(2020) 09 DRT CK 0016

In the Debts Recovery Tribunal

Case No : Transfer Application No. 44 Of 2017

Canara Bank And Anr. APPELLANT

Vs

M/s. Annam Steels Pvt. Ltd. And Ors. RESPONDENT

Date of Decision : 28-09-2020

Acts Referred:

Recovery of Debts Due to Banks and Financial Institution Act, 1993 — Section 2(g), 12(5), 19, 19(20)Companies Act, 2013 — Section 79(b), 125, 132, 372A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2)
Indian Contract Act, 1872 — Section 29
Transfer of Property Act, 1882 — Section 5, 59
Code Of Civil Procedure, 1906 — Order 6 Rule 1, Order 8 Rule 2, 3, 4, 5, Section 34
Limited Liability Partnership Act 2008 — Section 29, 29(1)

Citation : (2020) 09 DRT CK 0016

Hon'ble Judges : Labh Singh, J

Bench : Single Bench

Final Decision : Allowed

Judgement

1. The applicants Bank being consortium members (hereinafter to be known as 'Canara Bank Consortium') have filed this Original application through their respective Authorized Officers for recovery of an aggregate sum of Rs.163,89,66,756.54 (Rupees One Hundred Sixty Three Crores Eighty Nine Lakhs Sixty Six Thousand Seven Hundred Fifty Six and Paisa Fifty Four Only) from defendants 2 to 4 and 8 to 22 personally and jointly and severally and by sale of 'A' to 'G' and 'I' to 'Q' schedule properties to the OA and the aforesaid amount includes an amount of Rs.74,65,52,816/- outstanding in the account maintained by the 1st defendant with 1st applicant bank as on 31.07.2016 along with further interest @ 14.65% per annum with monthly rests plus penal interest @ 2% per annum from 01.08.2016 till realisation and a sum of Rs.89,24,13,940.55 outstanding in the account maintained by the 1st defendant with 2nd applicant bank as on 31.07.2016 alongwith further interest @ 14.60% per annum with monthly rest plus penal interest @ 2% per annum from 01.08.2016 till

realisation.

2. The brief facts of the case of the applicants are that the 1st defendant, a private limited company, is engaged in ship breaking, underwater ship repair, heavy machine handling and acquiring movable scraps of companies through high value tenders floated by Government and Private Agencies. The 2nd defendant is the Managing Director of the 1st defendant and defendants 3 and 4 are the Directors of the 1st defendant. The 5th defendant is a limited liability partnership (LLP) represented by one of its designated partners, the 2nd defendant; and the 6th defendant is a private limited company represented by its Director. The 7th defendant is a partnership firm represented by its Managing Partner, the 14th defendant. The defendants 5 to 7 provided collateral security to the applicants for securing the financial facilities sanctioned by the applicants to the 1st defendant. The defendants 5 and 7 also stood as guarantors and defendants 2 to 4 and 8 to 22 as individuals stood as guarantors for due repayment of the financial facilities sanctioned to the 1st defendant by the applicants. The 2nd defendant and defendants 8 to 22 also mortgaged their properties as security for the financial facilities sanctioned by the applicants. M/s.KIOCL Ltd., which is a Government of India Enterprises in Karnataka having mines and beneficiation plant located in Kudremukh, Chikmagalur, Karnataka, floated global tender for demolishing and sale of the unit. The 1st defendant being the highest bidder was awarded with the contract for a total value of Rs.227.11 Crores plus taxes etc. For bidding the said project, the 1st defendant approached the applicants for a short term loan of Rs.180 Crores under the consortium arrangement pursuant to the resolution passed on 02.04.2013, whereby the 2nd defendant has been authorised to execute necessary loan documents on behalf of the 1st defendant.

3. Considering the application submitted by the 1st defendant, the applicants sanctioned an amount of Rs.180 Crores to the 1st defendant under consortium arrangement, whereby the 1st applicant became the leader of the consortium. As per the sanction terms, applicants 1 and 2 sanctioned an amount of Rs.90 crores each to the 1st defendant vide sanction memorandums dated 03.06.2013 and 26.06.2013 respectively. The aforesaid sanctions were granted on the basis of the primary security of plant and machinery and other fixed assets proposed to be acquired by the 1st defendant in terms of the global tender and also on the collateral security of various items of properties belonging to defendant Nos. 2, 5 to 11 and 16 to 22 along with one item of property belonging to one P. K. Muralikrishnan and P. K. Lalitha. Apart from the above, personal guarantees of defendants 2 to 5, 7 to 11 and 14 to 22 and the corporate guarantee of the 6th defendant were also obtained by the applicants.

4. Contrary to the assurance given by the 1st defendant, they could not create security interest in respect of one item of property valued at Rs.20 Crores belonging to the aforesaid P. K. Muralikrishnan and P. K. Lalitha due to defect in title. Accordingly, the limits sanctioned were reduced to Rs.80 Crores each by the

applicants, leaving the balance amount to be contributed by the 1st defendant themselves for the project.

5. Consequent upon the 1st defendant's passing of a Board Resolution on 03.09.2013, it issued a letter to the 1st applicant consortium leader to obtain necessary loan documents from the defendants for the sanctioned limits as per Inter-se Agreement entered into between the members of 'Canara Bank Consortium' and executed a working capital consortium agreement, joint deed of hypothecation and a trust and retention account agreement in favour of the applicants.

6. The defendants 2 to 5 and 7 to 22 stood as guarantors to the loan advanced to defendant No.1 and executed their respective guarantee agreements on different dates between 03.09.2013 and 14.09.2013 and the 6th defendant company executed corporate guarantee dated 09.09.2013 in favour of the 1st applicant consortium leader to secure due repayment of the financial facilities sanctioned as aforesaid. The various items of properties belonging to different defendants were mortgaged to the 1st applicant being the consortium leader between 02.09.2013 and 13.09.2013 as collateral security for the financial facilities sanctioned to the 1st defendant. Besides mortgage of schedule 'A' to 'I' properties to the OA, the financial facilities were primarily secured by the 1st defendant by way of pari-passu first charge favouring applicants 1 & 2 over Kudremukh mining and beneficiation equipment, plant and machinery and other fixed assets including scraps acquired in terms of global tender, more fully described under schedule 'R' of the OA.

7. On sanction of the financial facilities as aforesaid, M/s. KIOCL gave consent for accepting the tender amount of Rs.231.66 Crores and agreed to release the project assets to the borrower company. Since the 1st defendant could mobilize margin of Rs.45.71 Crores alone by 30.09.2013, leaving a shortage of Rs.25.95 crores, the 1st applicant released a sum of Rs.102 crores only to the 1st defendant i.e., Rs.51 crores each by the applicants. The defendant No.1 deposited Rs.22.71 crores directly with KIOCL out of the aforesaid amount of Rs.45.71 crores margin money and applicants paid an amount of Rs.125 Crores to KIOCL Ltd. Thus, a total amount of Rs.147.71 Crores was paid to KIOCL towards the tender amount. On receipt of the consideration, the 1st defendant executed a link letter in favour of the 1st applicant confirming the disbursal of the proceeds of the loan. The charges created by defendants 1 and 6 in favour of the 1st applicant were duly registered with the Registrar of Companies (ROC), Chennai on 11.10.2013.

8. After disbursal of the initial loan proceeds, the 1st defendant could pool the remaining margin of Rs.25.95 Crores only on 31.10.2013 and at that point of time, the 1st applicant being the consortium leader released the remaining loan component of Rs.58 Crores i.e., Rs.29 crores each, with margin and the balance remittance of Rs.83.95 crores was effected to KIOCL Ltd. However, M/s.KIOCL did not hand over the project assets to the 1st defendant pending payment of

the additional interest amount of Rs.41 Crores for the belated period of the tender remittances. In the said circumstances, the 1st defendant approached the applicants for further funding of penal interest component to M/s.KIOCL amounting to Rs.41 Crores by offering additional collateral security of Rs.43 crores. Pursuant to application dated 15.01.2014, the 1st defendant was sanctioned additional term loans of Rs.20 crores each by the applicants. Thus, altogether the applicants sanctioned Rs.100 crores each to the 1st defendant.

9. The 1st defendant passed a resolution in its meeting of the Board of Directors held on 09.04.2014 for availing additional Term loan and executing necessary loan documents in favour of the 1st applicant through authorized persons. Towards the additional Term loan sanctioned, the 1st defendant executed Supplemental Working Capital Consortium Agreement and Supplemental Joint Deed of Hypothecation, whereby hypothecating whole of the current assets presently lying and which may brought in future, stored in the premises at M/s. KIOCL, Kudremukh (P.O), Chickmagalur; and also a trust and retention account agreement in favour of the applicants. For securing due repayment of the total limit of Rs.200 crores sanctioned to the 1st defendant, defendants 2 to 4 and 8 to 22 as also defendants 5 and 7 executed guarantee agreements in favour of the 1st applicant Consortium leader. Additional collateral security was provided by defendants 7, 12, 13, 14 and 15 by creating equitable mortgage on 07.04.2014 in respect of the properties described in Schedule 'J' to 'Q' of the Original Application. The equitable mortgage created by deposit of title deeds pertaining to properties described in Schedule 'A' to 'I' of the OA were also extended on 09.04.2014 to cover the additional sanctioned limits. The modification of charge created by the 1st defendant on 09.04.2014 with the 1st applicant was subsequently registered with the Registrar of Companies, Chennai.

10. Subsequent to the disbursement of the additional term loan, the 2nd applicant at the request of the 1st defendant has pruned down the limit to Rs.10 crores from Rs.20 crores and the overall credit limits enjoyed by the 1st defendant thus became Rs.190 crores, of which the 1st applicant disbursed Rs.100 crores and the 2nd applicant disbursed the remaining Rs.90 crores. Though the 1st defendant took possession of the project assets and started excavation and sale of the materials, it had failed to route the entire sale transactions through the escrow account maintained by it with the 1st applicant. Noticing the 1st defendant's diversification of transactions through other banks, the applicants issued reminders requesting it to route the sale proceeds through the escrow account and to clear the overdue amount. In response to that, the 1st defendant approached the applicants and sought time to clear the overdue amount and also requested to restructure the outstanding liabilities due under the Term Loan accounts.

11. The applicants, on specific terms and conditions, sanctioned the restructuring of outstanding Term loans, permitting moratorium in respect of the Short Term Loan and additional Term Loan availed earlier and by creation of Deferred

Interest Loan for the overdue interest portion in respect of the term loans availed earlier. The deferred interest payable to the 1st applicant being Rs.3.16 Crores, it had on 27.02.2015 permitted restructuring of the limits and provided Deferred Interest Loan of Rs.3.16 Crores. The deferred interest payable to the 2nd applicant being Rs.3.15 Crores, it had on 21.03.2015 permitted restructuring limits and provided Deferred Interest Loan of a sum of Rs.3.15 Crores. The 1st defendant through defendants 2 to 4 had on 27.02.2015 executed a Debtor-Creditor Agreement and a Debt Restructuring Agreement in favour of the 1st applicant and defendants 2 to 22 while standing as guarantors has endorsed the same besides executing a letter of undertaking. On 27.03.2015, the 1st defendant issued a letter to the applicants consequent upon its receipt of the 2nd applicant's belated sanction subsequent to the execution of the debt restructuring agreements. The modification of charge created by the 1st defendant on 27.02.2015 has been registered with ROC, Chennai subsequently.

