to the exercise of jurisdiction of the Magistrate have not been satisfied and the order is accordingly entirely without jurisdiction

(a) Standard Chartered Bank v. V. Noble Kumar (2013) 9 SCC 620

(b) Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and Ors. (2014) 6 SCC 1

(c) Mahendra Mahato v. Central Bank of India (Calcutta High Court) ? W.P. No. 38111(W) of 2013, decided on 29.08.2014

(d) Central Bank of India v. Debasish Nandy (Calcutta High Court) ? F.M.A.T. No. 1835 of 2014, decided on 05.02.2015

(e) Transcore (supra)

(f) Kottakkal Cooperative Urban Bank v. T. Balakrishnan and Anr AIR 2008 Kerala 179

(g) M/s. Kathikkal Tea Plantations v. State Bank of India AIR 2010 Madras 24

II Mandatory requirements of Section 14 of the SARFAESI Act as amended by Act 1 of 2013 (w.e.f. 15.01.2013) have not been satisfied and has been passed in ignorance of the amendment-

(a) V. Noble Kumar (Supra)

(b) Shiv Charan Lal Sharma v. Allahabad Bank AIR 2015 Allahabad 136

(c) Saraswat Cooperative Bank Limited v. State of Maharashtra 2011(5) ALL M.R. 249

(d) Trade Well v. Indian Bank 2007 Cri L.J. 2544

(e) Ritex Overseas v. Dena Bank (Bombay High Court) ? W.P. No. 10615 of 2014 decided on 26.11.2014

(f) Rangara Industries Pvt. Ltd. v. SICOM Ltd. (Bombay High Court) W.P. No. 10692 of 2014 decided on 15.12.2014

(g) Hari Trading Corporation v. Bank of Baroda (Bombay High Court) W.P. No. 11459 of 2014 decided on 23.2.2015

(h) Mathew Varghese (Supra)

And also referred

(a)Harsora Hotels Pvt. Ltd. v. Kotak Mahindra Bank Ltd., 2014 SCC Online Guj 9203

(b) Chabildas Lalloobhoy v. Mowji Dayal, 1901 Vol. III Bombay Law Reporter 456

Submissions and Judgments in Writ Petition No. 2486 of 2015, to set aside the auction and the sale:

32. The learned Senior Counsel appearing for BCHL in Writ Petition No. 2486 of 2015, made submissions in addition to the submissions already made by the learned Senior Counsel appearing for BCHL that the auction sale of the immovable property of Hyatt Hotel building and land on "as is where is basis"and pursuant to "symbolic possession" in June 2013 was illegal and contrary to the provisions of the SARFAESI Act. The submissions are also made to distinguish the concept "symbolic possession", "take possession", "taken/taking possession" and thereby, contended that the word "possession" in Section 14 means the actual physical possession and so also under Section 13(4)(a) and 13(6) read with Rule 8 (1) and (3).

33. It is further submitted that a sale of secured assets on the basis of symbolic possession, without the secured creditors having taken physical possession of secured assets, would be impermissible and illegal under the law and therefore, the sale of movable and immovable properties were in violation of provisions and the rules made thereunder and therefore, are illegal, null and void. [Mathew

Varghese (Supra)]. Therefore, ultimately the submission is made that the sale of movable and immovable properties and the sale certificate dated 25 February 2015 be quashed and set aside.

(a) V. Noble Kumar (Supra)

(b) Transcore (Supra)

(c) M/s. Kalyani Sales Company and Anr. v. Union of India and Anr. AIR 2006 Punjab and Haryana 107

(d) Harshad Govardhan Sondagar (Supra)

(e) Debasish Nandy and Ors. (Supra)

(f) M/s. Kent Pharmaceuticals and Ors. v. The Allahabad Bank and Ors. (Calcutta High Court) 2015 SCC Online Cal 8200, decided on 08.06.2015

(g) Mahendra Mahato and Ors. (supra)

(h) Mathew Varghese (Supra)

(i) United Bank of India v. Satyawati Tondon and Ors. (2010) 8 SCC 110,

Judgments in opposition, and in addition in above Writ Petition No. 2486 of 2015 by ITC.

(a) Lakshmi Shankar Mills (P) Ltd. and Ors. v. Authorised Officer/Chief Manager, Indian Bank and Ors. AIR 2008 Madras 181 (Full Bench)

(b) M/s. Vinay Container Services Pvt. Ltd. and Ors. (Supra)

(c) Santosh Kedia v. Standard Chartered Bank and Ors. (WP No. 232 of 2014, Calcutta High Court) dated 25 March 2014.

(d) M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors. AIR 1966 SC 470.

Basic submissions of IFCI and supporting Judgments:

34. The learned Senior Counsel appearing for IFCI, resisted the contentions and claims of BCHL and made submissions and relied upon the Judgments on the respective points as under:

(a) BCHL made no representation at the time of seeking a loan from IFCI that any part of the lands of the Goa Hotel were agricultural lands. The mortgage created to secure the loans was over the entire property and no disclosure was made of any "agricultural lands" at time of loan or creation of mortgage (Corporate Loan agreement dated 26 February 2010) and Declaration and Undertaking dated 9 March 2010.

(b) Even while making the Memorandum of Entry no statement or declaration was recorded on portions of the lands of the Goa Hotel being agricultural lands.

(c) The entire property of 45 acres is used to run a hotel which is one composite

unit; consists of guest rooms, spa, swimming pool, landscaped gardens and beachfront.

(d) BCHL entered into contract for management of the whole property as a hotel: A "Hotel Operations Service Agreement" dated 1 May 2009 (WPL No. 916 of 2015) entered into between Blue Coast Hotels Limited as owner and Hyatt India Consultancy Private Limited. The description of the "Site" in the Agreement in Section 1 of the Agreement read with Exhibit 1 thereto simply describes the property as "263-C, Arossim Beach, Cansaulim, Goa-403712, India"

(e) The revenue records produced by BCHL belie their case of Cultivation. The records produced show that the cultivation on the property is "NIL".

(f) The title search obtained by IFCI and the valuation Report of the Government approved and registered valuer commissioned by IFCI merely indicate that from revenue standpoint some part of the land is shown as agricultural land. However, for Section 31(i) of the SARFAESI Act, it is not mere revenue entries but the actual and predominant use which is relevant.

(g) Even the so called "Horticulture Items Supply Report" begins from August 2013. This is obviously a "record created" inasmuch as the period recorded therein is after IFCI took possession on 18 June 2013 and BCHLs moved DRT on 31 July 2013. This is also contrary to the revenue records. Moreover, most of the entries therein show zero production.

(h) The photographs relied upon by BCHL are a selective representation and appear to be of trees and shrubs on a landscaped garden rather than of cultivation. Naturally growing trees could not convert this seaside hotel into an agricultural farm.

(i) SARFAESI Act does not define "agricultural land"; therefore, actual use, intended use, and predominant use become relevant parameters to judge if the lands are agricultural.

(a) Commissioner of Wealth Tax, Andhra Pradesh v. Officer-in-charge (Court of Wards) Paigah (1976) 3 SCC 864.

(b) S.P. Watel and Ors. v. State of U.P and Ors. (1973) 2 SCC 238.

(c) Sarifabibi Mohmd Ibrahim v. Commissioner of Income Tax 1993 Supp (4) SCC 707.

(d) Gajula Exim (P) Ltd., v. Authorised Officer, Andhra Bank and Ors. 2008 SCC "online AP 224".

(e) Bijender Kr. Gupta v. Corporation Bank of India 2013 SCC online Del 4709; (2013) 205 DLT 269.

(f) Transcore (supra) and also relied upon the following Judgments

1. V. Shanmagam v. Union Bank of India, 2009 BC 461 Mad.

2. Prabin Chakraborty v. State of West Bengal and Ors. 2011 Cal 119.
3. General Manager, Sri Siddeshwara Coop. Bank Ltd. and Anr. v. Ikbali and Ors. (2013) 10 SCC 83.
4. Kanaiyalal Lalchand Sachdev and Ors. v. State of Maharashtra and Ors. (2011) 2 SCC 782.
5. Gopal C. Sharma v. Commissioner of Income tax (Bom) 1994 Income Tax Reports Vol. 209.
6. Tarsem Kumar v. Collector of Central Excise, Chandigarh 1972 SCC online P and H 154
7. Silicon Valley Auto Component Pvt. Ltd. v. Indian Bank 2014 (5) CTC 764.

ITC Submissions and the Judgments:

35. The learned Senior Counsel appearing for Respondent No. 2 ITC, has supported IFCI contentions and resisted the contentions and claims of BCHL on every aspect, made submissions and relied upon the same Judgments on the respective points.

I Agricultural Land:

- (a) Wealth Tax Commissioner (Supra)
- (b) S.P. Watel and Ors. (Supra)
- (c) Sarifabibi Mohamed Ibrahim (Supra)
- (d) Bijender Kumar Gupta (Supra)
- (e) Gajula Exim (P) Ltd. (Supra)
- (f) Dr. Morris v. Mrs. Veera D'Cruz 1959 KLJ 794 (Kerala High Court)

II ITC Limited purchased the Goa Hotel only after this Court order and other Courts also allowed the sale.

III The sale could have been stopped only if all dues of IFCI had been paid by BCHL in terms of Section 13(8) of the SARFAESI Act.

IV Upon the conclusion of sale, the interest of a Third Party Auction purchaser is protected and equity is created in its favour, notwithstanding any allegation of infirmity in respect of the proceedings leading to the sale.

He has also relied upon the following Judgments:

1. Sangramsinh Gaekwad and Ors. v. Shantidevi Gaekwad and Ors. (2005) 11 SCC 314 (DB)
2. Central Bank of India v. C.L. Vimla (AIR 2015 SC 2280) M.A. Krishnamurthy v. C.L. Vimla and Ors.

3. Padanathil Rugmini Amma v. P.K. Abdulla (1996) 7 SCC 668
4. Nawab Zainul Abidin Khan v. Mohammad Asghar Ali Khan, J.C. 1887 Dec 3
5. Janak Raj v. Gurdial Singh AIR 1967 SCC 608
6. Daman Singh and Ors. v. State of Punjab and Ors. (1985) 2 SCC 670
7. New India Assurance Co. Ltd. v. Nusli Neville Wadia and Ors.
8. New India Assurance Co. Ltd. v. KLM Engineering Co. (P) Ltd. (2008) 3 SCC 279
9. Hansraj Gupta and Ors. v. Dehra Dun ? Massoorie Electric Tramway Co. Ltd.
10. Dr. N.G. Dastane v. Mrs. S. Dastane AIR 1975 SCC 1534 ; AIR 1970 BOM 312
11. Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi (2010) 1 SCC 234
12. Bishundeo Narain v. Seogeni Rai AIR 1951 SC 280
13. Ram Singh v. Col. Ram Singh (1985) Supp. SCC 611
14. Gulabchand v. Kudilal AIR 1956 SC 1734
36. The learned Senior Counsel appearing for Respondent No.4ITC in Writ Petition No. 2486 of 2015, has supported the argument/submission of Senior Counsel for ITC in W.P. No. 222/2015 and made additional submissions.
37. The learned Senior Counsel appearing for the parties have read and referred various provisions of SARFAESI Act and Rules made thereunder, and various common judgments and separate judgments in respect of their contentions, based upon the common facts but from their point of view.

Common Reasons

Scheme and object of the Act:

38. The SARFAESI Act is a complete code, which regulates the securitisation and reconstruction of financial assets and provides the provisions of enforcement of security interest and all related provisions. It provides for separate and independent Tribunal (DRT) and Appellate Tribunal (DRAT) with all requisite powers, which are necessary to adjudicate the claims and disputes, without intervention of Court, so that the recovery of defaulting loans and/or nonperforming assets of banks and financial institutions can be enforced through the mechanism and the method so prescribed, specifically under the SARFAESI Act and the Rules made thereunder. The provision is also made for the security of interest, for taking possession of the security assets and/or to take over the Management for following the due measures, so prescribed. Provisions are also made, considering the right to Appeal by the borrower and/or by the financial institutions and accordingly the Appellate Tribunal is empowered to deal with the Application so filed by the aggrieved party, considering the scheme and purpose

of the Act. The power to grant stay/interim relief is also provided. Right of power to receive compensation and/or cost is also provided. It is also made clear that the provision of SARFAESI Act shall not apply to certain cases, including, "to any security interest created in agricultural land". There is clear provision whereby, the Civil Court debarred from entertaining any suit and proceedings in respect of the matters, which DRT and/or DRAT is empowered to determine. It is specifically debarred the Civil Court or other Authority, not to grant injunction in respect of any action taken or to be taken in pursuance of any power conferred under this Act and/or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (for short, "the RDBFI Act"). The provisions are also made that the SARFAESI Act shall have effect, notwithstanding in consistence therewith under any another law for the time being in enforce or instrument having effected by virtue of any such law. The provisions of SARFAESI Act or Rules made thereunder, are in addition to and not in derogation of Companies Act, 1956 the Securities Contracts (Regulation), Act 1956, the Securities and Exchange Board of India Act, 1992, the RDBFI Act and/or any other law for the time being in force. It is also made clear that for enforcement of security interest, notwithstanding anything contained in Section 69 or Section 69A of the TP Act, any security interest created in favour of any secured creditors, may be enforced without the intervention of the Court or Tribunal of such creditors, in accordance with the provisions of SARFAESI Act.

39. The validity of the Act is already upheld by the Supreme Court in *Mardia Chemicals Ltd.* (supra). The scheme and purpose of SARFAESI Act has been elaborated further in *Transcore* (Supra) in para 20 to 34, by covering various definitions, acquisition of rights and interest in financial assets, the importance of giving notice to acquisition and to deal with the objections, apart from taking steps to protect the assets from being alienated and/or disposed of, in any manner. Various measure of reconstruction companies, to take for assets reconstruction, is also provided. Section 13 and its mandate have been elaborated also, referring to every subsection from 13(1) to 13(13), so also its connection and importance from the point of view of the financial institutions and the borrower. Section 17, which specifically deals with the conferring right to appeal and the provisions of Sections 19, 35 and 37 are also noted. The power to take actual possession of the secured assets/immovable property as contemplated under Section 13(4), by referring to the enforcement Rules and the importance of demand notice under Section 13(2) are also dealt with. Dealing with the Enforcement Rules, in the relevant portion of para 74 of *Mardia Chemicals* (supra) it is observed as under:

"74. ?.....

Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV

prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante.?..... Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

40. The Supreme Court in Mathew Verghese (supra) examined the procedure required to be followed by the Bank or the financial institutions, when the secured assets of the borrowers are sought to be sold for settlement of dues of the bank or the financial institutions by noting the enforcement Rules, but with clear rider that "such enforcement should be in conformity with the other provisions of the SARFAESI Act". It is specifically observed that "SARFAESI Act, 2002 is specifically for the protection of the borrowers, inasmuch as, ownership of the secured assets is a constitutional right vested on the borrowers and protected under Article 300A of the Constitution of India", with further observations that "the Secured creditor as a trustee of the secured assets cannot deal with the same in any manner it likes and such a assets can be disposed of only in the manner prescribed in the SARFAESI Act". In para 30, it is observed

that-

"30. Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), any sale or transfer of a secured asset, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale."

The same view is further reinforced in Vasu P. Shetty (supra) in paragraph No. 25, which reads thus:

"25 The moment we find that the mandatory requirement of the Rules had not been waived by the borrower, consequences in law have to follow. As held in Mathew Varghese's case, when there is a breach of the said mandatory requirement the sale is to be treated as null and void. Moreover, the appellant has no answer to many other infirmities pointed out by the High Court. We, therefore, are of the opinion that the present appeals lack merit."

41. In *Authorised Officer, Indian Overseas Bank and Anr. (Supra)* the Supreme Court has noted the provisions and mandate of it in following words:

"39 We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

42. *J. Rajiv Subramaniyan and Anr. (Supra)*, reinforced the scheme of Section 13 with the relevant rules that, strict compliance with prescribed procedure and mandatory requirement if not followed, the sale effected, if any, was null and void and accordingly liable to be set aside. It is also observed that, secured creditors must take bona fide measures to ensure that there is maximum benefit to borrowers concerned from such sale, by referring even to Sections 60 and 69 of the TP Act, by reiterating the principle so laid down in *Mathew Verghese (supra)*.

43. In para 43 *Mathew Verghese (supra)*, it is also emphasised that-

"40 The above principles laid down by this Court also make it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a constitutional right, as well as the human right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside."

It is also reinforced that "it is therefore, imperative that for the sale to be

effected under Section 13(8), the procedure prescribed under the Rule 8 read along with Rule 9(1) has to be necessarily followed."

