

**IN THE COURT OF THE CIVIL JUDGE (J. D.)
BHUBANESWAR, DISTRICT- KHURDA.**

Present : **Ms. Sujata Priyambada Swain,
Civil Judge(Jr.Divn.),
Bhubaneswar, Dist-Khurda.**

C.S No. 150/07

1. Gopeswar Behera, aged about 52 yrs,
S/o- Sri Bhaskar Chandra Behera,
Flat No.202, Kumuda Towers,
Surya Nagar, Bhubaneswar-3.
2. Bhaskar Sahu, Aged about 50 yrs,
S/o-Sri Bauri Bandhu Sahu,
Flat No.203, Kumuda Towers,
Surya Nagar, Bhubaneswar-3.
3. Deepak Pati, aged about 55 yrs,
S/o-Golakha Pati, Flat No.201,
Kumuda Towers, Surya Nagar, Bhubaneswar-3.
4. Sumy Saraf Aged about 36yrs,
D/o-Bira Kishore Saraf, Flat No.201,
Kumuda Towers, Surya Nagar, Bhubaneswar-3.
5. Joachim Sabha Sundar aged about 50 yrs,
S/o-Late Tabia Sabha Sundar,
Flat No.003,Kumuda Towers,
Surya Nagar ,Bhubaneswar-3.Plaintiffs

Versus

1. Orissa Rural Housing and Development Corporation Ltd.,
A Government of Orissa enterprises represented through,
Its Managing Director, Having it is registered office At-3rd,
Floor, Ashoka Market Building Station Bazar,
PS-Kharavela Nagar, Bhubaneswar, Dist-Khurda.
2. M/s.Raj Laxmi Promoters Pvt. Ltd.,
Represented by its Managing Director,
Sri Santanu Kumar Pattnaik,
At-A/180, Saheed Nagar, Bhubaneswar,
PS-Saheed Nagar, Dist-Khurda.
3. Sri Birendra Kumar Singh aged about 52 yrs,
S/o-Late KumudaChandra Singh,
Of Hindol, PO/PS-Hindol, Dist-Dhenkanal,
At present Kumuda Towers, Surya Nagar,
Unit-7, Bhubaneswar-3.Defendants

Counsel for the plaintiffs :M/s. B. Mohanty & his Associates,
Advocate BBSR
Counsel for the defendants :M/s.J. K. Mohapatra & his Associates,
Advocate BBSR
Date of hearing of Argument :16.04.14
Date of delivery of Judgment :23.04.14

J U D G E M E N T

1. The plaintiffs have filed the present suit for declaration that the mortgage created by defendant no.2 and defendant no.3 in favour of defendant no.1(Bank) and the notice dated.12.03.07 purporting to be Under Rule 8 (1) of SARFAESI Act, is not binding on the plaintiffs; permanent injunction against defendant no.1 from enforcing the mortgage created by defendant no.2 and 3 affecting the land and flats described in the schedule "A" of the plaint; and for injunction against defendant no.1 from interfering with the plaintiff's title and possession in respect of schedule "A" flats and land and other reliefs.

2. The plaint averments in brief are as follows:
The suit schedule property constitutes flat nos.202, 203, 002, 201 and 003 which are part of Kumuda Towers over suit schedule plot no.101 corresponding to Hal plot no.22 Hal Khata no.163/51 of area Ac 0.248 decimals at Surya Nagar Unit-7, Bhubaneswar-3, in which the plaintiffs have proportionate impartible interest. The plot over which the apartment originally stood belongs to the defendant no.3 Birendra Kumar Singh of Hindol . The apartment consists of 16 flats belonging to different land owners. All the flat owners are joint owners of the