12. After restructuring of the limits also, the 1st defendant had not adhered to the repayment terms, not serviced the monthly interests and failed to route the entire sale proceeds through the escrow account and its irregularities remained uncleared despite the applicants' issuance of several reminders and default notices. The 1st applicant and the 2nd applicant thus classified the loan accounts of the 1st defendant as Non Performing Asset respectively on 27.09.2015 and 30.09.2015. To recover the outstanding liabilities, the applicants initiated SARFAESI proceedings against the secured assets and the 1st applicant issued separate demand notice dated 23.12.2015 under S.13(2) of the SARFAESI Act to defendants 1 to 22. The 2nd applicant also issued separate notice dated 17.11.2015 under S.13(2) of the SARFAESI Act to the defendants. Despite the applicants also caused a legal notice dated 19.01.2016, the defendants had not cleared the liabilities. The 1st defendant through the 2nd defendant had in the meantime executed a revival letter dated 09.02.2016 in favour of the 1st applicant Consortium leader.

13. The 1st defendant though subsequently approached the applicants with a proposal for a One Time Settlement, the applicants conveyed to the 2nd defendant their inability to consider it during the Consortium Meeting held on 17.03.2016 as the amount offered was far below the book outstanding itself. The applicants in the meantime understood as to the non-availability of the OA Schedule - 'H' property as security - it having been acquired for the Kochi Metro Rail Project. The Special Tahsildar (LA No.1), Kochi Metro Rail Project, Civil Station, Kakkanad, Kochi-30 being the Land Acquisition Authority has acquired the said property.

14. The applicants are maintaining a true and correct account of the transactions carried out by the 1st defendant in their Loan Accounts. As on the date of filing the OA, the liabilities due to the 1st applicant from the defendants under the Term Loan Account No. 0808763000001, Term Loan Account No. 0808773004656 and Deferred Interest Loan Account No.0808747000001 is a

sum of Rs.55,42,15,603.00 + Rs. 15,77,43,355.00 + Rs. 3,45,93,858.00 = Rs.74,65,52,816.00 (Rupees Seventy Four Crores sixty five lakhs fifty two thousand eight hundred sixteen only). Similarly, the liabilities due to the 2nd applicant from the defendants under the Term Loan Account No.425700IA00000015, Term Loan Account No.425700IA00000024 and Deferred Interest Loan Account No. 425700IA00000033 is a sum of Rs.75,95,58,592.67 + Rs.9,49,42,250.68+ Rs.3,79,13,097.20= Rs.89,24,13,940.54 (Rupees Eighty nine Crores twenty four lakhs thirteen thousand nine hundred forty and paise fifty four only). It is clear from the conduct of the defendants that they are deliberately evading payment to the applicants. Hence, the present original application has been filed.

15. Defendant No. 1 & 2 appeared and filed written statement raising preliminary issue that present original application is not maintainable at law and barred by law of limitation.

16. On merit, it is replied that the signatures of defendants were obtained by Canara Bank on the printed formats of the agreement of guarantee and the blank places were filled up for the entire debt of the consortium members rendering such agreement void ab-initio. Therefore, no personal liability could be casted upon the Directors of the company as well as the defendants 7 to 22 based on the said agreement of guarantee. Any personal agreement of guarantee executed on the basis of power of attorney is invalid in the eye of law as the guarantee obtained from defendants 7 to 22 cannot be made applicable against them for the reason that the power of attorney could be done only in favour of one bank - Canara Bank; therefore the case that the agreement of guarantee was executed in favour of the entire debt is highly impermissible.

17. It is further replied that the alleged mortgage created on the basis of a special power of attorney dated 27.09.2013 requiring the 2nd defendant to sign the documents for the amount sanctioned on account of Canara Bank being not a registered one, no right flows into the hands of the 2nd defendant and the same is not enforceable under the eye of law and Punjab National Bank even if it be a member of the consortium cannot derive any benefit of such mortgage. The mortgaged properties are available only for the purpose of dues sanctioned to the 1st defendant by Canara Bank. The Original Application preferred on the basis of a consortium is thoroughly misleading and cannot be accepted under any circumstances. The charge in respect of the company having not been registered under Section 125 of the Companies Act, no right could flow into the hands of the consortium lending.

18. The statement of account is not properly certified and is inadmissible in evidence. The interest charged is exonerated and is liable to be interdicted on this Tribunal finding the claim made by the consortium lending to be unsustainable. Both the banks having invoked the provisions of Section 13(2) of the Securitisation Act by issuing their separate demand notice dated 17.01.2015 and 23.12.2015 cannot join together in an original application filed under Section

19 of RDDBFI Act. The Original Application deserved to be dismissed with costs on this score alone.

19. Defendant No. 4 appeared and filed his separate reply contending therein that he happened to be an additional Director of the 1st defendant that had availed financial assistance from the applicants only for a short while i.e. for the period 01.02.2013 to 14.09.2015; and had been caused to sign the personal guarantee letter by the applicant banks only in his such status as one of the Directors without disclosing him anything about it. The shares held by this defendant in the 1st defendant company were transferred to the 2nd defendant on 14.09.2015 on the date of his resignation from the Directorship. Therefore, he is not holding any share in the said company much less any relation or association with it and had not participated in any of its board meetings. Therefore, merely on the strength of the personal guarantee taken from him, he who had otherwise not availed any amount from the applicants is not to be mulcted or fastened with any liability so much so consequent to his cessation of the Directorship and noticing the applicants about it. The other defendants having agreed to relieve him from the so called liability on the strength of the personal guarantee happened to be given to the advantage of 1 st defendant at that point of time, the original application requires to be dismissed against him.

20. Defendant No. 5 appeared and filed its separate reply raising preliminary objection that present original application is not properly signed and verified by the competent person. The applicant banks have failed to take steps to implead the shareholders of the 5th defendant whose assets are claimed to be mortgaged to it; hence, the Original Application is liable to be dismissed in limine for non-joinder of necessary parties. The Original application is also liable to be dismissed for the reason of the applicants' initiation of proceedings under SARFAESI Act.

21. On merit, it is replied that defendant no. 5 denies the execution of any valid guarantee agreement and offering of any property as collateral security at any point of time towards any financial transaction. The financial facilities having been sanctioned on the strength of the primary security of plant and machinery and other fixed assets proposed to be acquired by the 1st defendant which by itself would be sufficient to wipe off the entire liability, the obtaining of guarantee is a mere formality. The alleged guarantee agreement going by the pleadings of the applicants was executed on 14.09.2013 after the execution of loan agreement by the 1st defendant. The creation of mortgage has allegedly taken place only on 13.09.2013 for the loans sanctioned and all other security documents got executed prior to 03.09.2013. The applicant banks are at loss to produce the necessary documents to prove that the alleged designated partner has the authority to do the same.

22. It is further replied by defendant no. 5 that the additional limit was sanctioned without notice to the alleged guarantors/mortgagors and this defendant never executed any guarantee documents for such extended facility of

the 1st defendant at any point of time. Being a partnership firm, Annexures - 105 & 106 have no legal validity and are unenforceable in the eye of law. Even if the mortgage created by the 5 th defendant over 'H' schedule property is to be held enforceable for the credit facility sanctioned as per sanction order dated 03.06.2013, the applicant bank has to explain how or on what basis the guarantee and equitable mortgage of the answering defendant is executed for extended facilities granted to the 1st defendant. Since the applicant banks are relying on Annexures - 105 & 106, the earlier documents if any are rendered defunct and stands nullified for the reason of variance in terms of contract without the authority of the answering defendant.

23. It is further replied by defendant No. 5 that defendant No. 5 never executed any valid enforceable documents for the restructured loan facility at any point of time; and is not liable to pay any amount that is allegedly due from the 1st defendant. Annexure - 170 undertaking is not binding on the answering defendant and has no legal footing at all. The alleged Debtor - Creditor Agreement and debt restructuring agreement dated 27.02.2015 is not legally valid and is unenforceable one as this defendant never gave permission to anybody to enter into such an agreement. The answering defendant is under the bonafide impression that the accounts are in order as it was being informed by the applicants as well as the 1st defendant that the loan accounts are running smoothly without any issues.

24. It is further replied that the applicants having no valid mortgage right over the 'H' schedule property are not entitled to get any amount from the compensation payable for land acquisition as the 5th defendant alone is entitled to the same. There being no valid security interest over the OA 'H' schedule property, any proceedings under SARFAESI Act also have no legal validity. This defendant is not liable to pay any amount to the applicants towards the dues of the 1st defendant or any other defendants. Moreover contrary to the pleadings, the penal interest charged into the accounts are capitalised in the accounts which is not permissible as per the relevant guidelines.

25. Defendant No.5 filed additional written statement contending inter-alia that the consortium agreement is void for uncertainty of subject matter under Section 29 of the Indian Contract Act, 1872 so much so since it speaks of the obligations of the member banks which are not parties to it. The composite OA of the nature filed by the applicant bank is clearly not maintainable as no transaction could have been entered into in pursuance of the said agreement. The alleged guarantee and mortgages if executed are conspicuously bad and uncertain and also admittedly ultra vires the Memorandum and Articles of this partnership as it was incorporated singularly for engaging in real estate business as opposed to the subject matter of the alleged loan facilitates granted in favour of Annam Steels which clearly is outside the scope of business of partnership. The Creditor Debtor Arrangement, the Debt Restructuring Agreement having been executed behind the back of the answering defendant, it stands discharged from

obligations if any on account of the applicability of Sections 142, 143, 133 and 135. The signatures of the guarantors which have been visibly taken on blank paper cannot be pressed into service as against the answering defendant. The Original application as against defendant No.5 requires to be dismissed with exemplary costs.

26. Defendant no. 6 appeared and filed its separate reply raising preliminary objection that the persons who verified and signed the OA are not legally competent and the applicants shall prove their authority to do so. The applicant bank having failed to obtain valid permission from this defendant whose assets are alleged to be mortgaged to it, the original application deserves to be dismissed in limine. The original application is also liable to be dismissed for the reason of the applicants' initiation of proceedings under SARFAESI Act and assuming of possession of the OA schedule properties in negation of the relevant provisions of the RDDBFI Act.

27. On merit, it is replied that defendant No.6 denies the execution of any valid guarantee agreement and offering of any property as collateral security at any point of time towards any financial transaction. The financial facilities having been sanctioned on the strength of the primary security of plant and machinery and other fixed assets proposed to be acquired by the 1st defendant which by itself would be sufficient to wipe off the entire liability, the obtention of guarantee is a mere formality. The alleged corporate guarantee agreement going by the pleadings of the applicants was executed on 09.09.2013 after the execution of loan agreement by the 1st defendant. Annexure - 63 letter evidencing deposit of title deeds by the answering defendant is not a genuine one as the alleged mortgagor had no intention at all to create a valid equitable mortgage over 'D' schedule property at any point of time. The creation of mortgage has allegedly taken place only on 13.09.2013 for the loans sanctioned and all other security documents got executed prior to 03.09.2013.