44. The Apex Court in Harshad Govardhan Sondagar (Supra) (3 April 2014), while dealing with Sections 7, 8, 48, 58, 105, 108 and 109 of TP Act, read with Article 300A of the Constitution of India reinterpreted the provisions of SARFAESI Act, referring to priority of lessee's rights over those of subsequent mortgagee of lessor and elaborated the procedure to be followed by secured creditor or CMM/DM to obtain possession from the lessee of the borrower and the remedy of lessee in case of dispossession. It is noted in para 22 that:

"22. ?.....As we have noticed, there is no provision in Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decides to take the measures mentioned in Section 13 of the said Act. Without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all courts and tribunals."

It is also noted by referring to provisions of Section 14 of SARFAESI Act, read with the Rules 8 and 9:

"29 ?.....In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."

and thereby, quashed and set aside the order passed by the CMM/DM and further directed to pass fresh order in accordance with law by giving opportunity of hearing to the Appellants and the secured creditors, and has specifically dealt with the rights of lessee/lessor. The Supreme Court has reinforced the above principle of law.

45. The Supreme Court in V. Noble Kumar (supra) has specifically dealt with Sections 13(2), 13(4)(a), 13(3A), 14 and 17 of SARFAESI Act. In paragraph Nos, 19 and 21 it is observed as under:

"19 Sub Section (3A) further provides that if the secured creditor reaches a conclusion that the objections raised by the borrower are not acceptable or tenable, the creditor shall communicate the reasons for nonacceptance of the objections within a period of 15 days. The proviso to the said subsection declares that the rejection of the objections does not confer any right on the borrower to resort to the proceedings, contemplated either under Section 17 or 17A. We may indicate here both Sections 17 or 17A afford an opportunity to the borrower to approach the Debts Recovery Tribunal or (in the cases of Jammu and Kashmir) the District Court concerned against any measure taken under Section 13(4).

21 Under the scheme of Section 14, a secured creditor who desires to seek the

assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter."

The Supreme Court, in this Judgment of V. Noble Kumar (Supra), has noted the scheme of amended Section 14 as under:

"23. We must make it clear that these provisions were not in existence on the date of the order impugned in the instant proceedings. These amendments are made to provide safeguards to the interest of borrower. These provisions stipulate that a secured creditor who is seeking the intervention of the Magistrate under Section 14 is required to file an affidavit furnishing the information contemplated under various Subclauses (i) to (ix) of the proviso and obligates the Magistrate to pass suitable orders regarding taking of the possession of the secured assets only after being satisfied with the contents of the affidavits.

24. An analysis of the nine subclauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that:

24.1. (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest,

24.2. (ii) there is a security interest created in a secured asset belonging to the borrower,

24.3.(iii) that the borrower committed default in the repayment,

24.4.(iv) that a notice contemplated under Section 13(2) was in fact issued,

24.5.(v) in spite of such a notice, the borrower did not make the repayment,

24.6.(vi) the objections of the borrower had in fact been considered and rejected,

24.7.(vii) the reasons for such rejection had been communicated to the borrower etc.

25. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

It has reiterated that the Appeal under Section 17 is available to the borrower against any measures taken under Section 13(4). It is opined in paragraph 28 that:

"28. ?.....To set at naught any doubt regarding the interpretation of Section 17, the proviso to subsection (3A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17."

The Supreme Court, based upon the scheme of amended provisions of Section 14 read with Rules, has concluded that:

"36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1 (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2.(ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3 (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under Clause 36.2 (ii) above.

36.4. In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply."

It is reinforced that:

"37. ?.....

The grievance of the respondent that it will be left with no remedy is, therefore, misplaced. As held by a Bench of three Judges in *Mardia Chemicals*, it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13(4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the

Magistrate.

46. There are various High Court Judgments cited by the learned Senior Counsel for the parties in support of their respective contentions dealing with the scheme and purpose of the SARFAESI Act and the Rules made thereunder. Most of those Judgments are distinguishable on facts. The earlier Supreme Court directions/Judgments therefore, have been taken note of, to also the provisions existing on the date of issue, including then existing facts and circumstances, for adjudicating the issues so raised at the relevant time. The amended provisions of law and the Judgments of the Hon"ble Supreme Court directly on the issues, would prevail over the High Court Judgments, based upon the unamended provisions of law. We have noted that the Supreme Court Judgments on every aspects are relevant for the purpose of these Writ Petitions to decide the issue and the contentions so raised by the parties.

BCHL prayers and reliefs in respective petitions revolving around the property (Park Hyatt Hotel)

47. All these Writ Petitions are after the stage of Section 13 measures initiated by IFCI. (See para 149 to 151 also)

48. Before DRT, no evidence led by the parties. The documents/the evidence so produced by the respective parties, were the basis of the decision. Both the parties have placed their respective documents on record. IFCI has placed the documents of the bank and related documents with regard to the loan/the bank transactions, in question. There is nothing to show that BCHL has disputed those documents, filed by IFCI. There is nothing to show that they have admitted the contents of every documents filed. However, IFCI have also filed title investigation report of Amira Razaq, Advocate, revenue records of agricultural land, photographs and memorandum and articles, which permit them for farming. IFCI did not lead any contra evidence and/or evidence to rebut the fact that some lands are agricultural in revenue records.

"Description of the Immovable Properties including of Agriculture land?

49. All that piece and parcel of property, both present and future, known as "Park Hyatt Goa, Hotel Spa" (Park Hyatt Goa) admeasuring 1,82,225 square meters of land with a built up area of 25,812 square meters, situated at 263C Arossim, Cansaulim, Goa, comprised in the following survey fields:

1. Survey No.80/1, measuring 11,800 sq.mts. of Village Arossim, Mormugoa, Goa.
2. Survey No.76/1, measuring 15,800 sq.mts. of Village Arossim, Mormugoa, Goa.
3. Survey No.75/1B, measuring 6,500 sq.mts. of Village Arossim, Mormugoa, Goa.
4. Survey No.73/1, measuring 9,100 sq.mts. of Village Arossim, Mormugoa, Goa.

5. Survey No.71/2, 71/4, 71/5, 71/6, 72/2, 72/3, 72/4 and 72/5 measuring 1,300.60 sq.mts. of Village Arossim, Mormugoa, Goa.

6. Survey No.74/2A, measuring 11,362.50 sq.mts. of Village Arossim, Mormugoa, Goa.

7. Survey No.73/2B, measuring 22,000 sq.mts. of Village Arossim, Mormugoa, Goa.

8. Survey No.73/2A, measuring 54,675 sq.mts. of Village Arossim, Mormugoa, Goa.

Survey No.74/1, measuring 12,425 sq.mts. Survey No. 74/3 measuring 14,175 sq. mtrs. and Survey No. 75/1A measuring 6475 sq. mtrs. (total size 87,750 sq. mtrs.) of Village Arossim, Mormugoa, Goa.

9. Survey No.74/2(part), measuring 3,787.50 sq.mtrs. of Village Arossim, Mormugoa, Goa.

10. Survey No.74/4, measuring 3,350 sq.mts. And Survey No. 74/6 measuring 3000 of Village Arossim, Mormugoa, Goa.

11. Survey No.74/5, measuring 2450 sq.mts. and Survey No. 74/7 measuring 2900 of Village Arossim, Mormugoa, Goa.

12. Survey No.73/4, measuring 2425 sq. mts. of Village Arossim, Mormugoa, Goa.

Description of the Moveable Properties:

50. The whole of the movable properties of the Borrower including its furniture, kitchen, equipment, movable plant and machinery, machinery spares, tools and accessories, (save and except Borrower's stocks of raw materials, semi-finished, finished goods, consumable stores and book debts) and such other movables, including plant and machinery located at Park Hyatt Hotel 263 C, Arossim Beach, Cansaulim, Goa-403712 (save and except book debts, current assets, stock of raw material etc. already hypothecated to working capital bankers) both present and future whether installed or not and whether now lying loose or in cases or which are not lying or stored in or about or shall hereafter from time to time during the continuance of the security of these presents be brought in to or upon or be in or about all the Borrower's factories, premises and godowns at Park Hyatt Hotel 263 C, Arossim Beach, Cansaulim, Goa-403712 or wherever else the same may be or be held by any party to the order or disposition of the Borrower or in the course of transit or on high seas or on order, or delivery, howsoever and wheresoever in the possession of the Borrower and either by way of substitution or addition."

The property is located partly in CRZ Zone and partly in settlement and rest in orchard or agricultural zone. Total land area as shown, is 1,83,525.60 square meters. Built up area 25,812 square meters on survey Nos. 73/2, 74/3, 74/1 on

revenue record, as stated and the agricultural land consists of survey Nos. 74/2A, 73/1, 75/1B/ 74/2 (part) and 73/4.

51. The same description is shown in valuation report and the revenue record. The supporting documents relied upon by BCHL to show that the property is of agriculture in nature, are part of the record of first Writ Petition.

Sr.No. Date Description of document Page No.

1. January 2010 Valuation report of Knight Frank valuing property at Rs. 673.30 cr. 774

2. 06.09.2012 Report of Cushman and Wakefield valuing building and land at Rs.705.80 cr. 802

3. 18.05.2013 Valuation report of Parish Rao, a Government approved valuer wherein the property is valued at Rs.1250.01 cr. 842

4. 21.06.2013 Revenue Records showing survey nos. 73/1, 73/4 and 80/1 to be agricultural. 409

5. 22.02.2010 Title Investigation Report of Amira Razaq, Advocate, of IFCI, showing survey nos.73/1, 73/4, 74/2A, 75/1B and 74/2 (part) to be agricultural. 491 at

503,

505,

507,

516,

523.

6. - Photographs showing that the property is being cultivated. 529

7. - Documents showing the agricultural produce and its utilisation in the Hotel kitchen 542

All these description of properties are part of record of IFCI, DRT and DRAT and Writ Petitions.

Service Agreement of "Park Hyatt" and details of the property?

Hotel Operations Service Agreement (Park Hyatt Goa Resort and Spa)

52. Hotel Operations Service Agreement dated 1 May 2009 is executed between BCHL as owner with Hyatt India Consultancy Private Limited, as a Service Provider (HICPL). There are other Agreements also entered into between them, i.e. "Technical Services Agreement", "Marketing Agreement", "Strategic Agreement", "License Agreement". Various clauses have been provided for the day to day operations management assistance and technical assistance services,

for the benefit of the hotel. The nature of this service agreement and considering the fact that it is a Hotel Operations Service Agreement, the physical possession and control/management of the premises admittedly was with Park Hyatt Goa Resort and Spa on behalf of BCHL. The concept of "ownership" and/or "possession" and/or "symbolic possession" and/or "physical possession" and/or "trespass" are well-known and settled. IFCI were fully aware of this Agreement and the nature of it, so also the fact that of existence of running hotel in the property. The fact of use of whole property and surrounding, as described in the demand notice, is not in dispute. (See paras 128/129 herein below also).

Inclusion of Agricultural Land in the Secured Assets and its use and/or nonuse of agricultural land (31(i)) ?

53. The Corporate Loan Agreement dated 26 February 2010 and deed of hypothecation between BCHL and IFCI are not in dispute, so also the declaration and undertaking dated 9 March 2010, on the immovable properties. The share and subscription cum Shareholder Agreement dated 12 March 2010, Share Buyback Agreement dated 12 March 2010, Agreement for pledge of shares dated 20 May 2010 are also not in dispute. The correspondences showing the settlement and resettlement and all instalments, in view of stated defaults, are part of the record.

54. The entire property admittedly was being used to run the hotel, which is composite. About 27,112.50 square meters land area is not yet converted into the settlement shown, though applied. The State Government has rejected the application of BCHL to use the said portion of land for non-agricultural purpose by order dated 4 May 2012. IFCI were aware of description of the property, including some portion of the property being agricultural land, as no order of conversion was passed/granted.

55. Section 31(i) of the SARFAESI Act mandates that "the provisions of this Act shall not apply to (i) any security interest created in "agricultural land". There is no specific definition provided under the Act of "agricultural land". There is no dispute that the security interest can be created in agricultural land. It is thus permissible to mortgage, pledge and/or create security interest in agricultural land and the borrower, therefore, by creating the security interest for agricultural land, may procure loan/financial assistance from the financial institutions. However, in view of the specific provisions, therefore, though secured interest can be created, the provisions of SERFAESI Act and the Rules made thereunder, cannot be made applicable to agricultural land for all the purposes and specifically to recover the debt and/or to take steps and/or to deal with the defaulters and/or reconstruction of assets and for any securitization. It also means, no proceedings and/or measures be initiated against the borrower and/or defaulters and/or enforced as contemplated under the Act if "security interest" is created in agricultural land.

56. There is no bar and/or prohibition that financial institutions/banks cannot

invoke other laws and/or related provisions for enforcement of security interest. Section 37 contemplates the application of other laws for recovery of their dues/debts. The portion of the Park Hyatt hotel, being agricultural land, as described in details supported by the admitted documents, in view of Section 31(i), the provisions of SARFAESI Act, do not apply to such lands. There is no dispute with regard to the various Agreements placed on record, referring along with the respective sale-deeds of the agricultural lands. Those documents, includes the report of Amira Razaq, Advocate, the title search on behalf of IFCI. (Writ Petition No. 222 of 2015 page 491). It shows the portion of agricultural land and Revenue records Form I and XIV.

57. The various survey numbers, as recorded above, are agricultural land with detailed description are also part of IFCI's documents, public notices and sale notices. Certain photographs are also placed on record to show the agricultural activities by BCHLs. IFCI therefore, was fully aware that agricultural lands, are also secured assets along with the other building and portion of the property. The specific pleadings were accordingly raised under Section 18 Application by BCHL. (33 of 2014 dated 13 July 2013). IFCI, however, resisted the claim and placed on record various judgments in support of their contention that the said land is not agricultural lands, as the same was never used for farming; BCHL is not agriculturist; no agricultural activities conducted by its user, as agriculture.

58. BCHL in rejoinder dated 24 March 2014 to IFCI submission reiterated their objection revolving around 31(i) of the Act by referring to the survey nos. 73/1, 73/4, 74/2A, 75/1B, 74/2 (part) and 80/1 which are shown to be agricultural in nature. Along with supporting documents, placed on record Form 1 and IV, so referred above. It is specifically averred that no order of conversion of the said land into non-agricultural land has been passed. Specific averments are again made, based upon the investigating report dated 22 February 2010 of Amira Razaq, Advocate and so recorded above that the hotel building is over 25 acres and rest of the 58% of the property is being used for agricultural purpose/activities. For showing agricultural activities, certain documentary evidence are also relied upon. The other related averments are also made in the Application and also in the Writ Petition. They agreed to proceed before DRT based upon the documents placed on record. Both the parties read and referred, apart from averments, documents, various judgments in their support, which are noted earlier.

59. By order dated 31 March 2014, DRT, in detail has gone through the documents filed by the parties, specifically in para 25 to 27 and come to a clear conclusion that the revenue record established the land, as agricultural by holding that, the security interest created in agricultural land cannot be enforced under the provisions of the SARFAESI Act. This was also on the foundation that, no contra material/documents shown by IFCI, except the submission of use and non-use of the land as agricultural land. The reliance was also made and referred in the order made by DRT that the Application for conversion of the agricultural

land to non-agricultural land though filed, are yet pending. The lands are situated in village area and admittedly, are outside the Municipal limits and under the jurisdiction of the Panchayat. There is nothing to show that BCHL have made any Application for developing the said agricultural land for any other construction work, after due permission from the competent authority under the provisions. For the above reason and the reasons so added in earlier paragraphs, we are inclined to accept the contention of BCHL.

60. An appeal was preferred by IFCI before DRAT, to challenge the above findings/order. BCHL resisted the same by relying upon the documents/submissions recorded by DRT. In order dated 10 September 2014, DRAT however, reversed the findings of the said DRT by holding that out of 56 acres, 80% of area has been used for the hotel purpose and not for agricultural purpose. The several coconut trees are planted on a portion of the land and that those areas have not been converted into the nonagricultural/ commercial area. However, finding is given that a loan of Rs. 110 crores should not have been granted only for the development of the agricultural land of 56 acres and the sanction of the loan was for construction of five star hotel and on that basis, it has been constructed. Therefore, DRAT further held that the land does not come under the term of "agricultural property" and therefore, it cannot be said that it is only agricultural loan.

61. The learned senior counsel appearing for IFCI and ITC in their respective submissions strongly contended that the term "agriculture land" needs to be construed according to its normal and natural meaning and the actual condition and intended use of the land needs to be seen.

62. The following common Judgments are read and referred by ITC/IFCI in support of their submissions about non-use of agricultural land:

1.1. Commissioner of Wealth Tax, A.P. (Supra) at paras 6, 7, 8, 15 (5 Judge Bench): It is not correct to give a wide interpretation to agricultural land in the statute simply because the statute does not define it and it had to be given a more restricted meaning. Further, the Court held that the actual condition and intended user of the land has to be seen.

