

**SHAM LAL MOHAN AGRICULTURE FARMS v. BANK OF INDIA, (2022-2)206 PLR 459, 2022 PLRonline 6064**

PUNJAB AND HARYANA HIGH COURT

Before: Mr. Justice M.S. Ramachandra and Mr. Justice Harminder Singh Madaan.

M/S. SHAM LAL MOHAN AGRICULTURE FARMS and another – Petitioners,

Versus

BANK OF INDIA – Respondent.

CWP No.18829 of 2020 (O&M)

**(i) Constitution of India, Article 226 – Almost 15 months after grant of the status quo order by this Court, we are of the opinion that it would be a travesty of justice to compel the petitioners to avail the alternative remedy before the Debt Recovery Tribunal by invoking Section 17 of the Act - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) - SARFAESI Act, 2002 . [Para 41]**

**(ii) Constitution of India, Article 226 – No such such principle of law that a High Court, in exercise of its jurisdiction under Art.226 of the Constitution of India cannot decide disputed questions of fact. [Para 43]**

**(iii) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 13 - It would be arbitrary and unreasonable on the part of the Bank to proceed against the plant, machinery and the buildings of the cold storage under the SARFAESI Act, 2002, on its plea of extension of the equitable mortgage given by petitioners on the cold storage for the term loan to the Crop Loan - Plea liable to be rejected . [Para 48]**

**(iv) Transfer of Property Act, Section 58(f) - For creation of a mortgage by deposit of title deeds the requirements are (a) a debt, (b) a deposit of title deeds, and (c) an intention that the deeds shall be security for the debt.**

[Para 52]

**(v) Bank - Loan - “attendance register” - An “attendance register” can at best only be evidence of attendance of a person to a premises on a particular date - Its contents can be taken as evidence, if at all, only on the aspect as to who attended that particular premises of the Bank on what day and not of anything else - Said Attendance register is not evidence of any “oral assent” by petitioners to the extension of equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit [Para 62, 63]**

Held, Term loan of Rs. 2.02 Crores taken by them on 18.08.2009 for construction of cold storage, they had hypothecated building, plant and machinery of the cold storage to be constructed – Said loan was cleared on 10.05.2016 – Bank pleaded ‘oral assent’ for creating of mortgage of this property in a subsequent loan – According to them, on 12.04.2013, Bank had sanctioned an enhancement of crop loan from Rs. 7 Crores to Rs. 9 Crores – The sanction letter does not mention such extension of the mortgage on the cold storage – Bank relies on an “attendance register” to prove the extension of the mortgage of the cold storage for the said facility also – Fact that the Bank is in possession of the title deeds of the land on which the cold storage was constructed, in our opinion, does not help the Bank because this happened when the term loan of Rs. 2.02 Crores was sanctioned on 18.08.2009 to the petitioners for the construction of the cold storage – Document which is the loan agreement dt. 18.08.2009 relating to the sanction of the said term loan of Rs. 2.02 Crores, cannot be accepted as evidence of extension of the said mortgage on 12.04.2013 for the Crop Loan – Statement in Attendance register that “*Purpose of Visit* – “to extend the equitable mortgage already created on L.F.3/67 etc in respect of immoveable property, agricultural land and/or structures and/or plant & equipment etc situated in ....” – Such a statement in an “attendance register” can not be evidence of extension of equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013.

Under the heading “Security” there is no mention of extension of equitable mortgage on the plant machinery and building of the cold storage. It is omitted. Since parties chose to reduce the contract of extension of Crop Loan facilities from Rs. 7 Crores to Rs. 9 Crores into writing, the implication to extend equitable mortgage on the plant, machinery, buildings of the cold storage to the Crop loan is excluded by this express bargain, and it will be the sole evidence of its terms. If the Bank were to take the statement in the attendance register as proof of extension of the equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013, such recital/document would require ‘registration’ under Sec.17 of the Registration Act,1908, and in the absence of the same, it cannot be held that there is an extension of such equitable mortgage over the plant, machinery and building of the cold storage for the Crop Loan .