28. It is further replied that defendant no. 6 never executed any guarantee documents for the extended facility of the 1stdefendant at any point of time. The applicant bank never produced any documents to show that the Board of Directors accorded sanction via resolution to execute any such documents in their favour. That being the case, Annexure - 140 is unenforceable. Even if the mortgage created by the 6th defendant over 'D' schedule property is to be held enforceable for the credit facility sanctioned as per sanction order dated 03.06.2013, the applicant bank has to explain how or on what basis the guarantee and equitable mortgage of this defendant is executed for extended facilities granted to the 1st defendant. Since the applicant banks are relying on Annexure - 140, the earlier documents if any are rendered defunct and stands nullified for the reason of variance in terms of contract without the authority of this defendant.An exhaustive examination of Annexure - 155 document reveals that it is a concocted document generated for the purpose of this case only.

29. It is further replied that defendant No. 6 never executed any valid

enforceable documents for the restructured loan facility at any point of time and is not liable to pay any amount that is allegedly due from the 1st defendant. The alleged debtor - creditor agreement and debt restructuring agreement dated 27.02.2015 is not legally valid and is unenforceable one as the answering defendant never gave permission to anybody to enter into such an agreement. This defendant is under the bonafide impression that the accounts are in order as it was being informed by the applicants as well as the 1st defendant that the loan accounts are running smoothly without any issues.

30. It is further replied that defendant No. 6 is not liable to pay any amount to the applicants towards the dues of the 1st defendant or any other defendants. Moreover contrary to the pleadings, the penal interest charged into the accounts are capitalised in the accounts which is not permissible as per the relevant guidelines. There being no legally enforceable guarantee agreements as well as equitable mortgages against the answering defendant or against the original application schedule 'D' property the original application is only to be dismissed.

31. From the pleadings of the parties and documents placed on record, the following issues arise for consideration and decision by this Tribunal :

(i) Whether this Tribunal has no territorial jurisdiction to entertain and try the present original application?

(ii) Whether present original application maintainable at law?

(iii) Whether present original application is barred by law of limitation?

(iv) Whether original application is bad for non-joinder of necessary parties?

(v) Whether consortium agreement is bad in law, illegal and unenforceable at law?

(vi) Whether defendant no. 1 availed loan from applicants and executed loan as well as security documents?

(vii) Whether defendant no. 4 has been discharge from his liability?

(viii) Whether the guarantee agreements are executed by defendant nos. 2 to 4 and 7 to 22 in favour of applicant banks are legal and valid one?

(ix) Whether defendant no. 2 and 5 to 22 have created a valid security interest in favour of applicant banks?

(x) Whether guarantee agreements executed by defendant no. 5 and 6 in favour of applicant banks are legal and valid one?

(xi) Whether security interest created by defendant no. 5 and 6 is legal and valid one?

(xii) Whether applicant banks are entitled for amount claimed in the original application alongwith interest?

(xiii) Relief to which the applicant bank is entitled for?

32. In order to prove their claims made in the original application, applicant banks lead its evidence, through Mr. G.K. Renjith Chief Manager of Applicant No. 1 Bank, by filing AW-1 proof affidavit and additional proof affidavit and got exhibited documents Exh.A-1 to A-211 in support of their case. Defendants No. 1, 2, 5 and 6 filed their counter proof affidavit to rebut the claim of the applicant bank. Thereafter, evidence of both the parties was closed.

33. Mr. A. V. Thomas, Learned Senior Advocate appearing for applicant bank vehemently argued that no written statement has been filed by defendant no. 7 to 22; therefore facts shall be taken to be admitted on their part. Any plea uncontroverted or non traversed either for lack of pleadings of denial or for lack of countervailing evidence, the court would be competent to draw an adverse inference against the party that remained silence despite an accusing finger pointing toward him. He has placed reliance upon judgment passed by Hon'ble High Court of Kerala in case of Josita Antony Versus New India Assurance Limited 2006(1) KLT 393 and Suryanarayanan Versus Kerala Water Authority 2017(3) KLT SN 13. He has further relied upon judgment passed by Hon'ble Apex Court in case of M. Venkararamna Hebbar through LRs Vesus M Rajagopal Hebbar and Others (2007) SCC 401.

34. Mr. A. V. Thomas, Learned Senior Counsel for applicant has further argued that when defendant no. 1 and 2 submits that their signatures were misused by the applicant no. 1 bank then it was burden upon them to prove the said fact. However no such evidence has been placed on record to prove the said fact. He has placed reliance upon judgment passed by Hon'ble Apex Court in case of Punjab and Sindh Bank Versus M/s C.S. Company & Others 2012(2) SCC 743 where Hon'ble Apex Court observed that "the defendants' case regarding blank signed papers is not substantiated by any evidence except their say so. The trial court has rightly rejected this story and we concur with the trial court. Apart from the fact that there is nothing on record to establish the case of the defendants that the plaintiff-bank was party to such a fraud of creating fabricated documents after obtaining blank signed papers from the defendants, it also does not stand to reason that the defendants and its partners and other defendants are so gullible as to hand over to the plaintiff-bank several signed blank papers. Falsity of their case is seen from the documents on record".

35. Mr. A. V. Thomas, Learned Senior Counsel appearing for the applicant banks further argued that the particular contention has been raised by the defendant no. 1 and 2 for the first time in the present original application regarding non availability of mortgage for applicant No. 2 Bank. However, no such contention was raised by the defendants in reply to demand notice as well as legal notice despite the said notices were duly served upon all the defendants. The defendants never disputed mortgage created in favour of applicant No. 2 Bank. The said defendants have not raised any defence in the present original application as no reply has been filed by the said defendants who have given

power of attorney to defendant No.2. The said defendants have never initiated action against defendant no. 2 for exceeding his power. He has placed reliance upon judgment passed by Hon'ble Apex Court in case of Syed Abdul Khader Versus Rami Reddy and others AIR 1979 SC 553.

36. Mr S. Easwaran, Learned Counsel appearing for defendant no. 1 to 3 and 7 to 22 vehemently argued that both the banks have invoked the provisions of Section 13(2) of the Securitisation Act by issuing separate demand notice dated 17.01.2015 and 23.12.2015. Therefore, the consortium agreement has automatically come to end. Accordingly the present original application is not maintainable at law.

37. Learned Counsel for defendant No. 1 to 3 and 7 to 22 further argued that mortgage is claimed on the basis of power of attorney granted by defendant No.8 and a perusal of power of attorney Exh. A/27 reveals that the same is executed for the purpose of availing loan from applicant no. 1 Bank; and accordingly, defendant No.2 was not authorised to mortgage properties in favour of applicant No.2 i.e Punjab National Bank. He further submitted that power of attorney is not registered one; hence, no right accrue on the basis of said Power of Attorney. The perusal of letter of confirmation of mortgage particularly Exh.A/56 further reveals that mortgage is created only in favour of applicant No.1 Bank and not in favour of applicant No.2 Bank. The applicant banks have to prove that intention is to create equitable mortgage in favour of consortium members. He has further argued that a perusal of Exh. A/68 and Exh. A/169 reveals that there is debtor creditor agreement and loan has been restructured. However, clause 2 of the said agreement states that as and when there is default, the agreement stood cancelled and entire amount become payable. The search report obtained under section 125 of the Companies Act reveals that there is no charge over the immovable properties in favour of consortium members. Therefore question of availability of security to applicants is highly disputed.

38. Mr. S. Easwaran Learned Counsel for above defendants has placed reliance upon judgment passed by the Hon'ble Apex Court in case of Church of Christ Charitable Trust Versus Ponni Amman Educational Trust 2012(8) SCC 706 wherein Hon'ble Apex Court held that: "we have to consider the power of attorney. It is settled that a power of attorney has to be strictly construed. In order to agree to sell or effect a sale by a power of attorney, the power should also expressly authorize the power to agent to execute the sale agreement/sale deed i.e., (a) to present the document before the Registrar; and (b) to admit execution of the document before the Registrar. A perusal of the power of attorney, in the present case, only authorizes certain specified acts but not any act authorizing entering into an agreement of sale or to execute sale deed or admit execution before the Registrar".

39. He has further relied upon judgment passed by the Hon'ble Apex Court in case of P S Ranakrishna Reddy Versus M K Bhagylakhsmi and another 2007 (10) SCC 231 wherein Hon'ble Apex Court held that: "A document, as is well known,

must be read in its entirety. The intention of the parties, it is equally well settled, must be gathered from the document itself. All parts of the deed must be read in their entirety so as to ascertain the nature thereof".

40. Mr. Santosh Kumar Learned Counsel appearing for defendant No. 5 and 6 vehemently argued that this Tribunal is not having territorial jurisdiction to entertain and try the present original application. Secondly, defendant no. 5 furnished the guarantee for a purpose beyond the object of LLP and the Private limited Company; hence, it is ultra vires to the object of the Company. Therefore, no liability could be fastened upon said defendants.

41. Heard Mr. A. V. Mathew Learned Senior Counsel appearing for the applicant Banks and Mr. S. Easwaran appearing for defendant no. 1, 2, 3, 7 to 22 and Mr. Santosh Kumar appearing for defendants 5 and 6. I have also gone through pleading of parties, documents placed on record and written submissions filed by Learned Counsels for parties in support of their argument advanced in the Tribunal. I have also gone through relevant law applicable to facts and circumstance of present Original application.

Issue No. 1

42. The first contention raised by Learned Counsel for defendant No. 5 and 6 is that this Tribunal has no jurisdiction in view of clause 22 of Guarantee Agreement. As per clause 22 of Guarantee agreement, the guarantee agreement shall be governed by law applicable in India and the Courts of Bangalore shall have jurisdiction to hear suit, action, proceedings, petition in connection with guarantee agreement.

43. It is settled proposition of law that if two courts or more have jurisdiction to try suit then agreement between parties that dispute between them to be tried in any one of such Courts is not contrary to public policy. Hon'ble Apex Court in case of M/s Swastik Gases Pvt. Ltd Versus Indian Oil Corporation (2103) 9 SCC 32 held that " where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts."

44. However, in the present case, applicant banks have not agreed with defendant no. 5 and 6 that only the courts at Bangalore will have jurisdiction. The said clause 22 of the guarantee agreement is not binding upon applicant banks to enforce the guarantee in this Tribunal and it appears to be a clerical error as pointed out by learned Senior Counsel for applicant bank. The branch of the applicant banks which disbursed the loan are situated at Kozhikode and within the territorial jurisdiction of this Tribunal. Therefore, this Tribunal is having territorial jurisdiction to entertain and try the present original application.

Issue No. (ii)

45. Insofar as maintainability of the present original application is concerned,

defendants have raised preliminary objection that applicant no. 1 Bank has initiated its measures under the provision of the SARFAESI Act 2002 by issuing separate demand notice under Section 13(2) of the Sarfaesi Act 2002; and hence, consortium agreement has come to end. Therefore, present Original Application is not maintainable at law; hence, deserves to be dismissed on this ground alone.

46. Applicant No. 2 Bank addressed letter dated 03.09.2013 recognising and appointing the Canara Bank as Lead Bank of the Consortium to be known as "Canara Bank and Punjab National Bank Consortium" and nominated, appointed and constitued Chief Manager of Canara Bank as lawful Attorney to execute Facility Agreement and other documents in connection with Consortium Term Loan facility. Applicant No. 2 Bank further authorised Applicant No. 1 Bank to do all such acts, deeds, and things as are set out in 'Inter-se-Agreement' of the member Consortium. It was further agreed by the Punjab National Bank that authority given shall be irrevocable and unconditional. The said authority shall remain in force till both the Banks are Consortium Members; and shall come to an end automatically on Punjab National Bank ceasing to be a member of the "Canara Bank and Punjab National Bank Consortium." The applicant No. 1 and 2 and Defendant No. 1 entered into 'Working Captial Consortium Agreement' dated 03.09.2013 whereby Applicant No. 1 Bank is referred as 'A Bank' and Applicant No. 2 Bank is referred as 'B Bank' and both the Banks are referred as 'A Bank Consortium'.