land on which the apartment stood. The plaintiffs are affected by the mortgage created by defendant no.2 in favour of defendant no.1 and the authority of defendant no.1 to acquire the apartment under SARFAESI Act. The original owner defendant no.3 had proposed to erect the apartment with the assistance of promoter firm M/s. Rajlaxmi Promoters Pvt. Ltd, defendant no.2 for arranging customers willing to purchase proportionate impartible share in the land and then construct their own flats at their own cost. The present plaintiffs and other customers had purchased their respective shares in the land and have constructed their flats at their own cost. Under the apartment construction system the owner of the land is to enter into an agreement with the customers to sale proportionate share in land; simultaneously, in the same agreement the land owner permits the customers to construct their respective flats even before the actual sale of the land. In the same agreement the land owner also authorises the customer to incur loan from financial institutions by offering land as security. The nature of transaction i.e., permitting the customers to construct their flats and obtain loan on the security of land unmistakably indicates that the agreement is irrevocable. There are 16 completed flats in the apartment; out of which 4 flats belong to the land owners; and the remaining 12 flat owners have entered into an agreement with the land owner. The promoter defendant no.2 has under taken to accomplish the work of construction of the different flat owners according to their distinct choices. The promoters are also required to enter into separate agreement in the land or flat constructed by them. M/s. Rajalaxmi Promoter, the defendant no.1 is the agent (promoter) who undertook to construct the flats of the plaintiffs and other customers. Usually, the original estimated cost of the house gets enhanced in

course of construction and the customers have to pay additional sum to the promoter. In the present case the plaintiffs first entered into the required agreement with defendant no.3 and then with their construction agent and promoter (defendant no.2). After all these agreements the land owner and promoter have no right or authority to encumber the land and building. After construction of their respective flats, the flat owners have got their sale deeds registered and have become full owners of their respective flats.

The dates of agreements of the plaintiffs with the land owner and promoter are as follows:

(a) Gopeswar Behera the plaintiff no.1 in respect of flat no.202 became party to -

- i) An agreement with land owner on 5.10.99.
- ii) An agreement with promoter on 5.10.99.
- iii) Execution of a registered sale deed on 24.1.01.

(b) Bhaskar Sahu the plaintiff No.2 in respect of flat no.203 became party to -

- (i) An agreement with land owner on 22.9.99
- (ii) An agreement with Promoter on 22.9.99
- (iii) Execution of a registered sale deed on 5.12.03

(c) Deepak Pati the plaintiff no.3 in respect of flat no.002 became party to -

- (i) An agreement with the land owner on 14.10.99
- (ii) An agreement with the promoter on 14.10.99
- (iii) Execution of a registered sale deed on 25.10.2000

(d) Sumy Saraf the plaintiff no.4 in respect of flat no.201 became party to -

- (i) An agreement with the land owner on 10.09.99
- (ii) An agreement with the promoter on 10.09.99

- (iii) Execution of a registered sale deed on 14.08.2002
- (e) Joachim Sobha Sundar the plaintiff no.5 in respect of the flat no.003 became party to -
 - (i) An agreement with land owner on 5.10.99
 - (ii) An agreement with promoter on 5.10.99
 - (iii) Execution of a registered sale deed 15.03.2002

After the plaintiffs entered into the said agreements with the landowner and the promoter- it seems that the landowner and the promoter have colluded together and have mortgaged the entire apartment in favour of defendant no.1; and seem to have obtained a huge loan on the basis of such mortgage without the knowledge of the flat owners. The so called mortgage is a result of collusion between landowners and the promoters to defraud the customers who have paid the price of land and the cost of construction. To meet the construction charges the plaintiffs have obtained loan from SBI, Canada Bank and PNB respectively on security of their proportionate impartible share in land and the flats proposed to be constructed. The mortgage created by defendant no.3 and 2 in favour of defendant no.1 is not binding on the plaintiffs. In exercise of the powers conferred under SARFAESI Act, the defendant no.1 issued notice on 17.9.2004 to the promoter defendant no.2, recalling the loan and asking the promoter – Lonee to repay the loan forthwith. The promoter defendant no.2 challenged the notice in WP (c) No.3315/05. The plaintiffs came to know about the notice and the writ when the defendant no.1 approached the flat owners asking them to pay the loan amount proportionately or in alternative to vacate their flats. The defendant no.1 is threatening that on their failure to pay loan it will take possession of their flats forcibly. The plaintiffs therefore filed an application before the Hon'ble Court