1.2. S.P. Watel and Ors. (supra)., at paras 2023, to see if an area is agricultural or not, it is necessary to see the nature of actual use of the land, where the Act does not define it.

1.3. Sarifabibi Mohmed Ibrahim (Supra) at paras 12 20: Application to authorities for non-agricultural use of land shows intent to not use land for agricultural purpose and the price at which land is sold is also a factor to consider while determining whether land is agricultural land or not. Actual use and intended purpose of the land has to be taken into account.

1.4. Bijender Kumar Gupta (Supra) at paras 11, 12: Only land where actual agricultural activity is being carried on is exempt under Section 31 from

SARFAESI Act. Land on which a banquet hall is being run cannot be "agricultural land" within the meaning of Section 31(i) of the SARFAESI Act.

1.5 Gajula Exim (P) Ltd (Supra), at para 15: The nature of actual use of the land and not revenue records will determine whether lands are "agricultural lands" or not within the meaning of Section 31(i) of the SARFAESI Act.

1.6. Dr. Morris (Supra), at paras 2, 3 and 4: Agricultural land has to be land devoted to agricultural purposes. Nature of use of the land as one composite unit for residential use also has to be considered and the mere existence of a few trees on the property will not turn it into "agricultural land".

63. ITC and IFCI further submitted that the actual use of the land has to be ascertained in order to determine whether the land is agricultural or not. But the ITC and IFCI themselves have overlooked the title search report of IFCI, which was based upon the revenue records and certain portion of the lands are recorded to be agricultural land. They tried to distinguish IFCI valuation to show that zoning as not in residential zone, therefore, does not discuss the actual use of the land. The title report, as well as, the valuation report even of September 2014 shows that 27,992 square meters of land was not in agricultural zone and it was agricultural land for the purpose, even in the record of bank, from the inception of the transactions in question. Argument was made by ITC and IFCI with regard to the revenue records of actual use as mentioned in Forms I and IV which shows the garden area. This further shows no cultivation, as details of cropped area shown as "nil". No vegetables cultivated even as per BCHL's case and documents. Only Curry leaves and some other herbs shown to be a production from the land. For a period of August 2013 to January 2014, none of these items have been cultivated. The utilisation is for production of coconut which need not be treated as cultivation or agricultural activity. We are of the view that the non-use and/or non-production of agricultural produce, that itself are not sufficient to hold that the land is nonagricultural land and/or no agricultural land, even for the purpose of SARFAESI Act.

64. It is submitted by IFCI and ITC that BCHL has allowed Park Hyatt Hotel to provide operation services on the whole immovable property, in question, which is clear from the Operation Agreement (Page 691 of rejoinder of Writ Petition No. 222 of 2015), as the word "Site" referred to the entire land of 45 acres. The entire land is, therefore, used for the commercial purposes. The service agreement also provides and refers to the public grounds and gardens used and the features and facilities. The valuation report of BCHL, as stated, has shown entire land is commercial in valuation of 2013 by Rao and Associates. The description provided in the operational agreement, covering the agricultural land about 15 acres, is required to be stated in law as non-agricultural land or property.

65. Admittedly, BCHL's application of Blue Coast for conversion of land to non-agricultural was not granted and specifically in view of the order of Town and

Country Planning Department whereby, all conversions were kept in abeyance by the Government (page 352 of WP No. 222 of 2015). The pendency of the Application of conversion itself, unless specifically ordered, cannot become commercial land and/or non-agricultural land. The law is settled that unless specifically ordered/permitted any use of land for the non-agricultural purposes, including the construction made thereupon, need to be treated as impermissible, illegal and/or unauthorized. Permitting and/or allowing such agricultural land to be used for garden and/or special related purpose, by not producing any agricultural products from some time and/or non-production and/or because of non-use of agricultural land for long, that itself cannot be the reason to treat the said land as non-agricultural land. At the time of mortgaging such agricultural property, as the same is permissible, there was no such issue. The only issue of invoking SERFAESI Act against such secured assets, being admitted agricultural land in revenue record on the date of documentation when it put for enforcement and/or for the provisions of SARFAESI Act. The fact that BCHL is not agriculturist and as admittedly, one mortgage was created on the entire property offering the same as a loan for a Corporate Loan, that itself cannot be the reason to permit the Respondents to invoke SARFAESI Act for enforcement, as has done in the present case. There is no construction on the agricultural lands and as such the character of the said lands have not been altered.

The Judgment by BCHL in support of their case.

66. In *State of Karnataka v. Shankara Textile Mills Ltd.* (supra), in paras 6 and 9 deals that, in absence of prior permission, which is mandatory for the Revenue Act/ Provisions/ Non-use of agricultural land for agricultural purposes, cannot be said to have converted the nature of the land. The Apex Court in that case specifically held, thought referring to the Karnataka Land Reforms Act, 1962 and related provisions, that no agricultural land can be used and treated as non-agricultural land without obtaining prior permission.

"6 Section 95(2) of the Revenue Act at the relevant time read as follows:

"95. Uses of agricultural land and the procedure for use of agricultural land for other purposes. * * *

(2) If any occupant of land assessed or held for the purpose of agriculture wishes to divert such land or any part thereof to any other purpose, he shall apply for permission to the Deputy Commissioner who may, subject to the provisions of this section and the rules made under this Act, refuse permission or grant it on such conditions as he may think fit;"

"9 Thus the High Court has proceeded on the basis that there is no specific finding regarding the nature and usage of the land as agricultural and hence, the Special Deputy Commissioner could not treat it to be an agricultural land merely on account of the fact that permission for conversion of the land under Section 95(2) of the Revenue Act was sought (but admittedly not given). Secondly, it has proceeded on the footing that the land in question does not satisfy any of the

characteristics as required under the definition of "land" in Section 2(18) of the Act, i.e., Karnataka Land Reforms Act investing the authorities with the jurisdiction to take proceedings under Section 79B of the Act. We are afraid that the High Court has misread the facts on record. The consistent stand taken by the authorities is that the land was never converted for non-agricultural use as required by the provisions of Section 95(2) of the Revenue Act. The mere fact that at the relevant time, the land was not used for agricultural purpose or purposes subservient thereto as mentioned in Section 2(18) of the Act or that it was used for non-agricultural purpose, assuming it to be so, would not convert the agricultural land into a non-agricultural land for the purposes either of the Revenue Act or of the Act, viz., Karnataka Land Reforms Act. To hold otherwise would defeat the object of both the Acts and would, in particular, render the provisions of Section 95(2) of the Revenue Act, nugatory. Such an interpretation is not permissible by any rule of the interpretation of statutes. What is further, the respondent-Company had itself filed a declaration under Section 79B(2)(a) of the Act stating therein that the entire disputed land was agricultural land and had claimed exemption from the provisions of the said Section 79B under Section 109 of the Act on the ground that the land was mortgaged to the Mysore State Financial Corporation. We are, therefore, unable to agree with the view taken by the High Court on the point."

67. In Muhammed Basheer K.P. (Supra), in para 15 to 20, deals with a rubber plantation and would constitutes agricultural land by holding that the rubber plantation cannot loose its character as agricultural land by felling of old trees and even if it was kept idle for some time. These judgments are tried to be distinguished by the learned senior counsel appearing for IFCI and ITC showing that the determination of the land i.e. whether the agricultural land must be based primarily on the nature of its use or actual use. In our view, BCHL's submission, based upon the Judgments in support of their contention, that the portion of the land of immovable properties involved, are agricultural land, is correct.

68. The submission is made by the learned senior counsel for IFCI that Park Hyatt is an international hotel chain. Therefore, admittedly, using the agricultural areas for banquets and destination weddings. The Hotel Management Service Agreement was in respect of entire property. BCHL itself mortgaged the entire 45 acres as a five star resort hotel and provides destination wedding/party venues in open air and amid trees at the property. The submission was also made that the mode of acquisition and the purchase of the land of BCHL several years back, referring to the separate sale deeds is irrelevant for determination of the current character of the land is unacceptable. In our opinion, the above submissions are not sufficient to accept the case of the Respondents. The registered documents cannot be overlooked at the instance of Respondents now, and/or the subsequent purchaser, without leading any contra evidence, based upon the Judgments, so cited, not on identical facts. Those Judgments of Respondents are distinct and distinguishable. The registered sale deed/such documents cannot be

overlooked to refer the factual assertion without leading any contra evidence. DRT was wrong in not applying the correct test of Supreme Court Judgment cited by IFCI (supra), is unacceptable submission. DRT had given the reasons and arrived at correct conclusion, which we are also maintaining also for the above reasons. In view of Section 31 (i) of SARFAESI Act, the inclusion of agricultural land in the demand notice and all the measures so taken, is impermissible and contrary to law.

Section 13(2) Demand Notice not in accordance with law

69. The Corporate Loan Agreement dated 26 February 2010, was entered into between BCHL, as a borrower and IFCI Limited, as the lender at New Delhi. 21,86,142 shares were pledged by the promoter of the borrower (BCHL). BCHL also mortgaged "Park Hyatt Goa Resort and Spa" hotel property in question. BCHL-borrower created hypothecation of second charge on the movables. The security for the loan, includes the property so referred above. The purpose of the loan to repay the existing debt of Rs. 70 crores and balance of Rs.80 crores for investing as equity in the Silver Resort Hotel India Private Limited. The amortisation of schedule shows that Rs. 70 crores were payable in 3? years, including moratorium of three quarters from the date of first disbursement. "Facility B" for Rs. 80 crores was for 3? years from the date of first disbursement. Various documents, including title and deeds are part of first schedule of the Agreements, including all documents of the property, giving details of the built up area and its survey numbers. The survey numbers so referred earlier are admittedly part of the IFCI documents also.

70. The facility of Rs. 80 crores had not become due and payable when demand notice was issued, as admittedly, the amount was payable within a period of 3? years on or before September 2013. The demand notice required that debts should be legally recoverable before the demand made.

71. IFCI by the demand notice, based upon their calculation, claimed an amount, outstanding on 21 March 2013, Rs. 135,15,97,443/- (principal and interest) as stated defaults committed by BCHL in repayment of the loan. Reference was made of loan Agreement dated 26 February 2010 and other security documents for loan of Rs. 150 crores and declared the account as Non-Performing Asset (NPA) w.e.f. 30 September 2012.

72. The particulars are given in the schedule, annexed to notice. BCHL was thereby called upon to pay within a period of 60 days. The amount mentioned was as per Annexure-III. The notice was also given, in case of failure/repayment, for proposed recourse to Section 13(4) of the Act. By the same notice, the provision of Section 13 (13) was also invoked thereby, prohibited BCHL from transferring either by way of sale, lease or otherwise, any secured assets as referred in the notice, without prior written permission. In view of Section 13(2), this notice was issued without prejudice to their rights and remedies, available against BCHL, mortgagors, pledgers, guarantors and other Securities. The details

of secured assets, specifically annexed in Annexure-II with description of entire immovable properties, built up area, comprises of survey fields so elaborated including the agricultural lands. The description IS of the whole of the movable properties including, the furniture, kitchen equipment, machinery spares, details of tools and accessories, plant and machinery located at Park Hyatt Hotel, including whatever stored in the factory premises and/or the godown's of the hotel.

Section 133A not complied with?

73. Section 13(3A) of the SARFAESI Act, mandate IFCI and/or financial institutions to decide the representation/objection, if any and communicate the decision upon it within 15 days of receipt of the representation/objection with reasons. As noted, the first representation dated 27 May 2013, was received by IFCI on 28 May 2013. There is nothing on record to show that BCHL had waived its rights, as sought to be contended by the learned Senior Counsel appearing for the Respondents. On the contrary, in letter dated 27 May 2013, they had reserved their rights and so also, by the Respondents while accepting the proposal.

74. DRT held that there was a violation of the mandatory provisions of Section 13(3A) by IFCI, as admittedly IFCI did not reply and/or communicated any decision to the stated representation dated 27 May 2013 of BCHL(para 28 to 35). DRAT, however, rejected BCHL's case, mainly on the ground that the representation was not within the period of 60 days (para 6). We have noted that there is no specific provision and/or mandate in Section that the representation should be filed within a period of 60 days from the date of notice. However, the obligation is provided upon the secured creditors to reply and to take decision and communicate the same within 15 days from the receipt of the representation. In the present case, there is a material to show that IFCI had received the representation dated 27 May 2013, on 28 May 2013. The issue still agitated by IFCI that it was not an objection and/or representation, but it was an application based upon the earlier request to defer the proceedings, by granting instalments/time for the repayment. There is no communication on record to show that IFCI by reasoned order and/or communication, rejected even the representation and/or application. On the contrary, it is stated in the Writ Petition reply and we have also noted the letter, whereby IFCI accepted the representation, but on certain conditions. In any case, IFCI's inaction of not responding to the representation with reason within 15 days from the receipt of written representation, therefore goes to the root of the matter. IFCI, if had accepted the representation, then the action based upon demand notice dated 26 March 2013 could not have been continued, as a foundation for the auction/sale and the possession of the property. The in-consistence case of IFCI that the objection/representation was received 1 day late, beyond the period of 60 days and therefore, they had not decided and communicated any reasoned order, then also remained the mandate of noncompliance of measures under the SARFAESI

Act. There is nothing to show that, in the present facts and circumstances, one day delay (even assuming there was delay) could have been so fatal specifically in absence of any of such mandatory provision. There was no bar to accept such representation and/or to deal with the same, particularly when no further measures were taken by IFCI till then. In both the situation, the default was of IFCI, considering the Judgments so cited, apart from the contentions so raised, is fatal and goes to the root of all subsequent measures taken. Such noncompliance cannot be ignored.

Request for re-schedulement was representation - Section 13(3A) not decided?

75. The admitted reply to the demand notice, though stated to be representation and/or objection and/or request of re-schedulement of the payment, IFCI still should have decided in accordance with law. As not decided, the mandate of law would take its course. In Jaibharat Synthetics Ltd. (supra) (Paragraphs 9 and 10), Jaideep Singh and Ors.(Supra), (Paragraph 25) and Malabar Sand and Stones (Pvt.) Ltd. (Supra) (Paragraphs 9 to 12), it was held that such proposal representation/ application/ request falls within the ambit of "representation" as contemplated under Section 13(2), 13(3A).

76. The learned Senior Counsel appearing for Respondents-IFCI and ITC, opposed the submission revolving around the objection or representation under Section 13(3A), mainly stating it would defeat the object of SARFAESI Act and the rights accruing to the secured creditor under Section 13(4), if period longer than 60 days from the submission of the objection, as contended by BCHL is granted. The submission was on the ground that the period of 60 days expired on 26 May 2013. Reference was also made to Section 13(4) in support of the contention that "if the borrower failed to discharge his liability in full within the period prescribed in Sub Section 2, the secured creditor may take recourse to one of the measures available. The entire Section 13 has to be construed harmoniously to achieve the object of the Act though Section 13(3A) was inserted later on. It has to be harmonised with prior and subsequent provisions, if no objection received, the right to take measures vested with the secured creditors. The reference was made to the Judgment saying that "it is a well recognised rule that statute should be interpreted if possible so as to respect vested rights". The reliance was also placed on Commissioner of Income Tax Haryana, Him. Pra. And Delhi and Ors. v. Tarsem Kumar and Anr AIR 1986 SC 1477, whereby, Tarsem Kumar (supra) was upheld, so also Prabin Chakraborty (supra), thereby contended that the failure of BCHL to respond within 60 days from the date of notice, no way takes away the Respondents' obligation to take measures after expiring of 60 days.

77. These judgments are distinct and distinguishable on facts itself, apart from the scheme and provisions of the amended SARFAESI Act and even otherwise, in view of V. Shanmagam (supra) and Mardia Chemicals (Supra).

78. In the present case, the representation was filed and received by the

Respondents. The Supreme Court in *Mardia Chemicals (Supra)*, based upon then existing provisions has also not held that 60 days period for reply/objection is mandatory. The provisions of application of Limitation Act and the principles surrounding to the same, apart from the principle of natural justice read with the scheme of the SARFAESI Act needs to be noted first, before accepting the Respondents submission. IFCI submitted that granting an indulgence for time so sought under letter dated 27 May 2013 could not be treated as the representation, within the meaning of Section 13(3A) of the SARFAESI Act. The right was reserved by BCHL and therefore, the case that they did not give any response under Section 13(3A) and further that the letter was nothing but the proposal as contended by the Respondents, is not acceptable.