47. Thus the loan has been advanced by the applicant Banks being members of 'A Bank Consortium' and security documents have been executed by the defendants to secure loan advanced in view of Consortium Agrement. Applicant banks have to recover their debt from defendants who are jointly and severally liable to repay the same. As per Section 2(g) of RDDBFI Act 1993, 'debt' means "any liability which is claimed as due from any person by a bank or financial insitution or by consortium of banks or financial insititutions during the course of any bussiness activity undertaken by the banks or the financial institutions or the consortium under any law for the time being in force in cash or otherwise whether secured or unsecured or whether payable under a decree or order of any civil court or any arbitral award or otherwise or under a mortgage and subsisiting on and legally recoverable on the date of application". Therefore, both the Consortium Members have got cause of action to recover their dues being debt granted to defendant no. 1 being Consortium members.

48. Even otherwise, Section 19(2) permits any bank or financial instituion which has to recover its dues from same defendants to join in application filed by earlier bank or financial insitution at any stage before final order is passed. The plea of defendants that both the banks having invoked the provisions of Section 13(2) of the Securitisation Act separately by issuing a demand notice on 17.01.2015 and 23.12.2015; therefore, the consortium agreement has automatically came to end is not sustainable at law. The applicant No. 2 Bank did

not cease to be member of 'A Bank Consortium' merely on the ground that it has issued separate demand notice under Section 13(2) of the Sarfaesi Act 2002. Even otherwise, the signing and verifying the present original application by authorised officer of applicant no. 2 bank to recover the debt advanced to defendant No. 1 clearly proves that consortium agreement is still subsisting between the applicant banks.

49. Defendant No. 5 & 6 have raised another objection that present original application is not signed and verified by the competent person; therefore, present Original Application is not maintainable at law. The present application has been filed by Mr. N. Nagesh, Chief Manager of the 1st Applicant, Canara Bank and K. Rajendran Chief Manager of 2nd Applicant, Punjab National Bank. The original application has been duly signed and verified by the said both the officers of the applicant banks; therefore, there is no force in the said contention of the defendant No. 5 & 6. Accordingly, in view of the the facts of the present case and law applicable thereon, the present Original Application is maintainable at law.

Issue No. (iii)

50. The next contention raised by the defendants is that present original application is barred by law of limitation. However, the present original application has been filed on 01.08.2016. The 1st defendant passed its Board Resolution on 03.09.2013 and issued a letter to the 1st applicant consortium leader to obtain necessary loan documents from the defendants for the sanctioned limits as per Inter-se Agreement entered into between the members of 'A Bank Consortium'. Accordingly, thereafter defendant no. 1, through its authorised signatory, executed a Working Capital Consortium Agreement, Joint Deed of Hypothecation and a Trust and Retention Account Agreement in favour of the applicants. Even otherwise, the equitable mortgage has been created to secure the loan amount. Therefore, present original application is well within the limitation

Issue No.(iv)

51. Defendant No. 5 has further raised objection to the maintainability of the present original application on the ground that shareholders of defendant no. 5 whose property is claimed to be mortgaged has not been joined as party defendants in the present original application; therefore, present original application is liable to dismissed on the ground of non-joinder of necessary party.

52. Section 5 of The Transfer of property Act 1882 provides that "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and "to transfer property" is to perform such act. In this section "living person" includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by

companies, associations or bodies of individuals.

53. Hon'ble Apex Court in case of Bacha F. Guzdarvs Commissioner Of Income-Tax AIR 1955 SC 74 that "It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the articles of association, to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders".

54. Therefore, defendant No. 2 being a company is living person competent to mortgage its property through resolution passed by its Directors; and therefore, its shareholder are neither necessary nor proper party in the present original application. Hence the present plea of defendant No.5 is devoid of merits.

55. Therefore, plea of the defendants that present original application is bad for non-joinder of necessary part is devoid of merit; and present original application is fully maintainable at law.

Issue No.(v)

56. Defendant No. 5 & 6 have further raised preliminary objection that consortium agreement is bad in law, illegal and unenforceable on the ground that consortium agreement is void for uncertainty in view of Section 29 of the Indian Contract Act 1872. Learned Counsel for defendant no. 5 and 6 argued that it is not certain from agreement as to who are other members of the consortium. However, the Consortium Agreement it is clear that it is an agreement between Canara Bank and Punjab National Bank which are referred in 'Working Capital Consortium Agreement' respectively as 'A Bank' and 'B Bank' and collectively the Banks are referred as 'A Consortium Bank'. There are certain other standard terms such regarding increase or decrease from time to time by adding or dropping of one or more Banks or change by substitutions of one Bank by other Bank etc. The mere insertion of such a clause in the agreement does not prove that Consortium Agreement is uncertain; and accordingly illegal. Therefore, there is no uncertainty in the consortium agreement.

Issue No.(vi)

57. Insofar as availing of loan by defendant No. 1 and execution of necessary loan and security documents are concerned, defendant No. 1 - M/s Annam Steels Private Limited, through its Board of Directors passed a resolution Exh. A/1 dated 02.03.2013 authorising Defendant no. 1 Mr. E.T. Firoz one of its Director to submit loan application and execute loan documents to avail financial assistance to the extent of Rs. 180 Crores for execution of its KIOCL Project from Canara Bank and Punjab National Bank. Defendant no. 1 further resolved to accept personal guarantee of defendant Nos.2 to 5, 7 to 11 and 14 to 22 and the

corporate guarantee of the 6th defendant; and to request them to create equitable mortgage in respect of their properties.

58. Accordingly, Applicant No. 1 Bank sanctioned a Short Term Loan of Rs. 90 Crores being 50% of the total amount of Rs. 180 Crores vide Sanction Letter dated 03.06.2013 Exh. A/2 under Consortium Agreement with Applicant No. 2 bank on 26.06.2013 against primary security having pari passu first charge with PNB over the equipments, plant and machinery proposed to be acquired; and collateral security being immovable properties belonging to defendants 2, 5 to 11 and 16 to 22. Defendants 2, 3, 5, 7 to 11 and 16 to 22 stood as guarantors and defendant No. 6 stood as corporate guarantor to loan advanced to defendant no. 1. Defendant No. 1 vide letter Exh. A/4 dated 03.09.2013 requested to applicant No. 1 Bank to disburse the loan amount on behalf of the other consortium members. It was also admitted that the credit facilities so made available on behalf of the other members shall be treated as advance on behalf of the said consortium bank to the extent of the respective share of the said bank. It was further declared that the liability so incurred by the borrower in the aforesaid manner is enforceable against the borrower in accordance with the consortium documents; therefore, Punjab National Bank being consortium member of 'A Bank Consortium' sanctioned an amount of Rs. 90 Crores being 50% of the total amount of Rs. 180 Crores vide letter No. HO/1/13-14 dated 26.06.2013 Exh. A/3 against primary security having pari passu first charge along with Canara Bank over the equipments, plant and machinery proposed to be acquired; and collateral security being guarantees and equitable mortgage in respect of immovable properties.

59. However, Defendant No. 1 failed to create security interest in respect of one item of property belonging to the aforesaid P. K. Muralikrishnan and P. K. Lalitha valued at Rs.20 Crores due to the defect in title. Accordingly, the limits sanctioned were reduced to Rs.80 Crores each by the applicant banks for which defendant no. 1 passed a Board Resolution Exh. A/5 dated 03.09.2020 to avail loan of Rs. 160 Crores i.e. Rs.80 Crores each from Canara Bank and Punjab National Bank. Defendant no. 1 executed Working Capital Consortium Agreement Exh. A/7 dated 03.09.2013, Joint Deed of Hypothecation Agreement Exh. A/8 dated 03.09.2013, Trust and Retention Agreement Exh. A/9 dated 03.09.2013 and other loan security documents in favour of the 'A Consortium Bank'; and defendants 2 and 3 were authorized to execute such documents.

60. Thereafter, Defendant No. 1, through its authorised Director Mr. E.T. Firoz, requested for additional Term Loan and submitted Loan application Exh. A/92 to the applicant banks and offered additional security by way of equitable mortgage of properties having value of Rs. Rs.203.62 Crores for consortium members as a whole on pari passu basis including personal guarantee of owners of property. Applicant No. 1 Bank, after considering the request of defendant No. 1, sanctioned additional Term Loan of Rs. 20 Crores vide Sanction Letter Exh. A/93 dated 05.04.2014 being consortium member by accepting additional security

aggregating to Rs.43.17 Crores on pari passu basis; and collateral security by way of equitable mortgage in respect of immovable properties mortgaged with pari passu charge with PNB. Similarly, applicant No. 2 Bank vides Sanction Letter Exh. A/94 dated 08.04.2014, sanctioned an additional loan of Rs. 20 Crores. Defendant No. 1 in its Board of Directors Meeting vide Minutes dated 09.04.2014 Exh. A/95 confirmed availing of total loan of Rs. 200 Crores from 'A Bank Consortium; and further resolved to create charge over properties in favour of 'A Bank Consortium'. Defendant No.1 executed Supplemental Working Capital Consortium Agreement Exh. A/96 dated 09.04.2014, Supplemental Joint Deed of Hypothecation Exh. A/97.

61. Thereafter, defendant No. 1 failed to regularise the loans and requested to reschedule the loan vide Exh. A/165; and accordingly, applicant no. 1 Bank issued letter Exh. A/166 granting a moratorium period of six months for payment of principal amount of Term loan-I and moratorium of five months for principal amount of Term Loan-II. The applicant No. 1 Bank further sanctioned 'Deferred Interest Short Term Loan' for overdue interest portion of Rs. 3.15 crores. The Debtor Creditor Agreement Exh. A/168 dated 27.02.2015 was executed by the defendant No. 1 alongwith other defendants through its Director Mr. E. T. Firoz in favour of both the applicant banks and same is duly signed by him being authorised signatory apart from other defendants. The defendants agreed that securities and documents executed by them in favour of applicant banks shall hold good and available for the restructured debt.

62. The defendants' No. 1 and 2 have denied their liability as well liability of other defendants on the ground that their blank signatures were obtained on various loan as well as security documents. Meaning thereby the defendants have admitted that their signature were taken on the documents.

63. Insofar as legal aspect on this issue is concerned, the following passage from "Pollock & Mulla on Indian Contract and Specific Relief Act" - 11th Edition (1995), is usefully extracted for the purpose of the case. "The plea of non-est factum applies where a party signs a document and hands it over to the other party in order to enable him to fill in details and complete the transaction and the document is not in accordance with the instructions of the executants. Even in that case, he will be bound if it is not essentially different in substance or in kind from the intended transaction. The burden of proof is on the executants that he acted carefully and if he fails to show it he will be bound. But, negligence on the part of the executants will be a bar to the plea on non est factum."