that the promoter had no authority to offer the flats in the apartment as security for the loan incurred by him. During pendency of WP (c) no.3315/05, defendant no.2 was directed by the Hon'ble High Court to make interim payment so that the defendant no.1 might not take any coercive action in pursuance to the notice. Without complying with the said order defendant no.2 withdrew the writ. Then the defendant no.1 started demanding for payment from the flat owners threatening forcible dispossession. The plaintiffs therefore filed WP (c) No.6903/05. The Hon'ble Court dismissed the writ application giving liberty to the plaintiffs to seek their remedy in the appropriate Civil Court. The order was passed on 13.12.05. The promoter defendant no.2 impressed the plaintiffs that he would take care of defendant no.1's demand. But all of a sudden on 12.3.07 the defendant no.1 hung a notice in front of the apartment Kumuda Towers purporting to be possession notice u/s.8 (1) of SARFAESI Act. The plaintiffs are staying in their respective flats and are in no way connected with the loan transaction between the promoter and the corporation. The promoter or the land owner were not competent to create any encumbrance in respect of the flats of the plaintiffs. In the Hon'ble High Court the defendant no.1 did not challenge the title of the plaintiffs. The cause of action for the suit arose when defendant no.2 and 3 entered into their respective agreements with the plaintiffs, and the dates on which the defendant no.3 sold proportionate impartible share in schedule "A" to the plaintiffs and on 17.09.04 when defendant no.1 issued notice to defendant no.2 recalling the loan, on 13.12.05 when WP (c) no.6903/05 was dismissed, on 12.3.07 when defendant no.1 proclaimed by notice that it had taken possession of the apartment Kumuda Towers. Under the circumstances, the suit may be

decreed.

3. The defendant no.1 has made his appearance and filed his written statement. The averments made in the written statement in brief are as follows: The suit for declaration and permanent injunction is not maintainable; the suit is hit U/O 2 Rule 3 of CPC as several causes of action have been united in one suit.

The defendant no.1 is a company owned by Govt. of Odisha, registered under Companies Act, 1956 for financing rural and urban housing in the year 1994. The defendant no.1 procures funds from the State Govt, National Housing Bank (NHB), HUDCO and Govt. of India and manages funds of public by advancing loans. The suit is not maintainable as the auction of the defendant no.1 under SARFAESI Act is challenged and Section 34 of the said act is a bar to the jurisdiction of the Civil Court. The land which has already been mortgaged in favour of defendant no.1 on the strength of one registered power of attorney cannot be sold later to anybody unless, such land is released from defendant no.1. Therefore, the sale deeds alleged to have been executed in favour of the plaintiffs are invalid, illegal and void. The defendant no.2, the builder by taking power of attorney constructed the flats. The defendant no.2 has submitted encumbrance certificate of the land at the time of mortgage. The agreements and sale deeds in between the plaintiffs and defendant no.2 and 3 are result of an after thought. As per registered power of attorney in between the defendant no.2 and the defendant no.3, the promoter/builder can sale transfer and assign the various constructed areas except the owner share. Without obtaining clearance from the present defendant no.1, sale and mortgage of the property is illegal and void. It is asserted that construction of the flats is completed by the defendant no.2 by taking financial assistance from

defendant no.1. The averments in para 3 and 4 of the plaint concerning agreement with the landowner for construction of flats, agreement with the promoter for construction and execution of registered sale deeds in favour of the plaintiffs after construction – are denied. It is asserted that the plaintiffs should have ascertained regarding the status of land before the sale deeds were executed between them and the defendant no.2 and 3. The present defendant no.1 has the authority to recover outstanding dues from the defendant no.2 on the basis of mortgage by defendant no.2 on behalf of defendant no.3. It is denied that after entering into an agreement with the plaintiffs, the defendant no.2 and 3 colluded to mortgage the entire apartment in favour of defendant no.1. It is asserted that the mortgage was made much prior to the execution of the sale deeds in favor of the plaintiffs. It is admitted that defendant no.1 issued notice on 17.9.04 to defendant no.2 recalling the loan. It is admitted that defendant no.2 had challenged the said notice in WP (c) No.3315/05 before the Hon'ble High Court and an interim order was passed subject to payment of Rs.20 lakhs on installment ; but as the same amount was not paid the interim order was vacated. It is admitted that the plaintiffs have filed WP (c) No.6903/05 which was dismissed. It is denied that the writ application was dismissed giving liberty to the plaintiffs to seek remedy in the Civil Court. It is asserted that the defendant no.1 has taken possession of Kumuda Towers on 9.6.05 under the provisions of Rule 8(1) of SARFAESI Act. It is denied that the defendant no.2 and 3 are not competent to mortgage the apartment and the mortgage is not binding on the plaintiffs. It is asserted that the plaintiffs have no title over the land and the flats. The construction was not made by the plaintiffs. The defendant no.2 has completed the project by taking financial

assistance from the defendant no.1. The suit is under valued and the Court has no jurisdiction to entertain the suit.