79. The Respondents' counsel have tried to distinguish Judgments relied upon by BCHL on this issue. Those judgments including, *Krishna Chandra Sahoo*, *Jayant Agencies*, *Tetulia Coke Plant Pvt. Ltd.* and *Sunanda Kumari (supra)*. Reference was also made to *Mardia Chemicals* saying that the objection and representation as "synonymous". The Judgment, itself held the opportunity should be provided to the borrower to raise the objection. It is also observed that "nonetheless, dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism". This itself means, in the background of acceptance of proposal, that the parties could endeavour to resolve the dispute. The submission that the representation can only be to grant an opportunity to resolve the dispute of classification of NPA amount of dues and nowhere confer additional rights on borrowers, is unacceptable in view of the judgments so cited by both the parties included the provisions, in question. [*Transcore (Supra)*, *Kanaiyalal Lalchand (Sura)*, *V. V. Shanmagam (supra)*].

80. The learned Senior Counsel appearing for BCHL has read and referred in support of his contentions *Mardia Chemicals Ltd. (Supra)* (Paragraphs 45, 47, 77, 80), *Transcore (Supra)* (Paragraphs 24 and 25), *Kiran Devi Bansal (Supra)* (Paragraphs 9 and 10), *Clarity Gold Pvt. Ltd. (Supra)* (Paragraphs 11, 12 and 13), *Vinay Container Services Pvt. Ltd. (Supra)* (Paragraph 6) and *Krushna Chandra Sahoo (Supra)* (Paragraphs 5, 6, 7 and 10).

81. The Judgments cited by the learned Senior Counsel appearing for BCHL, with regard to the noncompliance of mandatory provisions of Section 13(3A) are recorded above. Additional Judgments are, *Tensile Steel (Supra)* (Paragraphs 3 and 21), *M/s. Jayant Agencies (Supra)* (Paragraphs 3, 20, 21, 25, 27, 28, 29, 32, 33 and 36), *M/s. Tetulia Coke Plant Pvt. Ltd. (Supra)* (Paragraphs 5, 9, 20, 22, 23 and 24) and *Mrs. Sunanda Kumari (paragraphs 1 and 5)*. The Judgment in *Prabin Chakraborty (supra)*, so cited by the Respondents in the facts and circumstances and in view of the amended provisions and the reinforcement of the scheme of SARFAESI Act by the Supreme Court in Judgments so referred above, has diluted its force. The Judgments cited by the Respondents are of no assistance to them.

DRAT reversal order:

82. DRAT has however, accepted the submissions of IFCI, without assigning specific reasons, including law and the submissions so raised, based upon the pleadings so available and failed to appreciate facts, as well as, the provisions of law. The unreasoned order of DRAT even on this issue, therefore, is bad in law, in the background so referred above.

83. BCHL has submitted that the possession notices were not published in 2 leading newspapers, one in vernacular language having wide circulation as required under Rule 8(2). (Pages 198 ? 201 of Common Compilation of Documents). Swastik Agency (Supra) (relevant para 56, 74 and 75). However, the affidavit has been filed by IFCI in these proceedings annexing copies of the publication as required by law, which has not been refuted by BCHL.

84. Section 13(2) notice demands payment of a sum of Rs.135,15,97,443/as being due as on 21 March 2013 under the Corporate Loan of Rs.150 crores. The possession Notice dated 20 June 2013 stated that the property will be subject to a charge for an amount of Rs.192,45,93,208.36 in respect of all liabilities, due as on 15 June 2013, i.e. an increase in amount by more than Rs.57.00 crores within a period of three months, showing that IFCI has also included the outstanding amount under the Share Buyback Agreement though no demand for the same was made in Section 13(2) notice. The same does not constitute debt within the meaning of Section 2(ha) of the SARFAESI Act. IFCI has in its Reply to the SA admitted that in the Possession Notice dated 18 June 2013 has included the amount due to it by virtue of its investment in Silver Resort India Pvt. Ltd., (Para 29 @ Page 430 of WP).

85. IFCI has in First Sale Notice dated 4 September 2013 (@ Page 107 of the Common Compilation of Documents) and in Second Sale Notice dated 9 January 2014 (@ Page 108 of the Common Compilation of Documents), mentioned a sum of Rs.51,18,60,081/showing the amount as being due towards "buyback of equity shares together with interest return thereon".

86. In third Sale Notice dated 8 October 2014 (@ Page 140 of the Common Compilation of Documents) and fourth Sale Notice dated 31 December 2014 (@ Page 143 of the Common Compilation of Documents), IFCI has stated that the property is also secured to the buyback of equity shares and return on investment by IFCI in Silver Resort Hotel (India) Pvt. Ltd., together with further return thereon.

87. DRT has in its order (Para 46 @ Page 103 of the WP) recorded the argument of BCHL that the possession notice includes an amount which is not a debt within the meaning of the RDDB Act/SARFAESI Act. It also records the submission of IFCI that it has included the amount due under the buyback obligation for investment made by IFCI in Silver Resort Hotel (India) Pvt. Ltd., in the Possession Notice dated 18 June 2013 (Para 7 @ Page 83 of WP). BCHL's pleadings (Grounds S, T, U and V @ Pages 30 to 32 of WP). Seven days notice prior to the date of taking possession was not given. Hence, violation of Rule

8(2). Mathew Verghese (supra) (Relevant para 34).

Steps for Possession:

88. The Demand Notice was against BCHL for Rs.135,15,97,443/. An amount of Rs. 192,45,93,208.36 stated to be subject to the charge of IFCI Limited, as reflected in symbolic possession notice dated 10/18 June 2013, published by the Authorised officer of IFCI Limited. The last amount appears to be inclusion of buyback of equity shares, together with the interest to the extent of Rs. 51,18,60,081/calculated upto 15 March 2013 thereby, given public notice dated 4 September 2013 and invited sealed cover bid on "As is where is" and "whatever there is" basis, for purchase of the assets of BCHL as a running concern described in the property covered and consisting of freehold land about 45 acres with a built up area, with all buildings and structures and plant and machineries. The public notice was given in the newspaper. BCHL's case is that it was never given in vernacular language in the city/place of site. By affidavit of IFCI however, it is contended that it was advertised in vernacular paper also. The bids were invited and demand draft was payable at New Delhi. The bids were supposed to be opened on 9 October 2013, at New Delhi. It appears that by communication dated 3 October 2013, BCHL requested IFCI referring to the earlier communication dated 30 September 2013, for further time for repayment of the loan given and to keep the recovery proceedings in abeyance. The monthly schedule was accordingly provided covering the escrow of Cash Flow from Hotel Park Hyatt Goa Resort and Spa, infusion by Promoters. It was from October 2013 upto March 2014. The request was also made not to treat the account as "Non Performing Asset" (NPA). It was also agreed/offered/allowed to develop the proposed Villa Project on surplus land, adjoining the hotel and NOC thereof be issued and thereby, again endorsed IFCI to support and deferment of the recovery proceedings in respect of hotel property at Goa. By communication dated 29 October 2013, IFCI referring to the communication dated 3 October 2013, approved the proposal for clearance of the outstanding principal dues aggregating to Rs. 129.00 crores in respect of Corporate Loan No. 1 and Corporate Loan No. 2, as per the schedule prescribed. The payment dates were accordingly rescheduled for both the loans, by 15 December 2013 (Rs.49 Crores + Rs. 40 crores for Loan No. 1 and Loan No. 2) and so also the payment of balance instalments by 10 March 2014, and future interest on regular/due dates/payments. However, it was made subject to the condition that "Principal Company/promoters would furnish an undertaking to IFCI that in case any default is committed in payment by the company/promoters, they shall not be objecting the sale of assets under SARFAESI Act, after December 31,2013." This letter was without prejudice to the rights and contentions and the remedies available and in case of default in payment of dues, IFCI proceed for recovery as per the law. The parties by this, therefore, without prejudice, agreed for further instalments and rescheduling. 9 January 2014, was another public notice for sale of the same property, building and structures together with all plants and machineries, by following the same procedure.

89. IFCI by public notice dated 18 June 2013 under Section 13(4) announced to the public at large that they took the possession of the Goa Hotel ("Hyatt") being "secured assets". Admittedly, it was symbolic possession. The property was put to public auction on 10 February 2014 by issuing notice on 9 January 2014, at a reserve price of Rs. 403 crores. The same was increased by another sale notice dated 8 October 2014 to Rs. 542.57 crores. The same was further reduced on 31 December 2014 to Rs. 515.44 and on 23 February 2015, for the property, ITC Limited was declared as the highest bidder. The entire bid price was paid by 25 February 2015. The sale certificate under the SARFAESI Act was issued to ITC Limited for all the properties. On the same date, for the first time, an Application under Section 14 of the SARFAESI Act filed before the DM to take physical possession of the Goa property.

Section 14 Application filed by IFCI for physical possession of the Park Hyatt Hotel property?

90. The SLP filed by BCHL, was withdrawn on 27 February 2015. The DM, by order dated 27 February 2015, directed to take physical possession of the property and further directed to hand over the same to IFCI Limited. On 27 February 2015, the final notice was issued by the Mamlatdar, Marmugao, Goa, directing BCHL to hand over the property to IFCI by 2 March 2015. BCHL filed Writ Petition No. 1150 of 2015 on 2 March 2015, challenging order/notice dated 27 February 2015 of DM and notice of Mamlatdar. The order of status-quo was passed on 3 March 2015 after recording the submissions of both the parties with regard to the physical possession of the property. There is issue with regard to the actual possession of the property, as reflected in the averments so made in Notice of Motion (L) No. 206 of 2015.

91. Admittedly, IFCI never took physical possession of the property, even on the date of filing of Application under Section 14 of the SARFAESI Act. The concept of "Symbolic Possession" and the "Physical Possession" are recognised and accepted one of the mode to protect the interest and rights in the secured assets, once the borrower failed to make the payment as demanded. Both the parties had proceeded on this basis throughout, recognising the two stages/measures, first for protecting the property immediately after the failure to make the payment so that the third persons"/parties" rights should be avoided and secondly, to issue notice to the people at large that the property is secured assets of the financial institution/bank and they have interest and rights over it to take steps to recover the amount as provided under Section 13 (2), (4) readwith Section 14 of the SARFAESI Act and the Rules. This also means that, once a notice under Section 8(1) is issued, the borrower and/or person who is in possession in view of the various agreements between the parties, still retain the physical possession of the property and get time to make the payment and/or ask for the payment and/or ask for the instalments. This also means the financial institutions, subject to the conditions and/or riders, may accept the proposal and/or instalments and/or rescheduling the instalments and payment due dates. This enable both the

parties to continue with the commercial transactions and to pay the balance amount and/or receive the balance amount, though in instalments, if agreed. The interest of both the parties therefore, by this methodology of taking symbolic possession, (8.1) of Rule, will achieve the purpose and object of the Act in many cases. We have noted that there is nothing contrary pointed out and/or nothing contrary can be read out from the provisions so read and referred by the learned senior counsel appearing for the parties, by referring to the judgments so cited.

92. The issue of dichotomy of "symbolic possession" and/or "physical possession" in our view, needs to be read in the background of aims and object of the Act and the purpose behind it. We have already recorded that the SARFAESI Act itself is a complete code. The Civil Court has no jurisdiction to deal with and/or interfere with any of the steps and action, including the measures so prayed and referred under Section 13, specifically Section 13(4). This itself means, the financial institutions/bank and the Tribunal and even the DM need to follow the provisions and to take measures within the framework of law, by keeping in mind consistent provisions of other laws, so mentioned in Sections 31 to 37. It is also clear, therefore, that in case of any inconsistency referring to the other provisions/law, the provisions of this Act shall prevail, though the application of other laws are not barred. These specific provisions, therefore, cannot be overlooked to interpret the other provisions only in favour of the financial institutions and/or only in favour of the borrower and/or third person. Such mandatory provisions of SARFAESI Act, as amended, need to be read together in every respect and mandate the person/parties/Court/Tribunal to follow the same, while passing the interim and/or final order against the secured creditor.

93. The earlier Supreme Court Judgments and the Judgments of various High Courts cited by the learned senior counsel appearing for the parties, based upon the unamended provisions of SARFAESI Act, need to be read in context of the then existing provisions. Amended Section 14 of the SARFAESI Act basically Act 30 of 2004 (S.7) (S.8) w.e.f. 11 November 2004, and 1 of 2013 (S.5) w.e.f. 15 January 2013 made it mandatory for the Chief Metropolitan Magistrate and/or DM to assist the secured creditors in taking possession of the secured assets. Therefore, apart from the details of unpaid due amount and affirmation of creation of security interest over the various properties, giving the details of the properties, and as after declaring the property as a nonperforming assets because of the default in repayment of the financial assistance, it is necessary for the financial institutions to aver that the financial institutions had given 60 days notice, and after serving the demand notice, the borrower failed to make the payment. It is also necessary to confirm that the objection and/or representation in reply, received from the borrower, has been considered by the secured creditors and the reasons for nonacceptance of the objection and/or representation has been communicated to the borrower. It is also necessary, as per the scheme of this amended Section 14, that the borrower must have failed to make the repayment after the notice, and therefore, the "authorised officer" is entitled to take physical possession of the secured assets. The Supreme Court

has reinforced that the Magistrate should "after satisfying the contents of the affidavit", pass suitable order for the purpose of taking possession of the secured assets. The amended Section itself provides that the requirement of filing affidavit in first proviso, shall not apply to the proceedings pending before any District Magistrate on the date of commencement of this Act. Admittedly, the present proceedings and/or demand notice, itself was issued after the amended provisions were inserted i.e. after 15 January 2013, so also the steps taken by the financial institutions for recovery of symbolic and/or physical possession of the property in question. The Enforcement Rules, so prescribed and noted, reinforced the mandate of provisions of this in totality, and now reiterated by the Apex Court in many Judgments.

94. In the same provisions, the DM is empowered to authorize, to support, to meet, to take possession of such assets and documents relying thereto, and to forward these assets and documents to the secured creditors for the purpose of securing compliances. It empowers to the District Magistrate to take and/or caused to be taken such steps and/or such force, as may in his opinion be necessary. This includes, police assistance and/or help to take physical possession of the property, in case the borrower and/or possessor of the property, obstruct by any possible ways and means.

95. It is therefore, clear that if the borrower and/or person in possession on demand notice make the payment and/or settle the issue and/or seek instalments and the financial institutions accept it, there is no question of taking any coercive steps and/or measures. But, if there are issues on every stage, right from the demand notice, and obstruction in every measures taken by the financial institutions, such banks/financial institutions are authorised to take steps/measures under the Act and the Rules made thereunder. However, it is clear that any measures or action taken by the banks/financial institutions and/or by the concerned Authority, Tribunal, Appellate Tribunal, and/or District Magistrate and/or Authorised Officer, must be in compliance with the mandate of these provisions. It also means that everybody needs to follow the provisions and basically banks/financial institutions, before even issuing the demand notice to ascertain the assets, the secured assets and/or interest in the movable properties and the immovable properties of the borrowers. They need to check and complete the legal formalities of banking documentation, including the demand notice. Those documents, being a part of transactions, therefore, need to be scrutinised and verified, confirmed and reconfirmed by the financial institutions, at every stage, so also the tribunal/authorities. Both the parties, therefore, are fully aware of the mandate of the laws and the contents of the documents, and the measures need to be taken, based upon those documents. As already noted, these facts and provisions are in the interest of both financial institution, as well as, the borrower. In case of disputes, the Tribunal and/or the Court, needs to construe the provisions accordingly.

96. The plain reading of the provisions, specifically read with amended Section

14, it is necessary for the Magistrate to satisfy after going through the affidavit, which is to be filed by the Authorised Officer of the financial institution, is in strict compliances of the provisions. This itself means that all the elements so referred in Section 14 are to be complied with as it needs to be provided with details, if necessary with supporting documents. This covers the details of the "due amount", "secured assets", details of description of "Movable and/or immovable properties", the details of "demand notice", including due service of 60 days notice and the reply/decision to the representation and its reasoned communication to the borrower. The learned Magistrate, therefore, on the date before passing the order of permitting to take physical possession itself, must keep in mind all the provisions of the Act, including exclusive Section 31. The provisions of this Act override other laws. The Civil Court has no jurisdiction to deal with the subject/step/measures so prescribed under the Act, Section 36 to see whether the claim so read is within limitation.