64. The defence that the defendant's signatures were obtained on blank Performa is not only untrustworthy but also does not raise any triable issue. The defendants did not raise their little finger to point out if their signatures were obtained on any blank documents by the then Manager of the applicant bank till present original application was filed. The present original application was filed in the year 2016. Till then the defendants chose to keep silent about their signatures having been obtained on blank documents. The only irrestible

conclusion, therefore, is that the plea now sought to be raised by the defendants to the effect that their signatures were obtained on blank documents is merely a sham plea, devoid of any force and as such cannot be deemed to raise any triable issue.

65. Thus, it is proved on record that defendant No. 1 through its authorised signatory defendant no. 2 and other defendants have executed necessary loan as well as security documents to avail the loan from 'A Bank Consortium'.

Issue No.(vii)

66. Insofar as personal guarantee executed by defendant No. 4 to secure the loan availed by defendant No. 1 is concerned, defendant No. 4 has admitted that he was additional Director of defendant No. 1 for the period 01.02.2013 to 14.09.2015 and had signed the personal guarantee letter with the applicant banks. He only claims that as he has resigned from Directorship of defendant No. 1 on 14.09.2015 and shares held by him in the 1st defendant company were transferred to the 2nd defendant on 14.09.2015; therefore, he is not liable for the personal guarantee furnished by him.

67. Defendant no. 4 initially guaranteed an amount of Rs. 160 crores in his personal capacity by executing guarantee agreement Exh. A/13; and thereafter, on 09.04.2014 executed fresh guarantee agreement Exh. A/104 for total amount of Rs. 200 crores. Even otherwise, he acknowledged his liability in his personal capacity as guarantor towards loan availed by defendant No. 1 in Debtor-Creditor Agreement Exh. A/168 dated 27.02.2015 alongwith other defendants.

68. The liability of the Director has to be ascertained not from the date when he tendered resignation or from the date when he had revoked the personal guarantee as was offered by him but from the date when the loan was advanced and the loan agreement was executed unless the creditor itself consents or approves to any subsequent arrangement. Admittedly, the loan was advanced in the year 2013 and personal guarantee was executed by defendant No. 4 on 03.09.2013 & 09.04.2014 which were further acknowledged by him on 27.02.2015; therefore, the said resignation dated 14.09.2015 from the Board of Directors could not have absolved the defendant No. 4 from his liability. Therefore, he continued to remain jointly and severally liable along-with the company and its other Directors.

69. Therefore, question of no liability of defendant No. 4 for his personal guarantee does not arise at all. He is liable for his personal guarantee towards loan availed by defendant No.1.

Issue No. (viii)

70. Insofar as guarantee agreements defendant No. 2 to 4, 10, 11, 14 to 16, 19 and 22 are concerned, the said defendants in their respective individual capacity executed and forward their respective guarantee agreements Exh. A/24, Exh. A/11, Exh. A/13, Exh. A/32, Exh.A/15, Exh.A/20, Exh.A/22, Exh. Exh. A/34,

A/42 and Exh. A/50 to applicant No. 1 Bank for guarantee of repayment of loan of Rs. 160 crores advanced to defendant no. 1 for itself and as an agent of other consortium lenders. The said guarantee agreements were forwarded by defendant No. 2 to 4, 10, 11, 14 to 16, 19 and 22 through their respective Guarantee Covering Letters Exh. A/23, Exh. A/10, Exh. A/12, Exh. A/31, Exh. A/14, Exh. A/19, Exh. A/21, Exh.A/33, Exh. A/41 and Exh. A/49. Defendant No. 7, through its partner defendant No. 14 and 15, by way of Guarantee Covering Letter Exh. A/16 furnished its Guarantee Agreement dated 03.09.2013 Exh. A/17 for an amount of Rs. 160 Crores to applicant No. 1 Bank for itself and as an agent of other consortium lenders.

71. Defendant No. 8, 9, 17, 18, 20, and 21 appointed Mr. E.T. Firoz as their Attorney vide their respective Special Power of Attorney Exh. A/27, Exh. A/30, Exh. A/37, Exh. A/40, Exh. A/45, & Exh. A/48; and authorised him to execute and forward their respective Guarantee Agreements Exh. 26, Exh. A/29, Exh. A/36,Exh. A/39, Exh. A/44, Exh. A/47 for an amount of Rs. 160 Crores to guarantee repayment of loan amount of Rs.160 Crores availed by defendant no. 1 from applicant banks. The said guarantee agreements were forwarded through guarantee covering letters Exh. A/25, Exh. A/28, Exh. A/35, Exh. A/38, Exh. A/43, & Exh. A/46.

72. Thereafter, defendant No. 1 further availed an additional loan amount of Rs.40 Crores from both the applicant banks; and each of the applicant banks sanctioned and disbursed an amount of Rs.20 crore i.e total additional amount of Rs. 40 crores. Defendant No. 2 to 4, 10 to 16, 19 and 22 in their respective capacity, in order to guarantee the said additional loan of Rs. 40 crores availed by defendant No.1, forwarded their duly executed guarantee agreements Exh. A/100, Exh. A/102, Exh. A/104, Exh. A/114, Exh.A/116, Exh. A/118, Exh.A/120, Exh.A/123, Exh.A/125, Exh.A/127, Exh.A/133 and Exh.A/139 for security of total amount of Rs. 200 crores granted to defendant No. 1 through their separate Guarantee Covering Letters Exh.A/99, Exh.A/101, Exh.A/103, Exh.A/113, Exh.A/115, Exh.A/117, Exh.A/119, Exh.A/122, Exh.A/124, Ex.A/126, Exh.A/132 and Exh.A/138 respectively. Defendant No. 7, through its partner defendant No. 14 and 15 through Guarantee Covering Letter Exh. A/107 furnished its Guarantee Agreement Exh. A/108 for an amount of Rs.200 Crores. The said guarantee agreement were executed and forwarded to applicant No. 1 for acceptance for Applicant No. 1 Bank itself and as an agent of other consortium lenders.

73. Mr. E.T. Firoz, being Power of Attorney Holder of defendant No. 8, 9, 17, 18, 20 and 21 further executed guarantee agreement Exh.A/110, Exh.A/112, Exh.A/129, Exh.A/131, Exh.A/135 and Exh.A/137 for said defendants and forwarded the same through guarantee covering letters Exh.A/109, Exh.A/111, Exh.A/128, Exh.A/130, Exh.A/134 and Exh.A/136 for total amount of Rs. 200 crores.

74. The perusal of guarantee covering letters Exh.A/25, Exh.A/28, Exh.A/35,

Exh.A/38, Exh.A/43, & Exh.A/46 reveals that said letters have been addressed to applicant no. 1 bank for furnishing of duly executed guarantee agreements Exh.A/26, Exh.A/29, Exh.A/36, Exh.A/39, Exh.A/44 and Exh.A/47 to secure loan amount upto Rs. 160 Crores; and guarantee covering letters Exh.A/109, Exh.A/111, Exh.A/128, Exh.A/130, Exh.A/134, and Exh.A/136 has been addressed to applicant no. 1 Bank for furnishing duly executed guarantee agreements Exh.A/110, Exh.A/112, Exh.A/129, Exh.A/131, Exh.A/135 and Exh.A/137 to secure an aggregate loan amount of Rs. 200 crores advanced or to be advanced to defendant No. 1.

75. The said guarantee agreements have been executed and forwarded to applicant No. 1 Bank for loan sanctioned and disbursed by itself and to accept on behalf of PNB. It would be pertinent to reproduce herein relevant portion of the guarantee covering letter which is similar in each of the guarantee agreement:

"This agreement made this thirteenth day of September 2013 between 1* M/s. Annam Steels Pvt. Ltd No. 244, T.H. Road, Thondiarpet, Chennai-600081, Tamilnadu hereinafter termed as the Borrower. 2**P. Muneer, S/o. Musthafa Haji, Bushra Manzil, Kottappuram P.O. Neeleswaram - 670 314(hereinafter termed as guarantor and CANARA BANK, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act 1970 having its Head Office at Jayachamarajendra Road, Banglore and among others an office at Choothy Road, Calicut for self and as agent of other consortium lenders and represented by their Manager and duly constituted attorney Shini John hereinafter termed as Bank which expression shall be deemed to include their assigns, successors and attorneys witnessth." Similarly the other entire guarantees have been executed by defendant no. 2 being Power of Attorney Holder of respective guarantors. Defendant No. 8, 9, 17 18, 20, and 21 have not cancelled their power of attorney granted in favour of defendant No. 2.

74. Even otherwise, defendant No. 2, 3, 4, 10, 11, 14, 15, 16, 19 and 22 in their personal capacity and defendant no. 8, 9, 17, 18, 21, 22 through their power of attorney Mr. E.T. Firoz executed the Debtor Creditor Agreement dated 27.02.2015 Exh.A/168 alongwith other defendants in favour of both the applicant banks. The said defendants alongwith other defendants acknowledged their liability outstanding as on 31.01.2015 as described in Schedule 'A' to the said agreement as guarantors and mortgagor. They further agreed that securities and documents executed by them in favour of applicant banks shall hold good and available for the restructured debt.

75. Moreover, the defendant Nos. 7 to 22 has not filed written statement to rebut the claim of the applicant bank. Though defendant No. 2 while filing written statement submitted that defendant No. 7 to 22 will adopt the written statement filed by defendant No. 1 and 2. The provisions of Order 6, Rule 1 read with Order 8 Rules 2 to 5 contemplate filing of a written statement with specific admissions or denials of the averments in the plaint with a separate verification to the pleadings. A written statement adopting the written statement of others without

verification is no written statement in the eye of law under Order 6 Rule 1 read with Order 8, Rules 2 to 5, C.P.C. However, in the facts and circumstances of the present case, even no such adoption memo has been filed by the defendant no. 7 to 22.

76. Therefore, it is proved on record that defendant's No. 2 to 4 and defendant No. 7 to 22 have stood guarantor to Term Loan amount of Rs. 160 crores initially advanced to defendant no. 1 in the year 2013; and thereafter guaranteed further additional limit of Rs.40 Crores in the year 2014 aggregating to Rs. 200 crores. Defendant No. 2 to 4 and 7 to 22 waived all their rights conferred on them by virtue of Section 130, 133, 134, 135, 139 and 141 or any other relevant provision of the law in respect of their guarantee.