**(vi) Bank - Loan - Mortgage - “oral assent” - Bank says there is “oral assent” for such extension, to get over the difficulty of not having any registered document evidencing extension - Any internal record of the Bank recording oral assent for such extension for enhancement of the Loan limits does not bind the petitioners being a unilateral document to which they did not subscribe their signatures - In the absence of evidence of the intention on part of petitioners to extend the equitable mortgage over plant, machinery and building of the cold storage to the Crop Loan, the retention of title deeds deposited earlier wrt another loan , sicne closed, at the time of taking the Crop Loan alone does not help the Bank - Reject the plea of the Bank that there was an extension of equitable mortgage by way of oral assent given by the petitioners of the plant machinery and buildings of the cold storage to the crop loan - Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 13.**

**[Para 71 to 74]**

**(vii) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 13 - Heading "Security" - Under which the Bank granted extension of Crop loan from Rs. 7 Crores to Rs. 9 Crores to the petitioners, there is no mention of extension of equitable mortgage on the plant machinery and building of the cold storage - It is omitted - Indicates that the parties chose to reduce the contract of extension of Crop Loan facilities from Rs. 7 Crores to Rs. 9 Crores into writing, the implication to extend equitable mortgage on the plant, machinery, buildings of the cold storage to the Crop loan is excluded by this express bargain. [Para 67]**

**(viii) Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), Section 13 - Bank visit - Monitoring loan - In fact if the Bank were to take the statement in the attendance register as proof of extension of the equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013, such recital/document would require 'registration' under Sec.17 of the Registration Act,1908, and in the absence of the same, it cannot be held that there is an extension of such equitable mortgage over the plant, machinery and building of the cold storage for the Crop loan - Registration Act, 1908 (16 of 1908).**

**[Para 68]**

Cases referred to:-

1. (2000)10 SCC 454, *Balak Ram v. State of Punjab*.
2. (2018-2)190 PLR 583 (SC), *ITC Ltd v. Blue Coast Hotels Ltd.*
3. AIR 2018 SCC 3540, *Indian Bank v. K.Pappireddiyar*.
4. 1989 Banking 234 (All), *Atma Ram Misra v Bank of India, Farrukhabad*.
5. 2012(22) RCR (Civil) 478 (Madras) *E.Purushthaman Gardens V. Authorised office, Indian Bank zone*
6. 1995 ISJ (Banking) 513 (DB) (Madras), *C. Rajagopal v. State Bank of Travancore*.
7. Law Finder DOC ID 922825 (DB) (Madras) *R. Arumugasamy v. United Bank of India*.
8. 1976 PLJ 533 (DB) 533 (DB), *Arvinder Kaur v. KC Manchanda*.
9. CWP No. 13647 of 2021 (P&H) (DB), decided on 19.08.2021, *Nandini Flour Mills v. Canara Bank*.
10. (2010)8 SCC 110, *Union of India v. Satyawati Tandon*.

11. (2018)3 SCC 85, *State Bank of Travancore v. Mathew K.C.*
12. (2004)3 SCC 553, *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*
13. (1969)3 SCC 769, *Gunwant Kaur v. Municipal Committee, Bhatinda.*
14. (1970)1 SCC 582, *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council.*
15. (1998)8 SCC 1, *Whirlpool Corpn. v. Registrar of Trade Marks.*
16. (2012)12 SCC 170, *Real Estate Agencies v. State of Goa.*
17. (2020)9 SCC 356, *Hari Krishna Mandir trust v. State of Maharashtra.*
18. Civil Appeal No. 317 of 2021 decided on 17.02.2021, *Unitech Ltd v. Telangana State Industrial Infrastructure Corporation (TSIIC).*
19. (1971)1 SCC 874, *Veeramachineni v. Andhra Bank.*
20. AIR 1950 SC 272, *Rachpal Maharaj v. Bhagwandas Daruka.*

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**M.S. Ramachandra Rao, J. - (Reserved on 15.03.2022 Date of Decision: 01.04.2022) -**  
The petitioner No.1 is a Partnership firm constituted on 11.01.2001 (Annexure R-3) dealing with Agricultural products and petitioner No.2 is one of its partners.

2. The 2002 /2005 KCC Loan (Crop Loan) The petitioner No.1 had availed a loan from the Bank of India (for short 'the Bank') of Rs. 90 lakhs on 03.02.2002 in the shape of agricultural loan (Kisan Cash Credit) against hypothecation of standing crops at Village Lambra, Jalandhar District. In order to further secure the loan, another parcel of agricultural land measuring 116 Kanal 13 Marla at the said village was mortgaged with the Bank. The said crop loan was availed for cultivation of potato upon the land owned by the petitioner No.1 as well as on other leased land taken by the petitioner in the adjoining area.
3. On 16.02.2002, petitioner No.1 availed an additional loan of Rs. 60 Lakhs enhancing the loan to Rs. 1.5 Crores, which was later enhanced to Rs. 3 Crores on 30.01.2005.
4. The 2009 Term Loan for construction of Cold Storage In 2009, petitioner No.1 decided to set up a cold storage plant as the extensive cultivation of potato was requiring storage and there was no other provision for storage in the neighbourhood.
5. So the petitioner No.1 approached the Bank, and on 18.08.2009, a loan of Rs. 2.02 Crores was sanctioned. For this loan, the primary security offered by the petitioner No.1 was hypothecation of building, plant and machinery which would be constructed out of the finance provided by the said Bank. The equitable mortgage of the land measuring 116 Kanal 17 Marla at Village Lambra, Jalandhar was extended as security.