97. If the borrower gives physical possession and/or surrendered the possession, there is no question of taking steps by invoking Section 14. The actual possession, if taken by the financial institutions immediately after and/or along with all, after giving notice under Rule 8 (1), a movable and/or immovable property as provided, there is no reason for the financial institutions to move for taking physical possession of the property, by invoking Section 14 of the Act. The possession, therefore, so referred and deal with in the present facts and circumstances before selling the property, was on the foundation of the concept "symbolic possession". Admittedly, there was no physical possession taken and therefore, IFCI invoked Section 14 provisions, as recorded above. The parties, if compromise and settle the matter after borrower gives proposal before taking any coercive steps/physical possession/steps and if the financial institutions accept the said proposal, irrespective of the objections with regard to the description of the properties and/or the details of the movable and the immovable properties and/or issue and/or raising, there would be no issue of no communication of reasoned order to their proposal/objections/ representations, even at the stage of taking possession under rule (1). In the case in hand, the land, being agricultural land, and/or in executable by invoking these provisions of Act, as the same is outside the purview of all the purposes of the Act, including of taking physical possession of the same, though being part of secured assets and when no reasoned communication was forwarded to the borrower of rejecting their proposals and/or the representation. The selling of property, without taking physical possession based upon the symbolic possession with encumbrances, though based upon "As is where is" and "whatever there is" basis stating it to be running concern and confirmation of sale and issuance of sale deed and acceptance of bid and by confirmation of sale and all these actions therefore, required to be considered in view of the mandatory provisions of this Act and the Rules made thereunder. It is settled that even in case where there is a huge loan and the recovery is pending, still it required to be considered, on the foundation of the compliances and/or non-compliances of the mandatory

provisions. The law is settled that, if the mandatory measures and/or steps not followed, such recovery and/or such possession if taken, even after the confirmation of sale an appropriate status-quo ante order and/or "restitution of possession" is permissible.

98. IFCI, in support of their contention, states that all the ingredients of Application accompanied by the affidavit under Section 14 of the SARFAESI Act before the Magistrate have been complied with by making positive specific averments though the affidavit was filed on next date i.e. the application on 25 February 2015 and affidavit dated 26 February 2015. Admittedly, Section 13(2) notice was given for demand of Rs. 135 crores. However, notice under Section 13(4) annexed with the application refers to 192.45 crores dues, in respect of the charge exists. All the copies of loan deeds and documents of mortgage and hypothecation and charges were annexed with the affidavit/ Application, which include the description of the property, covering the agricultural land, (movable and immovable properties, as secured assets). The averments of IFCI are that "the notices were duly received and acknowledged by the Respondents. However, the borrowers have failed to discharge its obligations and could not make the payment. Averments are also made about Section 13(4) measures, and the publication of possession notice under Rule 8(1). The positive averments are made with regard to the objection or representation in reply to Section 13(2), that no objection/representation was received within the statutory period and therefore, there was no question to refer the objection and/or representation. The fact of receipt of objection/representation sent by BCHL and the same was received by IFCI are part of record, and specifically on the date of filing of Section 14 Application.

99. Admittedly, no decision and/or communication was sent and forwarded by IFCI. It is submitted that for taking the possession, IFCI issued the sale certificate and auction was held on 23 March 2013, and thereafter ITC was declared as a successful bidder who deposited the entire bid price. It is specifically averred that having once issued sale certificate, it is required to hand over the physical possession of the secured assets to ITC " auction purchaser". The borrower, might obstruct the physical possession and therefore, IFCI moved for the order of DM. Therefore, before and/or on the date of application for possession itself, IFCI, sold the property and ITC declared as a successful bidder. ITC was admittedly not concerned with and party to this Application and the affidavits. With regard to the compliances, as required, it is averred that IFCI has complied with the terms and conditions of the SARFAESI Act and Rules made thereto, which in our view for the reasons so recorded earlier, are unacceptable.

100. Orders and actions under Section 14 of SARFAESI Act dated 26 February 2015, directing the Mamlatdar, Murmugaon to take possession of Goa Hotel and the Notices of the Mamlatdar directing to hand over the peaceful possession to IFCI on 2 March 2015, are the subject matter of Writ Petition No. 1150 of 2015. Admittedly, the physical possession of the immovable property was taken after

completion of auction/sale proceedings accordingly by contending that there is no bar under Section 14(1) to apply to take possession of the property after its sale, so to complete its obligation to give physical possession to the auction purchaser. Such mechanism/mode is impermissible in view of the mandate of all the provisions so referred above. In our view, without first obtaining physical possession by the Secured Creditor, many purchasers may not come forward and the property may not fetch the potential price at the auction sale.

101. The DM, as stated, has not noted whether the supporting affidavit dated 26 February 2015 is affirmed by the "Authorised Officer of the Secured Creditors". The authorization, even if any, based upon a resolution, authorising the said officer to exercise the rights under the Act, the Application was filed on 25 February 2015 based upon the resolution dated 17 April 2012 of Respondent No.1, which was admittedly, prior to the amendment to the SARFAESI Act. The authorised officer must be "officer not less than a Chief Manager of a public sector bank or equivalent". The authorisation after the amendment was placed for the first time on 19 January 2016 in the Writ Petition, stating that the said officer was authorised by virtue of the resolution dated 17 April 2012 with authorisation dated 24 February 2015 given by the MD and CEO for initiation of legal action against BCHL. The affidavit filed in this Petition, was opposed by BCHL. The contention, therefore, rightly raised by BCHL that the application/affidavit filed by such person who was not duly "authorised officer", therefore, on this ground itself, application ought not to have been granted. The application, so filed under Section 14 by the secured creditors, should have been accompanied by the affidavit, duly affirmed by the authorised officer of the same date.

102. The affidavit of stated authorised officer of IFCI was filed after passing the impugned order by the DM. Therefore, at the time of passing of order, the said application was not accompanied by the requisite affidavit. (V. Noble Kumar) (Supra), followed in Shiv Charan Lal Sharma (supra).

103. There is force in the contention that the property, having been sold for Rs. 515.44 crores on the date of Section 14 Application and the interest of ITC-Respondent No.4 as noted above, have already been created in view of the auction/sale, IFCI ceases to be the "secured creditor" and so also the immovable property ceases to be "secured assets", as IFCI has recovered the debt fully. There was clear statement made that ITC-Respondent No.4 has acquired ownership of the secured assets. The Application needed to be, filed by the secured creditors to recover the secured assets possession with intention to recover its secured debts. IFCI (Secured Creditor), having sold the property, received the amount of secured debts, not entitled to seek possession by invoking Section 14 provision, as ceased to be secured creditor. The subsequent purchaser therefore, may require to follow provisions of other laws to take possession.

104. It is settled that in view of (V. Noble Kumar) (Supra) and followed further in Shiv Charan Lal Sharma (supra), that amended provisions required the secured

creditor to follow the procedure to appoint duly authorised officer indicating the elements of sub-clause (i) to subclauses (ix) to the first proviso, is mandatory and so also the filing of affidavit. Those (xi) clauses have been read and reproduced and dealt with by the Supreme Court in (V. Noble Kumar) (Supra) and followed in Shiv Charan Lal Sharma (supra) by the Allahabad High Court. The DM, therefore, ought to have applied his mind to all the documents and the averments so made in the application so filed by IFCI and should have satisfy himself as to the factual assertion as required by the mandatory provisions, so referred above.

105. The learned DM, by the impugned order, failed to record the reasons referring to the mandatory provisions so referred above, even, for its satisfaction to the declaration and the contents of the affidavit, as required under the law, specifically the second proviso to Section 14(1). The DM has relied upon the Judgment of this Court in Saraswat Cooperative Bank Ltd. (Supra). The Judgment was based upon the unamended provisions of Section 14. This reliance as stated was wrong on the date of passing of order on 25 February 2014. The reliance, therefore, of law of pre-amendment possession and the pre-amendment judgments, itself makes the order, as stated, unsustainable. The issue of requirement of second proviso, just cannot be overlooked by the Magistrate before passing the order of possession, specifically in view of reinforcement of the provision, after amendment by the Supreme Court and other High Courts in (V. Noble Kumar) (Supra) and Shiv Charan Lal Sharma (supra). The impugned order is, therefore, bad in law.

106. Admittedly, no notice to the borrower, of the Application filed under Section 14 of the SARFAESI Act, was given. Nothing noted about the factual possession of the property movable, as well as, immovable property. The nature of possession of Park Hyatt based upon the Hotel Operations Service Agreement, specifically in view of 20+10 years agreement and read with physical possession, just cannot be overlooked.

107. The learned senior counsel appearing for the Respondents, in support of their written submissions, apart from oral arguments also relied upon the cases of Kottakkal Cooperative Urban Bank (supra), Kathikkal Tea Plantations, Dilip Kumar Singh v. State of Uttar Pradesh 2013(97) ALR 659, Federal Bank Ltd. v. District Magistrate WP No. 25566 of 2008 dated 3.9.2008, Kalyani Sales Company (Supra). Those judgments are distinct and distinguishable, as those judgments were delivered by the High Courts, prior to the judgment of the Supreme Court of Nobel Kumar (supra) and Harshad Govardhan Sondagar (supra).

108. Having noted the importance of mandatory provisions of Section 14 proviso so added, which are nothing but the stages and the measures so contemplated under Section 13 and other provisions of the SARFAESI Act, every clause (i) to (ix) so added and the compliances of those requirements, in our view, need to be made from the point of view of borrowers and/or the affected/agreed party,

specifically when there is a resistance and/or obstruction by the borrower and/or person in occupation of the secured assets, basically immovable properties. If borrower and/or person in possession, as a lessee or legal occupants and/or even trespasser, if surrendering the immovable property after due notice under Section 13(2)/(4) read with Rules so referred, the issue of filing application under Section 14 with requisite averments need not arise. But, if there is issue for taking forcible physical possession arises, the financial institution/bank/secured creditor is required to take steps, in view of the Supreme Court judgments, including the essential steps for taking every measures as contemplated under Section 13 of the SARFAESI Act.

109. The elements of these (nine) clauses and as now reinforced in V. Nobel Kumar (Supra) goes to the root of every measures/steps taken by the secured creditors to initiate the proceedings for recovery of their debts, which ultimately culminated into the sale of the property. Therefore, to say that Section 14 is a procedural part and cannot be read with Section 13, and all the measures along with the Rules so referred above, is unacceptable, based upon the admitted facts, in the present case. The steps and the actions so initiated by the secured creditors, which ultimately culminated into the sale of the movable and immovable properties are not in accordance with the mandatory provisions of the SARFAESI Act.

110. The properties and/or the person, if are protected from the purview of this SARFAESI Act, in view of Section 31 provisions so referred above, such initiation of proceedings itself, needs to be declared null and void. The consequential restitution/restoration order must follow.

Secured creditors to deliver the physical possession even after sale?

111. The power of secured creditors to initiate the proceedings in case of defaults and/or nonpayment of borrowers, obligations, definitely needs to be respected in view of the specific provisions in all respects. The measures, so available under the Act therefore, are to be followed by the financial institutions but strictly in accordance with law and the mandate so provided at every stage of proceedings so initiated for recovery of the secured debts. The enforcement of security interest/debts by invoking the provisions of SARFAESI Act to be in addition to and/or not in derogation of any other law. We are inclined to accept the submissions made by the learned Senior Counsel that the other provisions of other Acts are available as mentioned under Section 37. Therefore, they can proceed ahead with taking steps to recover the debts by selling the property and by taking recourse to the other provisions, by following the due procedure and course so available under the other laws. The provisions are in addition, when there is any doubt and/or otherwise. The SARFAESI Act provisions are not in derogation of any other law. We are inclined to accept the contention that IFCI the financial institutions/secured creditor and their actions of taking steps in the present case, are in breach of provisions of SARFAESI Act and therefore, not acceptable and/or permissible. The remedy of TP Act and/or other provisions in

view of non-obstante clause as provided under Section 13(1) itself make the position clear that there are other remedies for such recovery to the secured creditors. The financial institutions are free to do so. But having once invoked the SARFAESI Act, they have to strictly followed the provisions. The financial institutions, therefore, having acted upon the provisions of SARFAESI Act, they are under obligation to follow the same. The provisions of TP Act, therefore, cannot be invoked when they are confronted with the non-compliances of mandatory provisions of SARFAESI Act.

112. The Judgments are cited by the Respondents, in support of their contention that the remedy under Section 14(1) can be adopted by the secured creditors, even after the sale of secured assets and/or issuance of sale certificates. [Kathikkal Tea Plantation (supra), Dilip Kumar Singh (supra), Kalyani Sales Company (supra), Shakthi Industries v. Indian Overseas Bank (2010) 2 DRTC 725 (Mad), Kotakkal Cooperative Urban Bank (Supra) and Federal Bank Ltd. (supra)]. These Judgments need to be read in the background of the subsequent Supreme Court Judgments, including of Noble Kumar (supra), Harshad Govardhan Sondagar (supra). All these Judgments, so cited by the learned counsel appearing for the Respondents, are on the basis of unamended provisions.

The secured assets need to be delivered to the purchaser free from encumbrances on deposit of money.

113. Rule 9, apart from the provisions, specifically provides time of sale issue of sale certificate and delivery of the possession by the authorised officer to the purchaser free from encumbrances on deposit of money, as specified in sub rule (7). Sale of property on "As is where is" and "whatever there is" basis as recorded above, in the present case, and the purchaser taking risk of purchasing the property knowing fully the background of litigation and the fact that the property in question is admittedly in physical possession of third person (Hyatt Hotel) the conductor/operator, based upon the service provider agreement so referred above. The submission of the Respondents that issuance of sale certificate itself entitles the secured creditors for taking recourse under Section 14(1) of the Act and specifically without intervention of the Court as contemplated by Sections 13(1), 13(2) and 13(4A) would defeat the purpose of SARFAESI Act, is unacceptable. The physical possession post sale in the present facts and circumstances has created the complications. Therefore, to say that the authorised officer, in the background, is able to deliver the property to the purchaser free from the encumbrances on deposit of money is complied with and/or was done following the due procedure so prescribed is not acceptable. There was no question of selling and/or transferring of such property, specifically based upon the admitted symbolic possession. The Judgment in Nagin Mansukhlal Dagli v. Haribhai Manibhai Patel AIR 1980 Bom 123 is of no assistance. Those facts are revolving around the "licensor" and "licensee" and "landlord and tenant" relationship. ITC, being subsequent purchaser, but not secured creditors,

independently also could not have applied for securing the possession by invoking provisions of SARFAESI Act, as the same was only available to secured creditors and not to the third person or subsequent purchaser. The remedy if any was elsewhere by invoking other provisions of other Acts. Therefore, also IFCI's whole action is bad in law.

Auction/Sale" As is where is" and "whatever there is" basis?

114. Both the counsel have made their respective contentions revolving around these phrases, which are well recognised in the commercial law. There is no serious issue so far as to the concept and purpose of these phrases. The Judgment so cited on the issue confirmed the position of law, revolving around the phrases so referred. Both the parties, BCHL, as well as, the Respondents were fully aware of the possession of the property, when it was put to the auction by IFCI. The tender conditions so read and referred, including the public notice made the position clear while describing the property and the amount dues, based upon the demand notice. ITC, having purchased the property after this notice/publication, was fully aware of the public advertisement/notice of auction as it was due to nonpayment and/or default by the borrower/BCHL. The litigation/dispute between the parties therefore, was well within the knowledge of all the concerned. Before purchase of the property, as recorded above, the verification of title is a regular procedure. As per IFCI title report/verification of title report, as recorded earlier in the chapter of agricultural land and/or property description and/or Section 13(2) and/or Section 13(3)(a), the nature of property was fully described including the part of agricultural land. There was nothing mentioned about the physical possession of the property. The description of symbolic possession in reference to Rule 8(1), is itself therefore, mentioned and informed to the people at large before putting such property to auction. Admittedly, Park Hyatt has been in possession of the property on behalf of BCHL since long, based upon the agreement as recorded above, with the movable and the immovable properties. The obligation of providing immovable un-encumbranced property, to be handed over to the purchaser, was also well within the knowledge of the parties, including the purchaser.

Notice/hearing to the borrower/owner occupants before order of possession?

115. Recently, the Apex Court in Vishal N. Kalsaria v. Bank of India AIR 2016 SC 530, in view of the provisions of the SARFAESI Act and Maharashtra Rent Control Act, while dealing with the issue of recovery of secured interest of the landlord/owner held that the Banksecured creditors, cannot arbitrarily evict the tenants/occupants residing in the said secured assets by using the provisions under the SARFAESI Act, as they have statutory rights vested under the Rent Control Laws read with the T.P. Act. This was after referring to the Supreme Court Judgment in Harshad Govardhan Sondagar (Supra). The learned Magistrate, in that case, held that the order passed by the Small Causes Court Judge, Mumbai, has no jurisdiction to restrict the power of the DM to pass order in favour of the secured creditor under Section 13 and/or 14 of the SARFAESI Act, to recover the

possession of the secured assets, interest and/or recovered the loan amount by selling the same in public auction. The Supreme Court did not accept the case of the DM. It is observed that:

"25 ?...The Transfer of Property Act, however, remains silent on the position of law in cases where the agreement is not reduced into writing. If the two parties are executing their rights and liabilities in the nature of a landlord-tenant relationship and if regular rent is being paid and accepted, then the mere factum of non-registration of deed will not make the lease itself nugatory. If no written lease deed exists, then such tenants are required to prove that they have been in occupation of the premises as tenants by producing such evidence in the proceedings under Section 14 of the SARFAESI Act before the learned Magistrate. Further, in terms of Section 55(2) of the special law in the instant case, which is the Rent Control Act, the onus to get such a deed registered is on the landlord. In light of the same, neither the landlord nor the banks can be permitted to exploit the fact of non registration of the tenancy deed against the tenant.