Issue No.(ix)

77. Insofar as mortgage created by defendant no. 2 and defendant No.7 to 22 are concerned, defendant No. 11 created equitable mortgage of its immovable property by deposit of title deeds Exh. A/57 described in Schedule 'A' of the Original Application vide letter evidencing deposit of title deeds Exh. A/56; and charge has been registered with Registrar of Firms vide Registration Certificate Exh. A/58. Defendant No. 7 created equitable mortgage by deposit of title deeds Exh. A/60 over its immovable properties described in Schedule 'B' of the original application vide letter evidencing deposit of title deeds Exh. A/59 through its both partners. Defendant No. 2 Mr. E.T. Firoz and Defendant No. 10 Mr. K.K. Ashraf created equitable mortgage by deposit of title deeds Exh. A/62 and executed letter evidencing of deposit of title deeds Exh. A/61 for properties described in Schedule 'C' of the Original Application. Mr. P.K. Munir Defendant No. 8 and Mr. P. Yusuf Ali created equitable mortgage by deposit of title deeds Exh. A/68 and Exh. A/70 over their properties described in Schedule 'E' and 'F' through their Power of Attorney Holder Mr. E.T. Firoz defendant No. 2 and letters evidencing deposit of title deeds Exh. A/67 and Exh. A/69 was executed by defendant No. 2 being their Power of Attorney Holder. Defendant No. 2 and Defendant No. 16 to 22 created equitable mortgage by deposit of title deeds Exh. A/72 to Exh. A/77 over their properties described in the Schedule 'G' of the Original Application and letter evidencing deposit of title deeds Exh. A/71 was executed by them. Defendant no. 2 created equitable mortgage over immovable properties described in Schedule 'I' of the original application and further extended mortgage to secure an amount of Rs. 160 Crores by deposit of title deeds Exh. A/84 and Exh. A/85. The charge for creation of equitable mortgage has been duly registered with Registrar of Company Chennai in Form No. 8 Exh. A/89 dated 03.09.2013 for an amount of Rs. 160 Crores and accordingly, Registrar of Company, Chennai has issued Certificate of Registration of Mortgage etc dated 03.09.2013 Exh. A/88 under Section 132 of the Companies Act 1956. The said charge has been created in favour of Canara Bank and pari passu charges with Punjab National Bank for consortium finance of Rs. 160 Crores.

78. Mr. E.T. Firoz, defendant No. 2 further extended equitable mortgage already

created on 25.11.2006 in favour of applicant bank to secure total amount of Rs. 200,60,00,000.00 for loan advanced to him and defendant no. 1 Company. The charge for extension of equitable mortgage has been registered with Registrar of Company Chennai in Form CHG-I Exh. A/162 dated 09.04.2014 for an amount of Rs. 200 Crores; and accordingly, Registrar of Company, Chennai has issued Certificate of Registration of Mortgage etc dated 09.04.2014 Exh. A/161 under Section 79(b) of the Companies Act 1956. The said charge has been created in favour of Canara Bank and pari passu charges with Punjab National Bank for consortium finance of Rs. 200 Crores.

79. M/s Karadan Properties and Developers, Defendant No. 7, through its partners Defendant no. 14 and 15, created equitable mortgage over its properties described in Schedule 'J', 'K', 'L' and 'M' of the original application through letter evidencing creation of equitable mortgage by deposit of title deeds Exh. A/142 to Exh. A/145 to secure loan amount of Rs. 200 Crores granted to defendant No. 1 Company. Defendant no. 7 further extended its equitable mortgage already created by deposit of title deeds on 05.09.2013 for an amount of Rs. 200 Crores by letter Exh. A/153 dated 08.04.2014 to secure additional amount of Rs. 40 Crores in addition to already secured loan amount of Rs. 160 Crores. Mr. Abdul Nawaf Defendant No. 12 created equitable mortgage of properties described in Schedule 'N' of original application and submitted title deeds Exh. A/147 and Exh. A/148 through letter evidencing creation of equitable mortgage Exh. A/146 to secure loan amount of Rs. 200 Crores advanced to defendant No. 1 Company. Mr.Kardan Sulaiman and his wife Sara Defendant No. 14 and 15 created equitable mortgage over their properties described in Schedule 'O' and 'P' of the original application by deposit of title deeds Exh. A/150 and Exh.A/151 through letter of creation of equitable mortgage Exh.A/149 to secure the loan amount of Rs.200 crores advanced to defendant No. 1 Company. Mr. A.T. Mohammad Ali also extended his equitable mortgage for an amount of Rs.200 Crores to secure additional loan amount of Rs.40 Crores in addition to already advanced amount of Rs.160 crores advanced to defendant No.1. Defendant No. 2 and 10 vide letter dated 09.04.2014 Exh. A/155 further extended equitable mortgage created by them on their property on 12.09.2013 to secure total amount of Rs.200 crores. Defendant No. 2 alongwith defendant No. 16 to 22 vide letter dated 09.04.2014 Exh. A/158 further extended equitable mortgage created by them on their property on 12.09.2013

80. It is undisputed fact that defendant No. 8, 9, 17 18, 21, and 22 executed power of attorney in favour of defendant No. 2 and said power of attorney was not revoked till security was created in favour of applicant banks and further extended thereon. The clause 3 of the each of the power of attorney Exh.A/30, Exh. A/27,Exh. A/37, Exh. A/40, Exh. A/45 & Exh. A/48 specifically empowers the Attorney to offer the properties for mortgage by way of deposit of title deeds to the Term Loan availed or to be availed by the defendant No. 1. Similarly clause No. 6 specifically provides to execute any other documents incidental to the said Term Loan or any other loan documents in favour of Canara Bank as

required or as directed by the Canara Bank for and on their behalf. The said power of attorneys have further authorised the Attorney to do all other acts and things required to be done of and incidental to the Term Loan or exercise of any or all of the power above mentioned effectually to all intents and purpose as they would done in their own case.

81. Defendant No. 8 and 9 through their power of Attorney Mr. E.T. Firoz created equitable mortgage over their property by deposit of title deeds Exh. A/68. The said title deed is forwarded through letter evidencing creation of equitable mortgage Exh. A/67. The perusal of Exh. A/67 reveals that title documents has been handed over to the Manager of Applicant No. 1 Bank to secure credit limits sanctioned/to be sanctioned to defendant No. 1 upto a limit of Rs. 160 crores and which may become due payable by defendant No. 1 to Canara Bank and/or any liability arising out of the aforesaid facilities granted or that may be granted by Canara Bank as also such other and further limits upto a maximum limit of Rs. 160 Crores. The said equitable mortgage has further been extended by defendant's No. 8 and 9 vide letter Exh. A/157.

82. Defendant No. 1 and 2 raised objection to these special power of attorney on the grounds that special power of attorney are not registered documents and hence alleged mortgage created on the basis of a unregistered special power of attorney dated 27.09.2013 is not legal and valid one.

83. The defendants' No. 1 and 2 have tried to wrench the facts from their real significance. A distinction has to be drawn between the powers of attorney, i.e., those who transfer a property and those who deposit title documents simplicitor. The equitable mortgage is valid by virtue of Section 59 of the Transfer of Property Act. The deposit of document itself makes a mortgage complete. There is no need of execution of any other document. The mortgagors need not append their signatures on any document. The question of guarantee is inbuilt. The money paid to the borrowers is the consideration".

84. It is the duty of the Tribunal to cull out the real intention of the parties. The defendant No. 8, 9, 17, 18, 19, 20 and 21 never challenged the said special power of attorney in any court of law till date. Even the said defendants opted not to contest the original application by filing their written statement. Even written statement filed by defendant No. 1 and 2 has not been adopted by the said defendants. The documents of title were deposited in the year 2013 by defendant No. 2 as their Special Power of Attorney. The equitable mortgage has been created in the year 2013. The Bank filed the Original Application for recovery of its dues in the year 2017. There is nothing on record as to what prevented the defendants' No. 8, 9, 17, 18, 19, 20 and 21 from taking those original documents back from the applicant Banks after a reasonable time of more than four years till present original application was by the applicant banks. Had the Bank been retaining the said documents illegally, the respondents could have taken action against it as per law. It is thus clear that the documents in question were deposited with the intention to create equitable mortgage.

Therefore, this plea from mouth of defendant No. 2 that equitable mortgage created on the basis of unregistered special power of attorney is not sustainable at law.

85. Moreover, the defendant No. 2, 7 to 12 and 16 to 22 being the mortgagor alongwith other defendants acknowledged their liability as on 31.01.2015 as described in Schedule 'A' to the 'Debtor-Creditor Agreement' Exh. A/168 as guarantors and mortgagor. They further agreed that securities and documents executed by them in favour of applicant banks shall hold good and available for the restructured debt.

86. Therefore, in view of the above, it is established on file that equitable mortgage is created by defendant no. 2 and 7 to 22 by deposit of their title deeds forwarded through letter of creation of equitable mortgage to secure initial 'Term loan' of Rs. 160 Crores and later on said equitable mortgage was extended to secure additional amount of Rs. 40 Crores granted by both the Banks in their Consortium Capacity. Therefore, intention of the defendant's no. 2, 7 to 22 is to deposit title deeds of their properties to secure 'Term loan' to be granted to defendant No. 1 Company and accordingly, 'Term loan' is granted to defendant No. 1 Company and none else. These defendants being mortgagor have acknowledged their liability and creation of security interest in Debtor-Creditor Agreement outstanding as on 31.01.2015 alongwith other defendants. It is specifically admitted in para No. 29 of reply to legal notice Exh. A/208 dated 19.01.2016 that more securities are created by way of mortgage in favour of consortium Banks besides prime security. Therefore, it is proved on record that defendant No. 2 and 7 to 22 have created a valid security interest in favour of both the applicant banks.

Issue No. (x)

87. Insofar as guarantees furnished by Defendant No. 5 and 6 are concerned, Learned Counsel for these defendants argued that defendant No. 5 furnished the guarantee for a purpose beyond the object of Limited Liability Partnership (LLP) and the Private limited Company; hence, it is ultra-vires to the object of the Company. The mere factum of ancillary power if any would not make the transactions intra-vires the company; since, both defendants No. 5 and 6 were incorporated for the purpose of conducting reality business. Accordingly, subject matter of alleged guarantee viz. the bid for an iron ore at Kudremukh port does not fall within the ambit of the object of the Company. Therefore, every person dealing with Company is deemed to have constructive notice of the object of the company.

88. Learned Counsel for defendant No. 5 & 6 has relied upon judgment passed by English Court of Appeals in case of Introductions Ltd Versus National Provincial Bank (1970) CH. 199 where in it was held that "a power or an object conferred on a company to borrow cannot mean something in the air. The borrowing is not an end in itself and must be for some purpose of the company

and as this borrowing was for an ultra vires purpose that is an end of the matter." He has further relied upon judgment in case of Ashburv Railway Carriage and Iron Company Ltd Versus Riche (1875) LR 7 HL 653.

89. Defendant No. 5 a Limited Liability Partnership firm passed its resolution Exh.A/53 authorising its designated partner Nishad Anthikkot or Mr. E.T Firoz to furnish corporate guarantee and create equitable mortgage of their immovable property namely 45.29 Ares in Survey No. 19/7A/1; 19/6A/1 and 19/8 of Edappally North village to the extent of Rs. 180 Crores in favour of applicant banks; and accordingly, Mr. E.T Firoz though covering letter Exh. A/51 executed Guarantee Agreement Exh. A/52 for an amount of Rs. 160 Crores in favour of applicant banks.

90. It would relevant here to refer to provision of Section 29 of the Limited Liability Partnership Act 2008 which is reproduced here as under:

"29. Holding out.-(1) Any person, who by words spoken or written or by conduct, represents himself, or knowingly permits himself to be represented to be a partner in a limited liability partnership is liable to any person who has on the faith of any such representation given credit to the limited liability partnership, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.

Provided that where any credit is received by the limited liability partnership as a result of such representation, the limited liability partnership shall, without prejudice to the liability of the person so representing himself or represented to be a partner, be liable to the extent of credit received by it or any financial benefit derived thereon.

91. Thus, the above referred proviso to Sub Section (1) to Section 29 of the Limited Liability Partnership Act provides that liability of the LLP shall be met out of the property of the LLP and LLP shall be liable for the acts of its designated partner. The partners of defendant no. 5 never raised any such objection regarding mismanagement of the LLP either at any time. The applicant banks issued various notices; however, no such objection has been raised in the written statement. Even otherwise, written statement is duly signed by the Mr. Nishad being authorised signatory; and therefore, he is estopped from raising any such contention.