*The enhancement of Crop Loan Limit in 2011/2013*

6. On 14.03.2011, the crop loan limit was extended to Rs. 7 Crores and the equitable mortgage already created on 116 Kanal 13 Marla at Lambra Village was extended.

7. On 12.04.2013, the respondent-Bank enhanced the crop loan limit to Rs. 9 Crore vide sanction letter (Annexure P-6) dt. 12.04.2013. In the said sanction letter Annexure P-6, it was mentioned that the security would be (a) hypothecation of standing crops of borrower on land owned/leased by the borrower and crop produced and stored in cold storage and (b) mortgage of agricultural land measuring 6 acres at Village Baroti, District Hoshiarpur and extension of equitable mortgage of agricultural land measuring 116 Kanal 13 Marla at Village Lambra.

8. The repayment of the Term Loan taken in 2009 in 2016

9. It is not in dispute that the loan of Rs. 2.02 Crores taken by the petitioners for construction of cold storage on 18.08.2009 was repaid completely and the said loan account was closed on 10.05.2016.

10. The proceedings initiated under the SARFAESI Act, 2002 against the petitioners

11. In 2018-19, according to the petitioners, they suffered losses and could not deposit the accrued interest in the crop loan account of Rs. 9 Crores.

12. On 11.08.2020, the respondent-Bank issued a notice under Section 13(2) of the SARFAESI Act, 2002 (hereinafter referred to as "the Act") demanding petitioners to pay Rs. 12,33,52,292/- with interest thereon. In this notice (Annexure P-8), it was mentioned that there was an equitable mortgage of land and building under cold storage including sheds and other construction on Acre 3.0347 along with entire plant and machinery situated at Village Lambra.

13. On 05.10.2020, petitioners submitted objections (Annexure P-9) to the said notice and inter alia contended that the cold storage plant and machinery were only mortgaged for the term loan of Rs. 2.02 Crores availed for construction of cold storage, which loan was cleared in its entirety, and that the cold storage was never mortgaged for the crop loan (KCC) account. They placed reliance on the letter (Annexure P-6) dt.12.04.2013 issued by the respondent enhancing the crop loan to Rs. 9 Crores and the absence of mention in the said letter of the extension of mortgage on plant, machinery and buildings of cold storage therein . It was, therefore, contended that the cold storage plant and machinery cannot be subject matter of any notice issued by the Bank under Section 13 of the Act.

14. On 15.10.2020, the Bank replied vide Annexure P-10 rejecting the said plea. It stated that the entire land was mortgaged to it including the equitable mortgage of land measuring Ac. 3.0347 and the building under the cold storage including sheds and other construction on this land alongwith entire plant and machinery for the KCC Limit of Rs. 9 Crores.

15. The respondent-Bank also issued notice dt.03.11.2020 under Section 14 of the Act to the petitioner.

16. Petitioners then applied to the respondent-Bank under the RTI Act, 2005 and Annexure P-11 set of documents were issued to them on 16.09.2020.

17. One of the documents furnished to the petitioners under Annexure P-11 was an unsigned document with the heading "Continuing oral assent in account of M/s Sham Lal Mohan Agriculture Farms". It was recorded:

"Janinder Kumar Son of Sh. Sham Lal Mohan called at the Bank today on 12th day of April, 2013 and orally assented to the Bank to continue to hold the title deeds of his properties, particulars of which are mentioned above as security not only for the existing limit of Rs. 700 Lakhs and term loan of Rs. 202 Lakhs, but also for additional crop CC limit of Rs. 200 Lakhs in all respects upon the terms and conditions set out in the oral assents....."

#### *The instant Writ Petition*

18. On 04.11.2020, petitioners filed this Writ Petition to quash notice dt. 11.08.2020 issued under Section 13(2) of the Act, reply dt.15.10.2020 and notice dt. 03.11.2020 issued under Section 14 of the Act.