"30 It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act. The expression "any other law for the time being in force" as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field."

"34 In view of the foregoing, the impugned judgments and orders passed by the High Court/Chief Metropolitan Magistrate are set aside and the appeals are allowed. We further direct that the amounts which are in deposit pursuant to the conditional interim order of this Court towards rent either before the Chief Metropolitan Magistrate/Magistrate Court or with the concerned Banks, shall be adjusted by the concerned Banks towards the debt due from the debtors/landlords in respect of the Appellants in these appeals. The enhanced rent by way of conditional interim order shall be continued to be paid to the respective Banks, which amount shall also be adjusted towards debts of the debtors/landlords. All the pending applications are disposed of."

We are not concerned with the case of tenant under the Rent Act, but above principle reinforce the SARFAESI Act provisions. The nature of the person's possession, therefore, require to be noted by the DM/Authority before taking any such steps under the law.

Even after the sale, IFCI whether continued to be a secured creditor?

116. The learned Senior Counsel appearing for the Respondents submitted that even after the sale is confirmed in favour of ITC, IFCI still remained to be a

"secured creditor" for filing Application to the CMM and/or DM to take physical possession of the secured assets as contemplated under Section 14 of the SARFAESI Act. This is also on the foundation that, to take physical possession before sale or transfer of the secured asset is not a prerequisite. It is therefore, submitted that the recourse to Section 14 even post a sale, a secured asset is not prohibited, it is independent for the sale of the property. This submission and the action of the Respondents itself shows and recognises that "symbolic possession" and "physical possession" are two distinct and different concepts under the SARFAESI Act. We have to consider the totality of the matter and the action of taking physical possession of the property after the completion of sale and/or transfer of secured assets. Once the property is sold, the secured creditor is under obligation to adjust the account after recovering the amount dues and to return or refund the surplus amount if received to the borrower and/or other financial institutions having second charge. BCHL did raise the objection, including the maintainability of such application at the instance of Secured Creditors. We have noted that ITC, the subsequent purchaser, was not party to the proceedings under Section 14 of the Act. Therefore, the issue with regard to the maintainability of such Section 14 Application, after confirmation of sale and the stated possession so taken based upon the same and the whole action arising out of the same, goes to the root of the matter including the power and authority of CMM/ DM to pass such order. We have also noted that clause IX (9.1) of the tender document states that, ".....the "purchaser" will take all necessary steps to take over the possession of the assets immediately".

ITC is or not a bona fide purchaser Collusion between IFCI and ITC-

117. This submission was initially objected during the course of the arguments. By order dated 15 January 2016, however, the objection was overruled. The parties accordingly proceeded further and made submissions. The said ruling is reproduced-

"1. The matter is listed today for further arguments of learned Senior Counsel Mr. Rafiq Dada for the BCHL in rejoinder. Written submissions in rejoinder are tendered today by Mr. Rafiq Dada, learned Senior Counsel on behalf of the BCHL on certain points. The respective notes of arguments have been placed on record, point by point.

2. The learned Counsel appearing for the Respondents however objected to the written submission in rejoinder on this issue of "collusion" between IFC Ltd. and ITC on the ground that this issue cannot be argued for the first time in rejoinder.

3. To elaborate the point learned Senior Counsel for the BCHL through the rejoinder notes/submissions on the point of collusion has placed details, stated to be based upon the pleadings on record as under:

"(i) ITC has all along been interested in purchasing the Hotel property.

(ii) ITC was all along aware of the litigation.

(iii) Postponement of the date of auction, process of auction and the issuance of confirmation of sale in the teeth of the statement made by IFCI's counsel before the DRT.

(iv) Hurried payment of balance 75% of purchase money by ITC.

(v) Payment by ITC of Rs.1,000/more than the reserve price to circumvent Rule 9(2) of the SARFAESI Rules."

The BCHL's Senior Counsel further submitted that it is not open to ITC to claim equities on the ground that it is a bona fide purchaser for value.

4. Learned Senior Counsel Mr. Dwarkadas appearing for Respondent No.2 in support of his argument opposing such submissions referred/cited a judgment of the Supreme Court in (1985) 2 Supreme Court Cases 670, Daman Singh and Others v. State of Punjab and Others and specifically para 13 thereof, which is reproduced as under:

"13. The final submission of Shri Ramamurthi was that several other questions were raised in the writ petition before the High Court but they were not considered. We attach no significance to this submission. It is not unusual for parties and counsel to raise innumerable grounds in the petitions and memoranda of appeal etc., but, later, confine themselves, in the course of argument to a few only of those grounds, obviously because the rest of the grounds are considered even by them to be untenable. No party or counsel is thereafter entitled to make a grievance that the grounds not argued were not considered. If indeed any ground which was argued was not considered it should be open to the party aggrieved to draw the attention of the court making the order to it by filing a proper application for review or clarification. The time of the superior courts is not to be wasted in inquiring into the question whether a certain ground to which no reference is found in the judgment of the subordinate court was argued before that court or not."

5. Learned Senior Counsel Mr. Kadam appearing for Respondent No.1 IFCI Ltd. also objected to the submissions in rejoinder about the collusion between IFCI Ltd. and ITC. He submits that the point was not even agitated by the parties before DRT and/or DRAT as ITC was not a party. There was no such specific point raised in the main arguments. Therefore, such arguments ought not to be allowed to be raised for the first time in rejoinder.

6. Based upon above, submissions are made that there is no question now to permit and/or allow the BCHL to argue the point in the rejoinder for the first time which was not initially argued.

7. We have heard the learned Senior Counsel appearing for the BCHL, learned Senior Counsel for Respondent No.1 IFCI Ltd. and learned Senior Counsel appearing for Respondent No. 2 ITC. The BCHL by this Petition along with other two Petitions has invoked Article 226 of the Constitution of India thereby challenged the impugned orders passed by the DRT and DRAT. There are specific

prayers made, apart from interim reliefs, to pass orders to set aside all further actions arising out of the impugned orders passed under the SARFAESI Act. Even otherwise other two Petitions filed by BCHL are also tagged with this Petition, whereby challenges are also raised to the auction sale of the subject property and order of the Magistrates under section 14 of SARFAESI Act. ITC though not a party to the original Writ Petition, but by Court's order, dated 9 March 2015, was added as Respondent No. 2. Related averments are also placed on record by amendment. Supporting averments and pleadings are specifically made in paragraph nos. 43, 53, 68 and other related paragraphs where references are made about the "collusion". Learned Senior Counsel appearing for Respondent No. 2 ITC at the time of his argument in Reply did refer various Supreme Court judgments and made submissions, that ITC is a bona fide purchaser and therefore there is no question of granting any equitable reliefs to the BCHL.

8. The judgment cited in *Daman Singh and Others* (supra) is in no way sufficient to deny the opportunity to the BCHL to make submissions in rejoinder as Respondent No. 2 ITC in their submission for the first time argued that it is a "bona fide purchaser". Therefore, in the interest of justice and to give an opportunity to the BCHL to deal with such specific contentions and as hearing present Writ Petition is still continuing, therefore the BCHL is entitled to answer the pleas raised about ITC being a bona fide purchaser. We are not inclined to accept the submission that the written submission in rejoinder of the BCHL on the issue of collusion, which based upon the averments made, ought not to be taken on record. It is also for the reason that while adjudicating the issues so raised, the issue of "bona fide purchaser" and its related aspects may be relevant and important to pass final order. The issue raised is not only in respect of DRT and DRAT orders but also to the subsequent events i.e. auction and sale in favour of ITC. Even otherwise, we have heard the matter substantially therefore inclined to give full opportunity to all the parties and to permit the learned Senior Counsel for the BCHL to make such submissions. Needless to say that the Senior Counsel for the Respondents would also be given complete opportunity to deal with the submissions regarding the aspect of collusion.

9. Therefore, the objections so raised by the learned Counsel appearing for the Respondents are rejected. We are permitting the learned Senior Counsel for the BCHL to make submissions on the contentions revolving around the issue of "bona fide purchaser" including around the aspect of alleged "collusion" between IFCI Ltd. and ITC. However, it is made clear that the Respondents are also entitled to rebut the submissions so made in this regard.

10. We are proceeding to hear the matter further accordingly."

118. Admittedly, no evidence led by the parties. Therefore, the issue of collusion, even if any, between IFCI and ITC needs to be inferred from the record and the conduct of the parties, in the present facts and circumstances on the record. ITC was interested in purchase of the hotel property and fully aware the litigations in question between IFCI and BCHL. The party purchasing property in public auction

based upon the notice under Section 13(2) of the SARFAESI Act, cannot be permitted to say that they were not aware of the litigations between the IFCI and BCHL. The property is purchased based upon the public notice and after participation in auction sale, which cannot be overlooked. Even otherwise, the purchaser of the immovable property is required to verify the title and details of the movable and the immovable properties. The person purchased the property with litigation and/or pending litigation cannot be later permitted to show the ignorance and claim equity after taking calculated risk. The purchaser of such property, in view of public auction and the proceedings initiated by the Respondents and after taking stated effective steps as per the procedure, cannot be denied its rights, having made full payment and in possession of the sale certificate provided all the measures are taken in accordance with law is the submission. The property so purchased, in the facts and circumstances of the case, not by following the due process of law and/or due measures required to be taken by the seller, IFCI, as noted. Therefore, as the mandate of the provisions of SARFAESI Act are not followed, and there are consistent breaches at every stage as noted above and as held by the Supreme Court that in such cases, the Court is required to interfere with sale proceedings and quash and set aside sale and direct the restoration/restitution/possession of rights, arising out of the same.

119. As noted, ITC came into picture only after its participation in auction process of the property in question. ITC was the sole bidder, knowing fully the background of the litigation and before tendering and participating in the auction process. ITC's claim, therefore, is that they are bona fide purchaser. The sale was proceeded without any obstruction, pending the Petition/Litigation. The interest of ITC, therefore as stated, was created on the conclusion of the sale. The case of ITC is that, being the bona fide purchaser rights shall not be impeachable as contemplated under Section 69 of the TP Act. The reliance were placed upon the Judgments of Central Bank of India (supra), Padanathil Rugmini Amma (supra), Nawab Zain-Ul-Abdin Khan (supra) Janak Raj (supra).

120. BCHL has alleged collusion, fraud, highhandedness, misappropriation, based upon the events and the material placed on record. The law of pleadings on such issues are strict as contemplated under Order 6, Rule 4 of the CPC even for Writ Petitions. [Bharat Amratlal Kothari, Bishundeo Narain, Ram Singh and Hansraj Gupta and Dastane (Supra)].

121. The allegations are raised by BCHL about the conspiracy and collusion of IFCI with ITC Limited in Writ Petition and also in SA No. 44 of 2015. This was to show that ITC was aware of the litigations and interested in purchasing the hotel property, so also the action of postponement of sale from time to time. Even notice of auction was issued on 5 February 2015 and 23 February 2015 in "Business Standard" about the property. IFCI postponed the date of auction to 23 February 2015. The statement was made that they would not confirm the sale before hearing of the matter, however, on the same date before 2.30 p.m. itself,

it was confirmed on 23 February 2015, thereby declaring ITC as successful bidder and confirmation of the sale, even before pending the matters. ITC's appearances were recorded. This all in the background of pendency of challenge to Section 13(2) demand notice and deposit amount of Rs. 515.44 crores. The submission made by the Respondents throughout that the amount of Rs. 515.44 crores have been paid/deposited, this itself is not sufficient to hold that the action or sale, apart from earlier measures, were within the framework of law.

122. In the rejoinder to SA 33/2014 filed in March, 2014, Blue Coast complained about the alleged highhandedness of IFCI (@ p.483 of WP No. 222 of 2015 and submitted as follows:

"The high handedness of Respondent is reflected in the fact that it has prearranged buyers for the property in synch with them with the blanket offer to write cheque at will. The Applicant's officials in one of meeting were in fact informed that the Respondent by virtue of its position holds a commanding position and upon an instruction of the Respondent, a cheque from Company's such as ITC Ltd., will be with them. They were also informed that several other competitors are in touch with the Respondent for the possible acquisition of the hotel property at a throw away price."

123. While challenging DRAT order the plea was raised in WP No. 222 of 2015 dealing with the alleged highhandedness of IFCI. BCHL submitted at page 20 of WP 222/2015 as follows:

"40. ? The high handedness of the Respondent (No. 1) is reflected in the fact that it has prearranged buyers for the property with the blanket offer to write the cheque at will. The BCHL's officials in one of meeting were in fact informed that the Respondent (No. 1) by virtue of its position holds a commanding position and upon an instruction of the Respondent (no. 1), a cheque from company's such as (Respondent No. 2 ie) ITC Ltd., will be available with them. They were also informed that several other competitors are in touch."

124. IFCI's case is that it was after the sale pursuant to the Fourth and final auction, that BCHL made the allegation of collusion and targeted ITC Limited, in the Synopsis to the SLP No. 69296930 of 2015 dated 26 February 2015, and later at page 20G of the amended Writ Petition No. 222 of 2015:

"53. As stated herein above, the Respondent had time and again pressurised the BCHL with the threat that it will sell off the property to ITC Limited. The alleged sale of the hotel by the Respondent No.1 to the Respondent No.2 is a part of a bigger criminal conspiracy/collusion and this fact was brought to the knowledge of the Hon"ble Debts Recovery Tribunal in the BCHL's Securitisation Application No.33 of 2014 and in all other submissions/ pleadings filed by the BCHL before the Debts Recovery Appellate Tribunal/High Court/Supreme Court. The BCHL had always feared that the Respondent No.1 will sell the property at a throw away price to the BCHL's competitor i.e. the Respondent No.2."

125. This plea was specifically denied by ITC Limited in its reply affidavit to WP No. 222 of 2015 as follows:

"14. It is submitted that the BCHL's claims of any alleged criminal conspiracy or collusion between the Respondent No. 1 and the Answering Respondent are blatantly false and the BCHL be put to strict proof thereof. It is submitted that the Answering Respondent is a bona fide purchaser for value as a result of a bidding process pursuant to a Public Notice and the BCHL be made to face all consequences of such wild and unsubstantiated claims on affidavit in the form of a Writ Petition. It is pertinent to note that though the BCHL has claimed in paragraph 53 of the Petition that it has made submissions on the alleged criminal conspiracy or collusion between the Respondent No.1 and the Answering Respondent before the DRAT, the Hon'ble High Court and the Supreme Court, no merit has been found in these false allegations by any forum."

126. We have noted, as contended that, on 23 February 2015, the following sequence of events took place:

(a) The auction was conducted at around 11 am where ITC had submitted its bid along with the Earnest Money Deposit and was found to be the only and highest bidder;

(b) By a letter dated 23.02.2015 (at pg. 1056 of ITC's Reply to W.P. No. 1150 of 2015) IFCI declared ITC as the highest bidder and a letter in this regard was issued by IFCI. In accordance with the statutory and Tender requirement to pay 25% of the bid amount (inclusive of the Earnest Money Deposit), ITC deposited another 15% of the bid amount in the afternoon with IFCI Ltd;

(c) At around 4 P.M., IFCI issued another letter (at pg. 972 W.P. No. 222 of 2015) confirming the sale, subject to deposit of the balance 75% within a period of 15 days thereafter.

(d) At around 04:30 P.M., ITC entered appearance at DRT in SA 44/2015 and moved by Blue Coast on 23 February 2015 challenging the deferment by IFCI of submission of bids from 5 February 2015 to 23 February 2015. ITC represented that it had been declared as the highest bidder and the sale had been confirmed in its favour, subject to deposit of balance 75%.

(e) DRT passed the order dated 23 February 2015 whereby it rejected the interim application of Blue Coast as follows at page 9 of its order:

"14. After going through the above said ruling carefully it is evident that sub-rule 1 and 2 to Rule 15 of 2nd Schedule to the Income Tax Act is applicable to sale under SARFAESI Act. The sub-rule 1 to Rule 15 empowers the adjournment of sale. As per sub-Rule 2 to Rule 15 procedure afresh is required to be followed for sale if a sale is postponed/ extended for more than one month. In our case the sale is not adjourned for one month. Therefore in my opinion neither procedure afresh is required to be followed nor sale notice dated 31.12.2014 is lapsed.