92. Similarly, defendant No. 6 which is a private company through its Directors Mr. Nishad Anthikot and Mr. E. T. Firoz passed its Board Resolution Exh. A/55 to furnish corporate guarantee to the extent of Rs. 180 Crores and create equitable mortgage of their immovable property namely 46.95 Ares in TS/RS No. 20/8; 20/11; RS. No. 19/12 in Nellikode, Kozhikode District in favour of Canara Bank and Punjab National Bank to secure the loan advanced or to be advanced to the defendant No.1. It was also resolved that Nishad Anthikot or E.T. Firoz, Directors of the company shall sign and execute necessary documents on behalf of the company and generally to do all acts, deeds and things that may be necessary or

incidental. Defendant No. 5 and 6 being a juristic persona also waived their rights available to normal guarantors. Accordingly, a Corporate Guarantee Exh. A/54 was furnished for an amount of Rs.160 Crores to secure the loan advanced to defendant No. 1 by 'A Consortium Banks' i.e Applicant banks

93. It would be relevant here to refer to relevant provision of Indian Companies Act 1956. The power to borrower money is specified in by the memorandum and article of association of the company and Directors cannot go beyond such authority. If the Directors borrow beyond the power prescribed by the Memorandum of Association and Article of Association then the borrowing is considered as ultra-virus borrowings. However, Section 372A of Indian Companies Act 1956 as it was applicable then provide for inters corporate loans and investment. Section 372A provides that:-

(1) No company shall, directly or indirectly, (a) make any loan to any other body corporate ; (b) give any guarantee, or provide security, in connection with a loan made by any other person to, or to any other person by, anybody corporate ; and (c) acquire, by way of subscription, purchase or otherwise the securities of any other body corporate, exceeding sixty per cent of its paid-up share capital and free reserves, or one hundred per cent of its free reserves, whichever is more:

Provided that where the aggregate of the loans and investments so far made, the amounts for which guarantee or security so far provided to or in all other bodies corporate, along with the investment, loan, guarantee or security proposed to be made or given by the Board, exceeds the aforesaid limits, no investment or loan shall be made or guarantee shall be given or security shall be provided unless previously authorised by a special resolution passed in a general meeting.

Provided further that the Board may give guarantee, without being previously authorised by a special resolution, if, -

(a) a resolution is passed in the meeting of the Board authorising to give guarantee in accordance with the provisions of this section;

(b) there exists exceptional circumstances which prevent the company from obtaining previous authorisation by a special resolution passed in a general meeting for giving a guarantee ; and

(c) the resolution of the Board under clause (a) is confirmed within twelve months, in a general meeting of the company or the annual general meeting held immediately after passing of the Board's resolution, whichever is earlier:

Provided also that the notice of such resolution shall indicate clearly the specific limits, the particulars of the body corporate in which the investment is proposed to be made or loan or security or guarantee to be given, the purpose of the investment, loan or security or guarantee, specific sources of funding and such other details.

(8) Nothing contained in this section shall apply - (a) to any loan made, any guarantee given or any security provided or any investment made by -

(i) xxxxx

(ii) xxxxx

(iii) a private company, unless it is a subsidiary of a public company

94. Therefore, in view of the above, there is no such restriction in the Companies Act 1956 as it was applicable then to give guarantee by Private Limited Company in view of Sub Section (8) of Section 372A of the Companies Act 1956. Defendant no. 6 passed a resolution Exh. A/55 through its Director Mr. Nishad Anthikot and Mr. E. T. Firoz to furnish corporate guarantee and create equitable mortgage in favour of applicant banks to secure the loan advanced or to be advanced to defendant no. 1. The plea of defendants 5 & 6 that obtaining guarantee was a mere formality and hypothecated asset is available to wipe off entire liability does not absolve the guarantor as well as mortgagor from their liability towards the loan amount availed by defendant No. 1. It is settled law that guarantor cannot direct the creditor as to how and in which manner he has to recover its dues.

95. Therefore, it is proved on record that defendant No. 5 and 6 have furnished guarantee in favour 'A Bank Consortium' to secure the loan of Rs. 160 Crore granted to defendant No.1.

Issue No. (xi)

96. Insofar as mortgage created by defendant No. 5 is concerned, defendant No. 5 further vide resolution dated 28.08.2013 Exh. A/53 resolved to create equitable mortgage in favour of applicant banks over its property admeasuring 45.29 Ares comprising in revenue survey no. 19/7A/1, 19/6A/1, and 19/8 of Edappally North Village in favour of applicant banks for security of an amount of Rs. 180 Crores and consequently, defendant No.5 through its designated partner Mr. E.T Firoz vide letter Evidencing Creation of Equitable Mortgage dated 13.09.2013 Exh. A/78 created equitable mortgage of property described in Schedule 'G' of the present original application by deposit of title deeds Exh. A/79 and Exh. A/80. The said equitable mortgage has been created to secure credit facilities of Rs. 160 Crores and interest thereon granted to defendant No. 1.

97. It is pertinent to mention here that as per Exh. A/78, the name of applicant No. 1 bank is mentioned therein and name of consortium member Punjab National Bank is missing in the said document which is letter evidencing creation of equitable mortgage. However, as per Resolution of Defendant No. 5 Exh. A/53, it is resolved by its designated partners to create equitable mortgage over its property admeasuring 45.29 Ares comprising in revenue survey No. 19/7A/1, 19/6A/1, and 19/8 of Edappally North Village in favour of applicant banks. The relevant para of Exh. A/53 is reproduced here as under:

"The designated partners discussed and decided to give corporate guarantee and to create equitable mortgage of their immovable property of 45.29 Ares of land owned by the LLP situated at Survey No. 19/7A/1, 19/6A/1, & 19/8, Edappally North, Kanayannu Taluk, Ernkulam District to Canara Bank, Cherooty Road Branch, and Punjab National Bank, Bank Road, Calicut towards security for the credit facilities to the extent of Rs.180 Croresgranted/to be granted by the banks to M/s. ANNAM STEELS PRIVATE LIMITED." The equitable mortgage is also created to secure an amount of Rs. 160 Crores as evident from letter of evidencing equitable mortgage Exh.A/78.

98. Similarly, defendant No. 6 has also vide its Board resolution dated 13.08.2013 Exh.A/55 resolved to create equitable mortgage in favour of applicant banks over its property admeasuring 46.95 Ares comprising in revenue survey no. 20/8, 20/11, and 19/12 of Nellikode, Kozhikode Taluk of Kozhikode in favour of applicant banks for security of an amount of Rs. 180 (later on reduced to Rs.160 crores)Crores and consequently, defendant no. 6 through its Director Mr. E.T Firoz vide letter Evidencing Creation of Equitable Mortgage dated 13.09.2013 Exh. A/63 created equitable mortgage of property described in Schedule 'D' of the present original application by deposit of title deeds Exh. A/64, Exh. 65 and Exh. A/66. The said equitable mortgage has been created to secure credit facilities of Rs. 160 Crores and interest thereon granted to defendant no. 1.

99. Similarly, as per letter of evidencing creation of equitable mortgage Exh. A/63, the name of applicant no. 1 bank is mentioned therein and name of consortium member Punjab National Bank is missing in the said document. However, as per Resolution of Defendant no. 6 Exh. A/55, it is resolved by its Board to create equitable mortgage over its property admeasuring 46.95 Ares comprising in revenue survey no. 20/8, 20/11, and 19/12 of Nellikode, Kozhikode Taluk of Kozhikode in favour of applicant banks. The relevant para of Exh. A/55 is reproduced here as under:

"The board discussed and decided to give corporate guarantee and to create equitable mortgage of immovable property of property admeasuring 46.95 Ares land owned by the Company situated at TS/RS No: 20/8, 20/11, RS No. 19/12 of Nellikode Kozhikode Taluk, Kozhikode District to Canara Bank, Cherooty Road Branch, and Punjab National Bank, Bank Road, Calicut towards security for the credit facilities to the extent of Rs. 180 Crores granted/to be granted by the banks to M/s ANNAM STEELS PRIVATE LIMITED."

The equitable mortgage has also been created to secure an amount of Rs. 160 Crores as evident from letter of evidencing equitable mortgage Exh. A/63.

100. The requisite to create an equitable mortgage are firstly there is a debt, secondly deposit of title deeds and lastly an intention that deeds shall be security for the debt. Therefore, if all the three conditions are satisfied then it raises early presumption of creating security over properties by way of equitable mortgage.

101. It would be relevant here to refer to provision of Section 114 of the Indian Evidence Act which provides:

'Section 114. Court may presume existence of certain facts.- The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.'

102. Therefore, during the subsistence of a debt if the debtor hands over his title deeds to the creditor then an initial presumption could be drawn that the title deed was handed over to secure the debt. Section 114 of the Evidence Act empowers the court to presume the existence of any fact which it thinks likely to have happened. Of course, it is a mere presumption of fact and it is always open for the debtor to show otherwise. But until the contrary is shown, it could be presumed that the handing over of the title deed was with intend to create security over the same for the subsisting debt.

103. The true purport, spirit and import of a 'presumption', has been lucidly explained by the Hon'ble Apex Court in case of Sodhi Transport Company Versus State of Uttar Pradesh AIR 1986 SC 1099 'A presumption is not in itself evidence but only makes a prima facie case for a party in whose favour it exists. It is a rule concerning evidence. It indicates the person on whom the burden of proof lies. When presumption is conclusive, it obviates the production of any other evidence to dislodge the conclusion to be drawn on proof of certain facts. But when it is rebuttable it only points out the party on whom lies the duty of going forward with evidence on the fact presumed, and when that party has produced evidence fairly and reasonably tending to show that the real fact is not as presumed the purpose of presumption is over. Then the evidence will determine the true nature of the fact to be established. The rules of presumption are deducted from enlightened human knowledge and experience and are drawn from the connection, relation and coincide of facts, and circumstances.'

104. In this regard, it would also be appropriate to refer to the judgment delivered by the Hon'ble Apex Court in case titled as United Bank of India Ltd. Vs. Messrs Lekharam Sonaram and Co. & others, AIR 1965 SC 1591, wherein it was observed as under:-

"When the debtor deposit with the creditor title deeds of his property with intent to create a security the law implies a contract between the parties to create a mortgage and no registered instrument is required under S.59 as in other classes of mortgage. It is essential to bear in mind that the essence of a mortgage by deposit of title deeds is the actual handing over by a borrower to the lender of documents of title to immovable property with the intention that those documents shall constitute a security which will enable the creditor ultimately to recover the money which he has lent".