19. The petitioners also sought a Writ of Prohibition restraining the respondent Bank from taking any coercive action qua the properties described in the notice dt.11.08.2020. It also sought an interim direction to the respondent to maintain status quo.

#### *Contentions of petitioners*

20. Petitioners contend that:

a) They have never given assent for extending the equitable mortgage given by them for the term loan taken for cold storage to the crop loan;

b) The Bank cannot rely upon an alleged oral consent given by the partners/petitioners' family members for extending the equitable mortgage given for the cold storage when the term loan was taken to the crop loan and seek to proceed against the said asset;

c) When the relations between the parties are governed by the written documents, oral evidence is statutorily excluded; thus, when on 12.04.2013, the petitioners had executed Annexure P-6 in which there is no mention of extension of mortgage over the cold storage, the Bank cannot contend that on the same day petitioners allegedly gave an oral consent for extension of the mortgage, which is contradicted by Annexure P-6.

d) A cold storage created on agricultural property is used for purposes subservient to agriculture i.e storage of crops; so it shall be treated as a building for the purposes and subservient to the process and purposes of agriculture itself, and it can be said that it is agriculture in nature. It is therefore exempt from being proceeded with under Sec.31(i) of

the Act.

21. Reliance is placed on decision of the Supreme court in *Balak Ram v. State of Punjab*<sup>1</sup> (2000) 10 SCC 454, *ITC Ltd v. Blue Coast Hotels Ltd*<sup>2</sup> (2018-2)190 PLR 583 (SC), AIR 2018 SC 3063, *Indian Bank v. K.Pappireddiyar and Another*,<sup>3</sup> AIR 2018 SC 3540 *Atma Ram Misra v Bank of India, Farrukhabad*,<sup>4</sup> 1989 ISJ BANKING 234 (Allahabad) *E.Purushthaman Gardens V. Authorised office, Indian Bank zone*<sup>5</sup> 2012(22)RCR Civil 478 (Madras).

#### *Events after filing of the Writ Petition*

22. Notice of motion was issued on 06.11.2020 for 12.11.2020 and the Bank was directed to file an affidavit with regard to its stand that the petitioners consented to create an equitable mortgage of the building of the cold storage including the plant and machinery towards the crop loan account already availed by the petitioners as the same was being vehemently contested by the petitioners.

23. After a short reply was filed, on 12.11.2020, further time till 21.12.2020 was granted to the Bank to file a written statement and in the meantime, the parties were directed to maintain status quo.

24. It was then adjourned from 21.12.2020 to 25.03.2021, and to 28.05.2021.

25. The Bank filed CM-6784-CWP-2021 on 04.05.2021 to vacate the status quo order granted on 12.11.2020.

26. It was listed on 13.8.2021, and notice was issued in the said application for 16.9.2021 along with the main case listed on the said day.

27. Thereafter, it was listed on 20.12.2021 and 25.01.2022, and finally heard on 15.03.2022 and orders were reserved.

#### *Contentions of the respondent-Bank*

28. In its written statement, the Bank contended that the cold storage is commercial infrastructure and is not connected with the agriculture because it generates commercial income; and that the question 'whether it is an integral part of the agricultural activity and so exempted under Section 31(i) of the Act or not?', has to be decided by the Debt Recovery Tribunal and not by this Court under Article 226 of the Constitution of India.

29. With regard to the plea of the petitioners that they did not agree for extension of mortgage of the cold storage for the crop loan, reference is made to (i) alleged oral assent of the petitioners, (ii) Annexure R-1 loan agreement dt. 18.08.2009 whereunder the Bank had sanctioned Rs. 2,05,00,000/- to the petitioners for construction of the cold storage, (iii) an entry in its register of loan securities (Annexure R-4) of the so called 'oral assent' of the borrowers for extension of the equitable mortgage on plant machinery and buildings of cold storage to the crop loan and (iv) an attendance register (Annexure R-5) which is signed by the Petitioner No.2 and other partners on 12.04.2013 mentioning under "purpose of visit"

column that they are visiting the Bank on that day to extend the equitable mortgage already created on the plant and equipment of the cold storage at the time of taking the term loan to the crop loan of Rs. 9 Crores.