15. In view of the above said discussion, no relief can be granted and hence the following order is passed.

ORDER

(1) The application (Exh.8) for interim relief stand rejected."

(f) At that time ITC having been declared as the highest bidder and submitting that the sale had been confirmed in its favour, subject to deposit of balance 75% bid amount within 15 days, a grievance was raised by Blue Coast that IFCI had undertaken that the sale was not to be confirmed by Blue Coast, despite which the sale had been confirmed.

In view of the aforesaid order, DRT dated 23.02.2015 also recorded the following:

"1. The Learned Counsels for both the parties are present. The Learned Counsel for the Applicant submits that in the morning session statement was made on behalf of the Respondent that the sale will not be confirmed till the order is passed however in violation of that the sale is confirmed.

2. The Ld. Counsel for the Respondent submits that it was a statement not to confirm sale till 3.00 p.m., moreover the highest bidder has deposited 25% and the sale will be confirmed after deposit of 100%."

127. Above events in any way cannot prevail over the interconnected mandatory non-compliances and the breaches. Having once held that all measures are in breach of laws, the case that ITC is not the bona fide purchaser is made out. The inference of manipulation and collusion cannot be ruled out.

128. This is also in the background of the Supreme Court Judgment in Indian Overseas Bank (Supra) whereby, it is made clear that, the sale made in the SARFAESI Act could be set aside only "in appropriate case". The present case falls within the ambit of such appropriate case therefore, required to be dealt with accordingly.

Park Hyatt is not a lessee in possession of the property:

129. There is no issue with regard to the Hotel Operations Services Agreement dated 1 May 2009, between Park Hyatt and BCHL (Writ Petition No. 1150 of 2015). But it is stated that, Hyatt is providing operating services therefore, it does not mean any leasehold interest of the Goa Hotel and/or that the possession of the hotel is with Hyatt. The relationship, based upon the hotel management agreement, between BCHL and Hyatt as per the Respondents therefore, required to consider from the point of view of recent Supreme Courts Judgments.

Blue Coast has stated in its rejoinder to WP 2486/2015 as follows:

"24?.. I state that the BCHL is in actual possession of the Park Hyatt Resort and Spa. The Resort is being run through HICPL, which is operating under a Management Contract with the BCHL. The said position is not disputed".

Hyatt in its capacity as a hotel management consultancy service provider has never claimed to be in possession as lessee or tenant of Blue Coast. The contract between Blue Coast and HICPL (at p.161 of W.P. No. 1150 of 2015) clarifies the nature of the relationship:

(i) The agreement states that the Service Provider (Hyatt) is willing to "provide the Hotel with the day to-day operations management assistance and technical assistance services". (Preamble of the agreement at p. 166 of W.P. No. 1150 of 2015).

(ii) Under Section 1 of Article IV, for its services (at p.178 of W.P. No. 1150 of 2015), Hyatt is entitled to receive from Blue Coast a service fee equal to 1% of the Revenue. A lessee would conduct its own business from the premises obtained on lease and take its own revenues from such business and pay a lease rent to the lessor. Hyatt is not paying any lease rent to Blue Coast nor taking the Hotel revenues. On the contrary, Blue Coast is taking the hotel revenues and paying Hyatt a service fee for providing operating services.

(iii) Under Section 2 of Article III (at pg. 170 of W.P. No. 1150 of 2015), Hyatt is required to implement strategic plans, guidelines and processes at the hotel as provided by Hyatt International South West Asia.

(iv) Under Section 4 of Article I (at pg. 167168 of W.P. No. 1150 of 2015), the Owner is required to maintain the ownership of the hotel during the operating term of the contract, failing which Hyatt has a right to terminate the agreement. It also provides that Hyatt i.e. the "Service Provider may peaceably, quietly and continually enjoy full and complete access to the Hotel in order to provide day-to-day operations management assistance and technical assistance services throughout the Operating Term."

Thus, like any other service provider at the premises, a right of access to the premises has been provided to Hyatt in order to be able to provide the services.

(v) Under Section 4 of Article III (at pg.172173 of W.P. No. 1150 of 2015) as a part of Hotel Operations Service, Hyatt has been authorised to collect monies from the guests, put up credit card systems, recruit employees for Blue Coast at the Hotel and pay salaries from out of the Operating Bank Account (as provided in Section 5) maintained by Blue Coast, arrange for purchases for operation of the hotel as may be required from out of such Operating Bank Account of Blue Coast, etc. Hyatt also provides a centralised IT platform and its international reservation system for the hotel and also provides management modules containing systems and procedures as specified under Section 13. For this purpose, under Section 9, "Owner hereby appoints Service Provider as its sole and exclusive agent to supervise, direct, control, and manage the day-today operations management assistance and technical assistance services as appropriate?."

(vi) Section 11 of Article III (at pg. 177 of W.P. No. 1150 of 2015) the agreement

provides that "Each employee of the Hotel, including, without limitation, the General Manager, shall be the employee of Owner and not of Service Provider, and Service Provider shall not be liable to such employees for their wages or composition." Thus, the hotel employees are not Hyatt's employees. Hyatt's managers, whether off site or on site, provide the management consultancy services and technical assistance services.

In any event, by its notice dated 4th March, 2015 (at pg. 1088 of W.P. No. 1150 of 2015), ITC already had offered employment to employees of the Hotel who were willing to join ITC. In fact, it is Blue Coast [by its notice (at page 40 of ITC's Notice of Motion (L) 206 of 2015 in W.P. No. 1150 of 2015] who threatened criminal action against its own employees if any of such employees chose to apply to ITC for continuing with their employment at the Hotel.

Physical possession of the Hotel is with ITC and/or BCHL

130. This is in the background that ITC has taken out Notice of Motion (L) No. 476 of 2015 and seeking a direction against BCHL to make accounts and deposit profits by stating that BCHL is a trespasser and is interfering with ITC's possession. This is stated to be without prejudice to their case and/or acceptance that BCHL is in possession of the property. Another Notice of Motion (L) No. 206 of 2015 filed on 25 March 2015 (Writ Petition No. 1150 of 2015) in support of the contention that BCHL is interfering with the possession of ITC Limited. The reliance was placed on *Larsen and Toubro Ltd. v. State of Gujarat* (1988) 4 SCC 387 and specifically following para 4, which reads thus:

"It is seen that the entire gamut of the acquisition proceedings stood completed by 17.4.1976 by which date possession of the land had been taken. No doubt, Shri Parekh has contended that the appellant still retained their possession. It is now well-settled legal position that it is difficult to take physical possession of the land under compulsory acquisition. The normal mode of taking possession is drafting the panchnama in the presence of panchas and taking possession and giving delivery to the beneficiaries is accepted mode of taking possession of the land. Subsequent thereto, the retention of possession would tantamount only to illegal or unlawful possession."

131. So also the reliance was placed on *Banda Development Authority, Banda v. Moti Lal Agarwal and Ors.* (2011) 5 SCC 394 in which the Supreme Court held that:

"(iii) If crop is standing on the acquired land or building/structure exists, mere going on the spot by the concerned authority will, by itself, be not sufficient for taking possession. Ordinarily, in such cases, the authority concerned will have to give notice to the occupier of the building/structure or the person who has cultivated the land and take possession in the presence of independent witnesses and get their signatures on the panchnama. Of course, refusal of the owner of the land or building/structure may not lead to an inference that the possession of the acquired land has not been taken.

(iv) If the acquisition is of a large tract of land, it may not be possible for the acquiring/designated authority to take physical possession of each and every parcel of the land and it will be sufficient that symbolic possession is taken by preparing appropriate document in the presence of independent witnesses and getting their signatures on such document."

In the present case, we are not concerned with compulsory acquisition and/or to take possession and/or acquisition of large tract of land.

Physical possession and symbolic possession?

132. The Apex Court in *M.V.S. Manikayala Rao* (Supra) held that the symbolic possession was tantamount in law to delivery of actual possession (para 20). The reference is made by the learned counsel for the parties to elaborate this term "possession" to Sections 13(4)(a), 13(6) and 40. We are not inclined to accept the submission that the "possession given" means "physical" possession alone. These two concepts of "physical" and "symbolic" possession are to be read in the context of the provisions of the Act and the Rules made thereunder. Both these concepts are recognised even under the SARFAESI Act. The symbolic possession, even if taken, still for actual possession/physical possession, Section 14 provisions are required to be invoked. For physical possession, in case issues are in disputes or conflicts, the parties need to move under Section 14, whereas the symbolic possession in given facts and circumstances to avoid further transfer and to protect the property, secured creditors after following due procedure, can take symbolic possession of the property keeping the parties in person to retain the possession for various purposes and objects. We have also to keep in mind the interest of borrower to secure the maximum and good price of the property through the public sale/auction by following due procedure of law. This is also means that the property should be transferred with physical possession and clear title. This, we have to read in the context and in view of the purposive interpretation and reinforcement of the amended provisions of the SARFAESI Act. (Nobel Kumar (Supra)). There cannot be an issue that the Court needs to consider the SARFAESI Act also in support of the recovery process so initiated to recover the due debts by the secured creditors (*Madras Petrochem Ltd. v. BIFR* (Civil Appeal Nos. 614615 of 2016 dated 29 January 2016)).

133. In *Harshad Govardhan Sondagar* (Supra), the Supreme Court has further elaborated dealing with the amended provisions, the mechanism needs to be followed by the secured creditors who want to take physical possession of the secured assets from the occupants/lessee. The similar view is reinforced in *M/s. Lakshmi Shankar Mills (P) Ltd. and Ors.* (Supra). Recently, the Apex Court dealt with the aspect of taking possession from the tenant. In those matters, the Apex Court even observed that a notice/opportunity of hearing required to be given to the person, claiming lessee or tenant and decide there is valid subsisting lease. The Magistrate, therefore, is under obligation to consider the issue before ordering the possession of the property to the secured creditors. As per Section 13(6), the transfer of any secured assets and/or rights or interest are created in

favour of transferee only after secured creditors have taken possession of the secured assets in accordance with law. The requirement of taking possession, through the Magistrate itself means the requirement of actual physical possession. The physical possession, therefore is a must before taking any steps further including of auction and/or sale of the property. The scheme and purpose of the Act, therefore, ought not to have been overlooked though the secured creditor has power to take steps and recourse to recover the secured credits and debts.

134. The learned Senior Counsel appearing for ITC in Writ Petition No. 2486 of 2015 has adopted the arguments advanced on behalf of IFCI in all the three matters. It is submitted that the provisions and position of TP Act, 1882 continue to apply even after the enactment of SARFAESI Act, including its amendment and specifically covering the concepts so provided in Section 58, 65A, 67, 69 of the TP Act. This is in view of non obstante clause in Section 13(1) and also read with Section 17(3), 35 and 37 of the SARFAESI Act. Therefore, submitted that the SARFAESI Act does not take away but strengthen the rights of the mortgagee/secured creditors under the TP Act. Reference was also made to the Supreme Court Judgments *Mardia Chemicals (Supra)*, *Transcore (supra)* and *Harshad Govardhan Sondagar (supra)*. All these IFCI and ITC's submissions are unacceptable for the reasons so recorded in earlier paragraphs in view of the Supreme Court Judgments cited by BCHL.

The provision of appointment of Receiver?

135. The provision of appointment of Receiver under Order 40, Rule 1 of the CPC are distinct and distinguishable. To take symbolic possession by the Respondents and keep the property in trust and even to take physical possession even prior to the decree, but itself is not sufficient to overlook the specific provisions of the SARFAESI Act. The "Authorised Officer" and its power cannot be compared as the same is governed by the specific provisions of SARFAESI Act and Rules made thereunder.

The confirmed sale in the facts is, required to be set aside being in breach of mandatory provisions?

136. Recently, the Supreme Court in *Pegasus Assets Reconstruction P. Ltd. v. M/s. Haryana Concast Limited and Anr.* 2016(1) SCALE 1 while dealing with the provisions of SARFAESI Act, though in the combination of Companies Act and the power of the Official Liquidator, when the auction sale was completed by following due procedure of law as required, observed that such confirmed sale cannot be disturbed/should not be interfered with merely because there was someone inclined to offer higher price. It is observed, in that case by noting that the due procedure under the law before conducting the auction and confirming the sale was followed. It is observed in para 25 and 32 as under:

"25 The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured

creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act."

"32M/s. Venus Realcon has rightly placed reliance upon the judgments of this Court in the case of Valji Khimji and Co. v. Official Liquidator of Hindustan Nitro Product (Gujarat) Ltd. 2008 (9) SCC 299 and Vedica Procon Private Limited v. Balleshwar Greens P. Ltd. 2015 (8) SCALE 713. In Valji Khimji, the law was enunciated in Paragraph 28 in the following words:

"..... It could have been a different matter if the auction had been held without adequate publicity in well-known newspapers having wide circulation, but where the auction-sale was done after wide publicity, then setting aside the sale after its confirmation will create huge problems. ?..... Of course, the situation may be different if an auction-sale is finalized, say for Rs. 1 crore, and subsequently somebody turns up offering Rs. 10 crores. In this situation it is possible to infer that there was some fraud because if somebody subsequently offers Rs. 10 crores, then an inference can be drawn that an attempt had been made to acquire that property/asset at a grossly inadequate price. This situation itself may indicate fraud or some collusion. However, if the price offered after the auction is over which is only a little over the auction price, that cannot by itself suggest that any fraud has been done.

In para 33, it is also observed that:

"33. ?.....However, once the Company Court is satisfied that the price is adequate, the subsequent higher offer cannot be a ground for refusing confirmation. The price of immoveable property keeps on varying depending upon the market conditions and availability of a buyer. Such fluctuations may attract fresh higher offers but normally such offers cannot be made the basis for reopening the confirmed sale which was otherwise valid."

The crux is, if the mandatory procedure not followed, even the confirmed sale can be set aside.

Owners right to realise full market value of the property.

137. Having adopted the recourse of these provisions, we are inclined to observe that the secured creditor is bound to follow the mandatory provisions, at every stage, by keeping in mind the interest of borrower, apart from recovering its due/debts. They are under obligation to ensure that the sale of the secured assets and property fetches its full market value, by giving full opportunity to the owner, including the wide publicity and declaration at large, and further to handover to the purchaser after sale of the property. Therefore, any such sale conducted merely on the basis of symbolic possession, without deciding the rights concerned including, the full opportunity to the owner of the property, would

definitely affect the sale price and in realising the full and real market value of the secured assets. The same procedure and principle applies also to the movables, as contemplated in Clause 4 and 5 of the Regulations. Any breach of these provisions would definitely required to be dealt with and tested on the foundation of interest of the borrower/owner of the properties.

138. The submission is made that the auction, in the present case, was without adequate publicity in well known papers of wide circulation was not done. No other person came forward to bid for the same except ITC. The price/offer was of only Rs. 1000/- more than the reserve price fixed by IFCI. According to the BCHL, the property was sold by Respondent No. 1 at the reserve price fixed, without the consent of the borrower and in spite of the receipt of notice of the Writ Petitions for admission and interim reliefs. The averments are made, supported by the documents that the property/asset was put to auction at a grossly inadequate price. The market price as stated is about 1250 Crores. The averments are also made of fraud and/or collusion. There is substance in the averments and allegations as made based upon the submissions so recorded above, about the illegality and irregularity in conducting the auction and the sale. The auction was conducted in the background so referred above on "As is where is" and "whatever there is" basis, by the secured creditors with encumbrances. Pertinently, the tender document suggests in clause IX (9.1) that the purchaser is required to take steps to take over possession. Therefore, such auction and confirmation of sale by the DM, are against the provisions and the settled law.

139. The claim and the interest of BCHL to fetch a maximum price of the property is also prime consideration for taking any decision in this regard. Admittedly, "Hyatt Park Hotel" property is in possession of BCHL's agent, based upon the stated Service Agreement of more than 20 years, extendable 10 years on the agreed compensation. The running Hotel having possession of various occupants, just cannot be overlooked. The effect and nature of such continuous possession ought to have been decided Admittedly, Section 14 Application was filed by IFCI-Respondent No.1 after issuance of the sale certificate on 25 February 2015 thereby, called upon BCHL to hand over the possession by 2 March 2015, within a period of 3 days without giving reasonable time as required. In totality, the inference of some collusion therefore, certainly can be drawn in the case.

140. The Apex Court in Madras Petrochem Ltd. (Supra), after noting the Pegasus Assets Reconstruction P. Ltd. (supra), while dealing with the provisions of Section 22 of the SICK Industrial Companies (Special Provisions) Act, 1985 read with the effect of Sections 35 and 37 of the SARFAESI Act and specifically the expression "or any other law for the time being in force" has noted as under

36."This expression will therefore have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement

of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market."