105. It has been proved on file that defendant No. 5 and 6 through their respective resolution authorised its designated partners and Directors to create

equitable mortgage over their respective properties mentioned in respective resolution Exh. A/53 and A/55 to secure the financial facility to be granted by the both the applicant banks to the extent of Rs.180 Crores (later on reduced to Rs. 160 crores). Even the letters evidencing creation of equitable mortgage clearly suggest that the title documents are being deposited for an amount of Rs. 160 Crores. Moreover, the charge for creation of equitable mortgage has been registered with Registrar of Company Chennai in Form No. 8 Exh. A/91 dated 11.10.2013 for an amount of Rs. 160 Crores and accordingly, Registrar of Company, Chennai has issued Certificate of Registration of Mortgage etc dated 11.10.2013 Exh. A/90 under Section 132 of the Companies Act 1956. The said charge has been created in favour of Canara Bank and pari passu charges with Punjab National Bank for consortium finance of Rs. 160 Crores. The clause 13(d) of the Exh. A/91 clearly mentions that equitable mortgage is for Canara Bank and Punjab National Bank. Thereafter, defendant No. 5 has extended equitable mortgage created earlier vide letter dated Exh.A/ 159 and defendant No. 6 has extended equitable mortgage created earlier vide letter Exh. A/154 to secure the amount of Rs. 200 Crores. The charge of creation of equitable mortgage was further modified in Register of Charge maintained with Registrar of Companies vide Exh. A/163 and Exh. A/164 respectively Certificate of Registration and Form No. 8 in favour of both the Banks. The defendants No. 5 and 6 alongwith other defendants acknowledged their liability as on 31.01.2015 as described in Schedule 'A' to the 'Debtor-Creditor Agreement' Exh.A/168 as guarantors and mortgagor. They further agreed that securities and documents executed by them in favour of applicant banks shall hold good and available for the restructured debt.

106. Moreover, the defendant No. 6 in its audited Balance Sheet Exh. A/210 clearly admitted that the Company has given a Corporate Guarantee in favour of the Canara Bank, Cherooty Road, Calicut and Punjab National Bank, Bank Road, Calicut to secure the consortium finance of Rs.160 Crores granted by the said banks to Annam Steels Private Limited. The said admission has not been shown to be withdrawn by the defendant no. 6 at any time.

107. It would be relevant here to reproduce Rule 12(5) of the Debt Recovery Tribunal (Procedure) Rule 1993 which provides as under:

"Where a defendant makes an admission of the full or part of the amount of debt due to a bank or financial institution, the Tribunal shall order such defendant to pay the amount, to the extent of the admission, by the applicant within a period of one month from the date of such order failing which the Tribunal may issue a certificate in accordance with section 19 of the Act to the extent of amount of debt due admitted by the defendant."

108. In case of Uttam Singh Duggal & Company Limited Versus Union Bank of India & Ors (2000) 7 SCC 120, it has been held by Hon'ble Apex Court that "admission are of many kinds; they may be considered as being on record as actual if they are either in the pleadings or in answer to interrogatories or

implied from the pleadings by non traversal. Secondly, as between parties by agreement or notice."

109. In case of Ultramasix System Private Limited Versus State Bank of India & Ors I(2008) BC 365, Hon'ble High Court of Bombay held that "we have no difficulty, therefore, in holding that statement contained in the Balance Sheet and profit and loss account of the petitioner Company would be an admission of liability, unless subsequent balance sheets were filed to show that either the amount have been paid or were not due and payable and/or any other material was produced to hold otherwise. That exercise was not done."

110. Therefore, in view of the facts of the present case and law applicable thereon, it is established on file that equitable mortgage is created by defendant no. 5 and 6 by deposit of title deeds forwarded through letter of creation of equitable mortgage to secure initial 'Term loan' of Rs. 160 Crores and later on said equitable mortgage was extended to secure additional amount of Rs. 40 Crores granted by both the Banks in their Consortium Capacity. Therefore, intention of the defendant's no. 5 and 6 is to deposit title deeds of their properties to secure 'Term loan' to be granted to defendant No. 1 Company and accordingly, 'Term loan' is granted to defendant No. 1 Company and none else. These defendants being mortgagor have acknowledged their liability and creation of security interest in Debtor-Creditor Agreement outstanding as on 31.01.2015 duly signed by their authorised signatory alongwith other defendants. The creation of equitable mortgage and its extension is not disputed by the defendants and rather, admitted in reply Exh. A/208 sent to legal notice dated 19.01.2016.

111. It is pertinent to mention here that property 'H' described in original application has already been acquired for Kochi Metro Rail Project and applicant banks have received an amount of Rs. Rs.35,91,72,323.00 (Rupees Thirty Five Crores Ninety One Lakh Seventy Two Thousands Three Hundred Twenty Three Only) from compensation awarded to defendant no. 5. Therefore, this property is no more available as security with applicant banks.

Issue No. (xii)

112. The amount outstanding in Term Loan account No. 0808763000001 maintained with applicant No. 1 bank as on 27.09.2015 on the date of NPA is Rs.49,27,46,111/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.5,82,52,297/- and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.66,72,015/-.The other charges claimed by the applicant bank in the said loan account is Rs.8,14,894/-. The defendants have remitted an amount of Rs.42,69,714/-after classification of the loan account as NPA. Therefore, balance liability in the said loan account as on 31.07.2016 is Rs.55,42,15,603/-. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/186 is placed on record to prove the claim amount. The true copy of calculation of unapplied and penal interest in the said account Exh. A/187 is also

placed on record.

113. Similarly the amount outstanding in Term Loanaccount No.0808773004656 maintained with applicant No. 1 bank as on 27.09.2015 on the date of NPA is Rs.13,81,53,880/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.1,76,09,153/- and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.19,80,322/. Therefore, total liability in the said loan account as on 31.07.2016 is Rs.15,77,43,355/-. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/188 is placed on record to prove the claim amount. The true copy of calculation of unapplied and penal interest in the said account Exh. A/189 is also placed on record.

114. The amount outstanding in deferred interest loan account No.0808747000001 maintained with applicant No. 1 bank as on 27.09.2015 on the date of NPA is Rs.3,02,99,713/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.38,59,756/- and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.4,34,389/-. Therefore, total liability in the said loan account as on 31.07.2016 is Rs.3,45,93,858/-. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/190 is placed on record to prove the claim amount. The true copies of calculation of unapplied and penal interest in the said account Exh. A/191 is also placed on record. Thus the total amount claimed by applicant No. 1 bank in all the three accounts is Rs.74,65,52,816/- outstanding as on 31.07.2016.

115. The amount outstanding in Term Loan account No. 425700IA00000015 maintained with applicant No. 2 bank as on 30.09.2015 on the date of NPA is Rs.66,64,98,968/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.8,56,53,372.21 and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.1,17,33,338.66. The other charges claimed by the applicant bank in the said loan account is Rs.4,86,168.80. The defendants have remitted an amount of Rs.48,13,255/- after classification of the loan account as NPA. Therefore, balance liability in the said loan account as on 31.07.2016 is Rs.75,95,58,592.67. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/192 is placed on record to prove the claim amount. The true copy of calculation of unapplied and penal interest in the said account Exh. A/193 is also placed on record. Applicant No. 2 bank has also placed on record Exh. A/194 to show detail of the bank charges debited in the account.

116. The amount outstanding in Term Loan account No. 425700IA00000024 maintained with applicant No. 2 bank as on 30.09.2015 on the date of NPA is Rs.8,28,04,711/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.1,06,75,185.50 and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.14,62,354.18. Therefore, total liability in the said loan account as on 31.07.2016 is Rs.9,49,42,250.68. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/195 is placed on record to prove the claim amount. The true copies of calculation of unapplied and penal interest in the said account Exh. A/196 is also placed on record.

117. The amount outstanding in deferred interest loan account No. 425700IA00000033 maintained with applicant No. 1 bank as on 30.09.2015 on the date of NPA is Rs.3,30,66,238/-. The unapplied interest from 27.09.2015 to 31.07.2016 is Rs.42,62,900.26 and penal interest charged from 27.09.2015 to 31.07.2016 is Rs.5,83,958.94. Therefore, total liability in the said loan account as on 31.07.2016 is Rs.3,79,13,097.20. The statement of account duly certified as per Bankers' Book Evidence Act Exh. A/197 is placed on record to prove the claim amount. The true copies of calculation of unapplied and penal interest in the said account Exh. A/198 is also placed on record. Thus the total amount claimed by applicant No. 2 bank in all the three accounts is Rs.89,24,13,940.55 outstanding as on 31.07.2016.Thus the claim of the applicant banks comes to an aggregate amount of Rs.163,89,66,756.54 outstanding as on 31.07.2016.

118. In so far as rate of interest charged by applicant bank is concerned, applicant bank has charged rate of interest as per terms and conditions of loan documents executed by the defendants as per rates applicable to the loan accounts in pursuance of guidelines issued by Reserve Bank of India from time to time and circular issued by Head office of the applicant banks. The applicant No. 1 bank has claimed interest @ 14.65% per annum with monthly rest and applicant No. 2 bank has claimed interest @ 14.60% per annum with monthly rest. The applicant banks have also charged penal interest @ 2% per annum over and above the prescribed rate of interest due to default committed by the defendant No. 1. It is stated by the applicant banks that no penal interest has been compounded or capitalised in the loan accounts. However, as per the provision of Section 19(20) of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 which is analogous to Section 34 of Civil Procedure of Code 1908, on filing of the suit/claim, the contract between the parties comes to an end and the Court/Tribunal has a discretion to award the same depending upon the circumstances of each case. Same principle has been laid down by the Hon'ble Apex Court in the case of Central Bank of India Vs. Ravindra & Others. Taking stock of all the circumstances and keeping in view that there is a drastic fall in rates of interest globally and domestically, I am of the opinion that interest of justice will be served if the interest at the rate of 14% per annum is awarded.

119. In the light of the above discussions, the Original Application deserves to be allowed.

O R D E R

1) I hereby allow this Original Application of the Applicant Banks and direct the defendants to pay to the applicant banks within 30 days from today, a sum of Rs.163,89,66,756.54 (Rupees One Hundred Sixty Three Crores, Eighty Nine Lakh, Sixty Six Thousands Seven Hundred Fifty Six and Paisa Fifty Four Only) alongwith simple interest on amount of Rs.161,61,00,378.76 (Rupees One Sixty One Crores Sixty One Lakh Three Hundred Seventy Eight and paisa Seventy Six only) at the rate of 14% p.a. from the date of filing of this O.A till the date of realization of dues with costs and expenses, after deducting an amount of

Rs.35,91,72,323.00 (Rupees Thirty Five Crores Ninety One Lakh Seventy Two Thousands Three Hundred Twenty Three Only) with 8 accrued interest thereon till date already deposited in 'no lien' account received from compensation awarded from acquisition of land described in Schedule 'H' of the original application,.

2) The applicant Banks shall be entitled to their proportionate share in the decretal amount as per their claim made in the Original Application with interest as awarded above.

3) In case of failure to deposit the said amount, the same shall be recovered from hypothecated properties described in Schedule 'R' of the original application and mortgaged properties described in Schedule 'A' to 'G' and 'I' to 'Q' attached to the original application.

4) In case of any shortfall, the same shall be recovered from the personal movable and immovable properties of the defendants.

5) Recovery Certificate is issued forthwith and is sent to Recovery Officer, Debts Recovery Tribunal-I, Ernakulam.

6) Applicant Banks are permitted to appropriate the amount of Rs.35,91,72,323.00 (Rupees Thirty Five Crores Ninety One Lakh Seventy Two Thousands Three Hundred Twenty Three Only) with accrued interest thereon as per their proportionate share in the said amount.

7) Registry of this Tribunal is hereby directed to issue the free copy of the order and sent to the both parties.

8) Any other application pending stands disposed of.

9) File be consigned to records.

Pronounced in Open Court.

Note: This judgment of mine consists of ninety four pages and each page has beenchecked and signed by me.