30. It contends that a mortgage by deposit of title deeds creates a charge over the property whether or not there is any memorandum executed when there is an oral assent of the mortgagor for creation of equitable mortgage and the same is recorded in its records by the Bank. It is contended that when extension of mortgage is affected, a mortgagor visits the branch of the Bank for the purpose of extension and an oral assent is recorded when he signs the attendance register stating he attended the Bank for the purpose of the extension of the mortgage. It is contended no separate deed is required for creation of such mortgage.

31. It contends that the attendance register was signed by the partners of the petitioner no.1 firm on the day for the said purpose at the

*Branch of the Bank.*

32. It is contended that though the term loan related to the plant and machinery and cold storage was closed on 10.05.2016, the Bank continues to hold the title deeds of the land on which the cold storage was built and it can proceed against the said asset when the crop loan had turned a Non Performing Asset (NPA).

33. Counsel for the respondent-Bank placed reliance on the *C. Rajagopal v. State Bank of Travancore*,<sup>6</sup> 1995 ISJ (Banking) 513 (DB) (Madras) *R. Arumugasamy v. United Bank of India*,<sup>7</sup> Law Finder DOC ID 922825 (DB) (Madras) *Arvinder Kaur v. KC Manchanda*,<sup>8</sup> 1976 PLJ 533 (DB) (Punjab) and *Nandini Flour Mills v. Canara Bank*,<sup>9</sup> Order dated 19.08.2021 in CWP No. 13647 of 2021 (P&H) (DB).

*Consideration by the Court*

34. The following questions arise for consideration by this Court:

(a) Whether the Writ Petition ought not to be entertained by this Court in view of the alternative remedy available to the petitioners under Sec.17 of the SARFAESI Act,2002 before the Debt Recovery tribunal?

(b) "Whether, in the facts and circumstances of the case, there can be said to be an extension of the equitable mortgage on the plant machinery and buildings of the cold storage to the KCC limit (Crop Loan) availed by the petitioner No.1?"

(c) "Whether the cold storage activity is also agricultural activity or a commercial activity?"

*Question (a) :*

35. No doubt in certain decisions of the Supreme Court, the Supreme Court had held that High Courts ought not to ordinarily entertain Writ Petitions when the parties can avail

remedy under Sec.17 of the SARFAESI Act, 2002. (*Union of India v. Satyawati Tandon*, <sup>10</sup> (2010) 8 SCC 110 *State Bank of Travancore v. Mathew K.C.*, <sup>11</sup> (2018) 3 SCC 85)

36. We may point out that this Writ Petition had been filed on 04.11.2020 and there was an interim order granted by this Court as long back as on 12.11.2020.

37. During this period and even in 2021, there was a second and later third waves of the Covid-19 pandemic and there was limited functioning of Courts and DRTs.

38. This High Court, in PIL No.77 of 2021, on 28.4.2021 had extended all interim orders granted by it by way of a general order till 30 June 2021, and later this was extended from time to time till 07.03.2022.

39. Also the term of the Presiding Officers had expired in some DRTs including the DRTs at Chandigarh and for a long time there were no Presiding Officers. So the Supreme Court passed orders requesting the High Courts to entertain Writ Petitions in regard to actions initiated under the SARFAESI Act,2002 during the above period.

40. Though an interim order of status-quo was granted in the instant case on 12.11.2020, CM-6784-CWP-2021 to vacate the said order was filed on 04.05.2021, 6 months later. Notice in the said CM was issued for 16.09.2021.

41. At this point of time, today i.e in March 2022, almost 15 months after grant of the status quo order by this Court, we are of the opinion that it would be a travesty of justice to compel the petitioners to avail the alternative remedy before the Debt Recovery Tribunal by invoking Section 17 of the Act.

42. The counsel for respondent Bank then sought to contend that disputed questions of fact cannot be adjudicated in a Writ Petition filed under Art.226 of the Constitution of India.

43. There is, in our opinion, no such principle of law that a High Court, in exercise of its jurisdiction under Art.226 of the Constitution of India cannot decide disputed questions of fact.

44. In *ABL International Ltd. v. Export Credit Guarantee Corpn. of India Ltd.*, <sup>12</sup> (2004) 3 SCC 553, at page 567 the Supreme court declared that the High Court is not deprived of jurisdiction to entertain a petition under Art.226 of the Constitution of India merely because in considering the petitioner's right to relief, questions of fact may fall to be determined; and that in a petition under Article 226, the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it held, discretionary, and that the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. It declared:

“ 16. In this view of ours, we are supported by a judgment of this Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatinda*, <sup>13</sup> (1969) 3 SCC 769 where dealing with

such a situation of disputed questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)

“14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine.