141. Therefore, the case is made out, for the Tribunal and/or the Court under Section 17 and 18 of the SARFAESI Act, to pass order of restitution and/or restoration, in view of the law laid down by the Supreme Court in Vasu P. Shetty, Mathew Vargese and Transcore, Noble Kumar, Harshad Govardhan Sondagar (Supra). There was no reason not to follow the mandatory provisions, at all stages by the Respondents. There was no question of waiver of any kind about these mandatory provisions by the Borrower/BCHL.

142. The conclusion of all the Judgments is that the provisions of the SARFAESI Act should prevail over other laws, once the secured creditor has invoked the same for taking measures under Section 13. The breaches in this case goes to the root of every actions of the Respondents. The breaches of the mandatory requirement and the reasons, as recorded under each subject/title/heading based upon the case in hand, including the whole action/steps/decision/measures against BCHL's property, are illegal and contrary to the law.

Power to set aside auction, sale, sale certificate and restoration of possession including refund of the amount?

143. The submission is made by the learned counsel appearing for BCHL that this is a fit case to grant prayers in view of the illegality and/or non-compliances of mandatory provisions of the SARFAESI Act. The Respondent-IFCI initiated the proceedings and even concluded it by selling the property and by creating third party rights in the immovable properties, including agricultural property. As the action/order taken and passed by the authorities are illegal, void, impermissible, contrary to the mandatory provisions, therefore, apart from setting it aside, it is required to restore the possession to BCHL and to pass order of refund of amount. The submissions are made by referring to the various Supreme Court Judgments.

144. The submission of ITC-Respondent No.2, based upon events being the bona fide purchaser of the Hyatt Hotel property, after this Court and other Courts allowed the same. Therefore, the rights so created of third party auction purchaser, cannot be disturbed and taken away. BCHL's remedy, as stated, is only to claim and/or seek damages from IFCI. The submission is also made by the Respondents that sale could have been stopped only if all dues of IFCI is paid by BCHL under Section 13(8) of SARFAESI Act and therefore, as there was consistent default including nonpayment of deposit of Rs. 10 crores, as ordered by this Court on 5 February 2015, there is no question of interfering with the order of the conclusion of sale. The equity as created in favour of third party (ITC), notwithstanding any irregularity to the proceedings leading to the same.

The reliance is placed on the Central Bank of India (supra), whereby, it is held that even if a recovery officer of a Bank had committed errors in the auction process, the auction purchaser, who has paid the sale consideration has equitable rights and a sale cannot be set aside. Reliance was placed on Para 21 to 24. Further reliance was placed on Padanathil Ruqmini Amma (supra). In this Judgment, it is held that the property purchased by a bona fide purchaser who is a stranger to the Court proceedings by participating in Court auction sale in execution of a decree, the sale in his favour is protected and he cannot be asked to restore the property to the judgment debtor, if the decree is set aside. Reference was also made to the Nawab Zain-ul-Abdin Khan (supra), whereby the protection is provided to the bona fide purchaser. In Janak Raj (supra), merely because the decree was set aside or modified in the fact of that case, the sale was confirmed though the decree was set aside later on. All these submissions are of no assistance to the Respondents and to overlook their clear breaches of mandatory provisions of the Act in question.

Restoration of possession:

145. In Transcore (supra) further reinforced, considering the scheme and purpose of the Act and the Rules that actual possession is required to be taken under Section 13(4) (a) and if the case is made out by the borrower, DRT under Section 17 can restore the possession to the borrower. The Apex Court in Standard Chartered v. V. Noble Kumar (supra) also reinforced that the secured creditors need to be followed three methods to take possession of the secured assets in the SARFAESI Act, which cover and include the requirement of taking actual possession. It is further observed that in para 36 "in any of the three situations above, after possession is handed over to the secured creditor, the subsequent provisions of Rule 8 concerning preservation, valuation and sale of the secured assets and other subsequent rules from the Security Interest Rules 2002, shall apply".

The power of Tribunal under Section 17(3) to declare the recourse illegal and restitution and/or restoration of possession of the secured assets of the borrower.?

146. The Respondents submission are not acceptable that as the amount is already paid and the interest in the property is already transferred in view of the confirmation of sale and therefore, the sale cannot be disturbed and the legal remedy available to BCHL is only to sue IFCI for compensation/damages. The Judgments relied upon in support of the same need to be considered in the background of the fact and the governing provisions involved therein. Central Bank of India (Supra) This was a case where, the guarantor's property was sold in execution by the Recovery Officer pursuant to a Recovery Certificate. This was not a case of sale immediately after the symbolic possession and/or without deciding the objections so raised. In Padanathil Ruqmini Amma (supra), the land was purchased in execution of a decree under the Court auction. In Nawab Zainulabdin Khan (supra), the auction was held by the order of the Court. In

Janak Raj (supra), the property was sold in execution of ex parte money decree. We have to deal with the position of law in question, as well as, the facts to consider the power of the Court/Tribunal to declare the recourse as illegal and to restore and/or reconstitute the position so taken by such illegal recourse/action.

147. The Apex Court in *Authorised Officer (Ashok Saw Mill)* (supra), paragraph 39 held that, the recourse so taken by the secured creditors in view of Section 13, is open to scrutiny and if found to be illegal impermissible and/or contrary to the provisions, the action/order can be set aside. The power of granting statusquo ante by DRT is also recognised. In *Ram Murty Pyara Lal and Ors.* (Supra) in paragraph Nos. 9 and 10, the Delhi High Court stated that DRT is vested with wide powers and can restore possession of the secured assets to the borrower, if the action of secured creditors declared invalid and/or illegal. In *Hotel Sharda Paradise* (supra), the High Court has set aside the sale in favour of auction purchaser having recorded that there has been violation of the mandatory provisions, and further directed to refund the amount to the auction purchaser. (Para 38 and 39).

Physical possession of the secured property (Hotel Park Hyatt) is of BCHL or its agents, though stated to be of trespasser.

148. The Notice of Motion is taken out by the Respondents (ITC) for claiming the compensation/damages for illegal use of the property, which are required to be taken note of before passing any final order in these Writ Petitions. The settlement talks, in the background, as averred in the Writ Petitions, specifically between BCHL and Respondent No.1, prior to the demand notice and/or post demand notice, and the proceedings so initiated in haste for sale of physical possession, including of taking physical possession; and confirmation of sale, without following the due procedure of law, are important factors to grant the prayers so made in the respective Writ Petitions.

149. In Writ Petition No. 222 of 2015, the prayers are made to quash and set aside the impugned order dated 10 September 2014 passed by DRAT in Appeal No. 80 of 2014 and all action taken in pursuance of and consequential to the same. Interim reliefs are also sought against Respondent No.1 not to take further steps with respect to the Hotel Park Hyatt and the area so mentioned. The prayers are also made to stay the effect and operation of the order dated 10 September 2014 passed by DRAT. By amended prayers, protective prayers are sought against Respondent Nos. 1 and 2 also not to disturb the possession of BCHL of the Hotel Park Hyatt property with further prayer against Respondent to deal with, transfer, alienate and/or encumber and/or create any third party right/title or interest and/or parting with the possession of the Hotel Park Hyatt property, pending the hearing of this Petition.

150. BCHL has filed Second Writ Petition No. 1150 of 2015, on 2 March 2015 (Writ Petition No. 162 of 2015 in the High Court of Bombay, at Goa), and amended on 23 October 2015. The prayers are to set aside order dated 26

February 2015 passed by the District Magistrate South Goa, including the final notice dated 27 February 2015 passed by the office of Mamlatdar OF Mormugao Taluka Vasco DaGamaGoa and prayed for consequential reliefs. The prayers are also made for interim reliefs thereby, sought stay of order dated 26 February 2015 and 27 February 2015, so referred above, as such the challenge in High court under Article 226 of the Constitution of India is maintainable as observed in para 29 of the Harshad Govardhan Sondagar (Supra). On 3 March 2015 by reasoned order considering the situation so recorded, directed to maintain statusquo with regard to the disputed premises by keeping all contentions open. BCHL has made averments with supported documents, that they are in possession and control of the Hotel Park Hyatt as the same is running concerned. The Contempt Petition filed by BCHL in the background that the Respondents including Respondent No.4, tried to take forcible possession of BCHL's property/ premises in question. (Contempt Petition No. 6 of 2015 and the same is pending.)

151. BCHL has filed third Petition (Writ Petition No. 2486 of 2015), pending other two Petitions and Contempt petition, which was amended on 30 April 2015. In this Petition, the prayers are made on 19 March 2015 to quash and set aside the Confirmation Letter (Exhibit "P"), Confirmation Letter (Exhibit "P1") and sale certificate dated 25 February 2015 (Exhibit "V" collectively). The directions are also sought against the Respondents to remove themselves, their servants and agents permanently from the Resort property. Possession Certificate dated 3 March 2015, (Exhibit "V" collectively) is also challenged. Specific prayers made against Respondent No.1 to deposit the entire amount of Rs. 515.44 crores and prayed, same be invested in Nationalized Bank and alternatively prayed to deposit the amount arrived at by deducting the claim as due by Respondent No. 1 in 13(2) Notice. The injunctions are sought from proceeding further in any manner in respect of acquisition of right, title or interest, including to registration of sale certificate, transfer documents in respect of Resort property, including the prayer for taking possession of any movables on the Resort property and/or to take over Management of Resort property from BCHL and HIPPL. The prayers are also made against the Respondents and their officers, servants and/or agents, pending the hearing and final disposal, for restraining them from interfering with the Management of the hotel under the Management Agreement dated 1 May 2009.

152. It is required to be noted in the background that, the Notice of Motion is taken out by SBICAP Trustee Company Limited in Writ Petition No. 222 of 2015 with prayer to intervene, with further prayer/to seek directions of disclosure of their claim and their second charge over the said Goa property. Prayer is also sought to revalue the said property by appointing the valuer from the panel of the Court. The written submissions are filed and the Respondent IFCI also opposed the same by their submissions, including written submissions filed on 8 March 2016.

153. Another Notice of Motion is taken out in Writ Petition No. 222 of 2015, by

PACL Limited, to intervene in the matter with prayer against the Respondents to pay the balance sale proceeds of the Park Hyatt Hotel to the Applicant in satisfaction of their claim. In the alternative, prayer is also made for the directions to deposit the entire sale proceeds of Hotel with this Court. The same was opposed by the submissions, as well as, the written submissions filed by IFCI on 8 March 2016. Both these Notice of Motions, along with other Motions/Chamber summons taken out by the Intervenor, Petitioner and Respondents are pending. All are also disposed of in view of the final decision in all the three Writ Petitions leaving the parties to adopt such proceedings as may be advised.

154. Considering the affidavits and rejoinders and the submissions, including the Notice of Motions so taken out by the parties, BCHL is entitled for the reliefs so prayed, including to retain the possession of the property. The order of statusquo, so passed at the instance of BCHL, therefore, remained intact till this date. The fact of actual physical possession of BCHL through Hotel Park Hyatt and otherwise and same being in operational and the fact of filing of Notice of Motion for various compensation by Respondents, treating BCHL's position as of the stated trespassers reflects the position of possession in favour of BCHL and its agents, if any. The case is made out that BCHL is in control and in complete possession, through HICPL, as running hotel management with 444 employees and various agents.

Power of Writ jurisdiction including of restitution/restoration and all consequential orders.

155. The power of Court/Tribunal under Section 17 to restore the possession and/or pass appropriate order is not in issue. By consent of the parties, as the matters have been directed to be heard expeditiously, it is submitted to hear the Writ Petitions finally and pass the appropriate orders. The learned senior counsel appearing for the parties, submitted that in the background, there is no point in remitting the matter and/or directing BCHL and/or the parties to approach the Tribunal/Court under Section 17. This would cause further delay and/or frustrate the proceedings, including the object of early recovery of the debt. We have heard the matter finally, as argued by all the learned senior counsel appearing for the parties for many dates on all points. This is also on the submission and as conceded by all the Senior Counsel appearing for the parties that the writ petitions are maintainable against such impugned order/actions. The hearing, therefore, proceeded accordingly. The High Court, under Article 226 of the Constitution of India is empowered to pass appropriate order, which the Tribunal could have passed in the interest of justice, considering the scheme and purpose of the SARFAESI Act.

Conclusion:

(a) The provisions of SARFAESI Act and the Rules are mandatory in nature, therefore, in view of the non-compliances and/or breaches, all the measures/actions of IFCI are bad in law and liable to be quashed and set aside and

necessary consequences shall ensue, including restoration/restitution.

(b) Section 13(2) notice issued by IFCI, by including agricultural property in spite of bar under Section 31(i) of the SARFAESI Act is contrary to the law, as admittedly despite the Application by BCHL, the said land was not converted into non-agricultural land. The actual use and predominant use of such agricultural land in the present case, cannot be the criteria to hold that such land is non-agricultural land. There is no construction on the agricultural lands and as such the character of the said lands have not been altered.

(c) IFCI failed to take decision on the representation of BCHL which was a mandatory requirement under Section 13(3A) of the SARFAESI Act before taking drastic action of taking possession of the property. BCHL cannot be said to have waived its rights in respect of decision on its representation.

(d) The auction/sale of the property based upon the symbolic possession was contrary to the scheme of SARFAESI Act and the Rules. The sale of immovable property of Hyatt Hotel building and land on "As is where is" and "whatever there is" basis in June 2013, without obtaining prior physical possession is illegal and contrary to the law. The inference of collusion between IFCI and ITC cannot be ruled out, particularly when the other bidders may not have come forward as there was no physical possession being handed over at the time of the sale. It resulted in the property not fetching its potential market purchase price and ITC was the sole bidder who bid only Rs. 1000/more than the reserved price.

(e) The DM has acted without jurisdiction by overlooking the amended provisions of Section 14, its Clauses and not providing sufficient reasons for its satisfaction on all these clauses. The DM has relied upon unamended provisions and the Judgments based upon it. IFCI cannot be said to be a secured creditor after the sale of the property, as full debt amount was recovered at the time of invocation of Section 14 of the Act.

(f) All Petitions are allowed in terms of the operative order herein below.

Operative Order:

156. Therefore, taking overall view of the matters, we are inclined to pass the following order:

ORDER

(A) All Writ Petitions are accordingly allowed in terms of respective prayer clause/s, which read/s thus

W.P. No. 222 of 2015

(a) this Hon"ble Court be pleased to issue a Writ of Certiorari or a Writ in the nature of Certiorari or any other Writ/Order/Direction, calling for the papers and proceedings culminating in the impugned Order dated 10.09.2014 passed by the Hon"ble Debts Recovery Appellate Tribunal at Mumbai in Appeal No. 80 of 2014

in Securitization Application No. 33 of 2014 and after examining the legality and priority thereof be pleased to quash and set aside the same; "and all actions taken in pursuance of and consequential to the same.

W.P. No. 1150 of 2015

(a) Issue a Writ of Certiorari and/or a Writ, Order or direction in the nature of certiorari quashing and setting aside the order dated 26.02.2015 passed by the District Magistrate, South Goa in Case No. G/12015/ Rev/2191;

(b) ?....in the nature of certiorari quashing and setting aside the Final notice dated 27.02.2015 passed by the Office of mamlatdar of Mormugao Taluka, Vasco-Da-Gama-Goa bearing No. MMM/MOR/DEFORD/ 2015/615 in the alternative.

AND, W.P. No. 2486 of 2015

(a) this Hon"ble Court in exercise of it's extraordinary jurisdiction conferred by Article 226 of the Constitution of India ?.....order or direction in the nature of Certiorari and after examining the record and proceedings culminating in the alleged sale certificates quash, set aside and cancel:

(i) the Confirmation Letter (Exhibit "P" hereto);

(ii) alleged actual Confirmation Letter (Exhibit "P1" hereto);

(iii) Alleged sale certificates dated 25/2/2015 (Exhibit "V colly" hereto);

(b) ?.Writ of Mandamus, orders and directions to the Respondents to remove themselves, their servants and agents permanently from the Resort property.

(c) ?....order or direction in the nature of Certiorari quashing and setting aside the Possession Certificate dated 3rd March 2015 (Exhibit "V Colly" hereto);

(B) All the Notices of Motion/Chamber Summons for intervention and other reliefs are disposed of leaving the parties to adopt appropriate proceedings, if so advised.

(C) The parties to bear their respective costs.

(D) The Petitioner and/or its agents to retain the physical possession of the property, movable and immovable.

(E) In view of above order, ITC is entitled for the refund of the amount paid to IFCI.

157. The learned Senior Counsel appearing for the Respondents seeks stay of the Judgment and order and have sought continuation of status quo order, granted earlier by this Court, which has been in force till this date.

158. Considering the reasons so recorded above and in the interest of justice, the operation of this Judgment and Order shall not be given effect for six weeks from today. The status quo order dated 3 March 2015, to continue till then.