The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner’s right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the appellants it is clear that in proof of a large number of allegations the appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification under Section 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit.”

17. The above judgment of Gunwant Kaur finds support from another judgment of this Court in the case of *Century Spg. and Mfg. Co. Ltd. v. Ulhasnagar Municipal Council*,<sup>14</sup> (1970)1 SCC 582 wherein this Court held:

(SCC P. 587, Para 13)

“Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.”

18. This observation of the Court was made while negating a contention advanced on

behalf of the respondent Municipality which contended that the petition filed by the appellant Company therein apparently raised questions of fact which argument of the Municipality was accepted by the High Court holding that such disputed questions of fact cannot be tried in the exercise of the extraordinary jurisdiction under Article 226 of the Constitution. But this Court held otherwise.

19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of Gunwant Kaur this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact."

....

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whirlpool Corp. v. Registrar of Trade Marks*<sup>15</sup> (1998) 8 SCC 1.) And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction."

(emphasis supplied)

45. This principle was reiterated in *Real Estate Agencies v. State of Goa*,<sup>16</sup> (2012) 12 SCC 170 *Hari Krishna Mandir trust v. State of Maharashtra*,<sup>17</sup> (2020) 9 SCC 356 and *Unitech Ltd v. Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors*,<sup>18</sup> Civil Appeal No.317 of 2021 dt.17.2.2021.

46. Also in this Writ Petition, we only propose to consider the question (b) i.e., "whether, in the facts and circumstances of the case, there can be said to be an extension of the equitable mortgage on the plant machinery and buildings of the cold storage to the KCC limit (Crop Loan) availed by the petitioner No.1?".

47. Since, the decision on the above point did not in our opinion require any elaborate trial and could be decided on the pleas raised by the parties and the material placed before us, we do not deem it necessary to relegate the petitioners to the alternative remedy under Section 17 of the Act.

48. Also it would be arbitrary and unreasonable on the part of the Bank to proceed against the plant, machinery and the buildings of the cold storage under the SARFAESI Act, 2002, if its plea of extension of the equitable mortgage given by petitioners on the cold storage for the term loan to the Crop Loan is liable to be rejected by us.

49. We do not propose to go into the question "whether the cold storage activity is also agricultural activity or a commercial activity?" since as we shall presently point out, it is unnecessary for us to decide it.

50. Question (a) is decided accordingly in favor of the petitioners and against the respondent.

*Question (b):*

51. We shall now consider the question :

"whether, in the facts and circumstances of the case, there can be said to be an extension of the equitable mortgage on the plant machinery and buildings of the cold storage to the KCC limit (Crop Loan) availed by the petitioner No.1?"

Section 58(f) of the Transfer of Property Act deals with a "mortgage by deposit of title deeds". It states:

" Section 58. 'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed' defined :

(a) A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee; the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any), by which the transfer is effected is called a mortgage-deed.

....

(f) Mortgage by deposit of title-deeds.—Where a person in any of the following towns,

namely, the towns of Calcutta, Madras 6[and Bombay], 7[\*\*\*] and in any other 8town which the 9[State Government concerned] may, by notification in the Official Gazette, specify in this behalf, delivers to a creditor or his agent documents of title to immovable property, with intent to create a security thereon, the transaction is called a mortgage by deposit of title-deeds."

52. Thus, for creation of a mortgage by deposit of title deeds the requirements are (a) a debt, (b) a deposit of title deeds, and (c) an intention that the deeds shall be security for the debt.

53. In the instant case, the petitioners themselves admit that for the term loan of Rs. 2.02 Crores taken by them on 18.08.2009 for construction of cold storage, they had hypothecated building, plant and machinery of the cold storage to be constructed by the said funds on 3.0347 acres in Village Lambra. But it is their case that the said loan was cleared on 10.05.2016, which is not disputed by the respondent-Bank.

54. Petitioners contend that they never extended the said mortgage on the cold storage for the crop loan limit extension to Rs. 9 Crores and the so called 'oral assent' pleaded by the Bank in that regard cannot be believed.

55. According to them, on 12.04.2013, vide Annexure P-6, the Bank had sanctioned to them an enhancement of crop loan from Rs. 7 Crores to Rs. 9 Crores, and if the plea of the Bank is correct, in the sanction letter itself such extension of the mortgage on the cold storage would have been mentioned; and when the said document does not mention the said fact, the Bank cannot rely on an "attendance register" (Annexure R-5) to prove the extension of the mortgage of the cold storage for the said facility also.

56. Undoubtedly, the burden to prove that the petitioners extended the mortgage on the cold storage to the crop loan of Rs. 9 Crores is on the respondent-Bank.

57. The fact that the Bank is in possession of the title deeds of the land on which the cold storage was constructed, in our opinion, does not help the Bank because this happened when the term loan of Rs. 2.02 Crores was sanctioned on 18.08.2009 to the petitioners for the construction of the cold storage.

58. So, Annexure R-1 document which is the loan agreement dt. 18.08.2009 relating to the sanction of the said term loan of Rs. 2.02 Crores, cannot be accepted as evidence of extension of the said mortgage on 12.04.2013 for the Crop Loan.

60. No doubt the attendance register Annexure R-5 contains in col.5 the words:

#### *Purpose of Visit*

"to extend the equitable mortgage already created on L.F.3/67 etc in respect of immoveable property, agricultural land and/or structures and/or plant & equipment etc situated in village Lambra and Bhagwanpur Teh and Distt. Jalandhar to secure not only the existing cash credit (Crop Loan) limit of rs.700 lakhs and term loan of Rs.202 lakhs but also an additional cash credit ( crop loan) limit of Rs. 200 lakhs sanctioned by ZLCC on 23/3/2013 to M/s Sham Lal Mohan Agl. Farm"; and in Col.6 signatures of petitioner no.2 and other partners are found.

61. We do not accept the plea of the Bank that such a statement in an "attendance register" can be evidence of extension of equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013.

62. An "attendance register" can at best only be evidence of attendance of a person to a

premises on a particular date. Its contents can be taken as evidence, if at all, only on the aspect as to who attended that particular premises of the Bank on what day and not of anything else.

63. So we hold that the said Attendance register is not evidence of any "oral assent" by petitioners to the extension of equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013 In *Veeramachineni v. Andhra Bank*,<sup>19</sup> (1971) 1 SCC 874 the plaintiff Bank instituted as suit against all the defendants for the recovery of a loan advanced to 5th defendant. The suit was decreed and affirmed by the High Court. The basis of the decree against the 4th defendant (appellant before the Supreme Court) was a letter written by him to the Bank demanding certain amount of loan by deposit of title deeds. The plaintiff treated the letter and the deposit of title deeds as a mortgage to secure earlier suit debts. The 4<sup>th</sup> defendant contended that the deposit of title deeds was to secure the loan given to him subsequently and appealed against the decree.

64. The Supreme Court allowed the appeal by the 4th defendant holding that the very deposit of title deeds with Bank created an equitable mortgage only for the loan applied for by the appellant; the oral and documentary evidence unmistakably proved that the title deeds are security only for the appellant's loan; Ex.A6 ( the letter addressed by the 4<sup>th</sup> defendant to the Andhra Bank) which is a printed form containing the terms of deposit of the documents of title covering the bargain of the Appellant and defendants 1 to 3, is inadmissible for want of registration under Sec.17 of the Registration Act,1908 and the plaintiff cannot maintain the suit on the basis of Ex.A6. It declared:

"17. From the recitals of Ex. A-6, it is seen that that memorandum in question was intended to "put on record" the terms already agreed upon. That being the case, the document cannot be considered as a contract entered into between the parties. If the parties intended that it should embody the contract between them, it would have been necessary to register the same under Section 17 of the Registration Act, 1908. As observed by this Court in *Rachpal Maharaj v. Bhagwandas Daruka*,<sup>20</sup> AIR 1950 SC 272 that when a debtor deposits with the creditor titledeeds 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 Section 59 as in other forms of mortgage. But if the parties choose to reduce the contract to writing, the implication is excluded by their express bargain, and the document will be the sole evidence of its terms. In such a case the deposit and the document both form integral parts of the transaction and are essential ingredients in the creation of the mortgage. As the deposit alone is not intended to create the charge and the document, which constitutes the bargain regarding the security, is also necessary and operates to create the charge in conjunction with the deposit, it requires registration under Section 17 of the Indian Registration Act, 1908, as a non-testamentary instrument, creating an interest in immovable property, where the value of such property is "one hundred rupees and upwards". Therefore the crucial question is: Did the parties intend to reduce their bargain regarding the deposit of the title-deeds to the form of a document? If so, the document requires registration. If on the other hand, its proper construction and the surrounding circumstances lead to the conclusion that the parties did not intend to do so, then, there

being no express bargain, the contract to create the mortgage arises by implication of the law from the deposit itself with the requisite intention, and the document being merely evidential does not require registration.

18. The law relating to the nature of a memorandum filed along with the deposit of title-deeds or one filed thereafter has come up for consideration by Courts in this country as well as in England. The decisions on the subject are numerous. We have already referred to the decision of this Court in Rachpal Maharaj case. ...”

65. In the instant case, under the heading “Security” in Annexure 1 to Annexure P-6 letter dt. 12.04.2013 (under which the Bank granted extension of Crop loan from Rs. 7 Crores to Rs. 9 Crores to the petitioners), there is no mention of extension of equitable mortgage on the plant machinery and building of the cold storage. It is omitted.

66. In the said Annexure 1 to Annexure P-6, only (i) hypothecation of the crop stored in the cold storage and (ii) legal mortgage of Agl. Land measuring 6 Ac at Village Baroti & extension of equitable mortgage on Agl Land measuring 116 K 13 M at village Lambra & Bhagwanpur Dt. Jalandhar are mentioned, but not the extension of equitable mortgage on the plant, machinery, buildings of the cold storage.

67. Since Annexure P-6 dt.12.4.2013 indicates that the parties chose to reduce the contract of extension of Crop Loan facilities from Rs. 7 Crores to Rs. 9 Crores into writing, the implication to extend equitable mortgage on the plant, machinery, buildings of the cold storage to the Crop loan is excluded by this express bargain, and Annexure P-6 will be the sole evidence of its terms.

68. In fact if the Bank were to take the statement in the attendance register Annexure R-5 as proof of extension of the equitable mortgage over the plant machinery and building of the cold storage in favour of the Bank for enhancing the crop loan limit to Rs. 9 Crores on 12.04.2013, such recital/document would require ‘registration’ under Sec.17 of the Registration Act,1908, and in the absence of the same, it cannot be held that there is an extension of such equitable mortgage over the plant, machinery and building of the cold storage for the Crop Loan .

69. This is because the retention of the documents of title of the cold storage by the Bank after the term loan of Rs. 2.02 Crores is cleared by the petitioners did not automatically extend the said equitable mortgage on 12.6.2013 to the enhancement of the Crop loan limits from Rs. 7 Crores to Rs. 9 Crores. Such retention in conjunction with the writing in the Attendance register together can only create the interest on plant, machinery and buildings of the cold storage to the crop loan provided such writing is contained in a registered deed registered under Sec.17 of the Registration Act, 1908.

*Without registration, it is absolutely nothing at all.*

70. That was why cleverly, the Bank says there is “oral assent” for such extension, to get over the difficulty of not having any registered document evidencing extension.

71. Any internal record of the Bank such as Annexure R-4 recording oral assent for such extension for enhancement of the Crop Loan limits to Rs. 9 Cr, does not bind the petitioners being a unilateral document to which they did not subscribe their signatures.

72. In the absence of evidence of the intention on part of petitioners to extend the equitable mortgage over plant, machinery and building of the cold storage to the Crop Loan, the retention of title deeds deposited in 2009 at the time of taking the Crop Loan alone does not help the Bank.

73. We, therefore, reject the plea of the Bank that there was an extension of equitable mortgage by way of oral assent given by the petitioners of the plant machinery and buildings of the cold storage to the crop loan.

74. In the decisions cited by the respondent Bank on basis of evidence on record, a finding has been recorded that there was an intention to create security by deposit of title deeds for the loan advanced by the Banks in question.

75. The facts are otherwise in the instant case. In the instant case, we have held that there was no extension of equitable mortgage over the plant, machinery and buildings to the crop loan advanced to petitioners by the respondent Bank.

76. Question (b) is answered accordingly in favor of the petitioners.

*Question (c):*

In view of the finding given by us on Question (b), there is no need for this Court to decide question (c) i.e., "Whether the cold storage activity is also agricultural activity or a commercial activity?".

77. No other point is canvassed before us.

#### *CONCLUSION*

78. For the aforesaid reasons, the Writ Petition is allowed in part; and the notices dt. 11.08.2020, reply dt. 15.10.2020 and notice dt. 03.11.2020 issued by the respondent-Bank with regard to initiation of proceedings against the plant, machinery and building of the cold storage of the petitioners located in acres 3.0347 in Village Lambra, District Jalandhar only, are set aside.

No costs.

**Sd/- Harminder Singh Madaan, J.**

R.M.S.

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*Petition allowed.*