4. The defendants no.2 and 3 have made their appearance and have filed their WS. The averments in the WS in brief are as follows: The defendant no.2 is a builder/promoter firm namely, M/s Rajalaxmi Promoter Pvt. Ltd. During 1999 the defendant no.3 had approached defendant no.2 for construction of apartment on the suit land and had executed an agreement on 18.6.99 with defendant no.3 to develop, construct and promote the apartment among the intended customers. The present suit has been filed by five different customers whose flats are supposed to be auctioned by defendant no.1 for non-payment of outstanding dues to defendant no.1 which ought to have been paid by defendant no.2. It is submitted by defendant no.2 that he had availed loan from defendant no.1 ; due to cyclone his construction work was delayed and the interest on the loan amount aggravated due to non-delivery of apartment in time. Subsequently, he had approached defendant no.1 for settlement of dues and defendant no.1 had no legal authority to evict the plaintiffs under SARFAESI Act as they have already paid their dues to the satisfaction of defendant no.2 and 3. The defendant no.2 has filed a suit in the Court of Civil Judge (Sr. Divn.), Bhubaneswar challenging the arbitrary imposition of interest at compound rate. The defendant no.1 is not a secured creditor as defined u/s.5(c) of the Banking Regulation Act, nor a financial institution as defined U/s.4 (a) of the company Act, 1956 and 2 (m) of Banking Regulation Act 1949 as on the date of release of Company loan. Therefore, charging of interest at compound rate is unauthorized and illegal. Hence, defendant no.1 is not authorized to take recourse to Section 13 (2)of the SARFAESI Act. Defendant no.1 is not a registered money lender under

Odisha Money Lending Act ; the plaintiffs have entered into agreements with the land owner first and then with the construction agent defendant no.1. Para 4, 5 and 6 of the plaint concerning agreement of the plaintiffs with defendant no.2 and 3, dates of the agreements entered into and execution of registered sale deeds in favour of the plaintiffs are admitted. It is denied that the defendant no.2 and 3 had colluded to mortgage the entire apartment in favour of defendant no.1; it is further denied that the defendant no.2 and 3 had colluded to defraud their customers. It is admitted that WP (c) No.3315/05 was filed by defendant no.2 and order for interim payment was made. It is stated that defendant no.2 had made representation to defendant no.1 for interest concession. Defendant no.2 was forced to file CS No.461/06 in the Court of CJ (SD), Bhubaneswar for interest concession. It is asserted that the plaintiffs have already obtained interim relief from the Hon'ble Court restraining the defendant no.1 from taking any coercive action. It is submitted that the plaintiffs are bonafide owners of their respective flats purchased by them and therefore, auction by defendant no.1 is illegal.

5. In view of the above pleadings of both the parties, the following issues have been framed for adjudication.

Issues

- I) Whether the suit is maintainable?
- ii) Whether there is any cause of action to file the suit?
- iii) Whether the plaintiffs are entitled to a relief of declaration that the mortgage created by defendant no.2 and 3 in encumbering the land and flats described in schedule "A" and the notice dtd.12.3.07 U/s.8(1) of Security Interest (Enforcement) Rules,2002 are not binding on the plaintiffs and the defendant no.1 is not entitled to enforce the

mortgage against the plaintiffs and their property?

- iv) Whether the plaintiffs are entitled to a relief of permanent injunction against defendant no.1 from enforcing the mortgage created by defendant no.2 and 3 in favour of defendant no.1 affecting the land and flats described in schedule "A"?
 - iv) Whether the plaintiffs are entitled to a decree of permanent injunction against defendant no.1 from interfering with the plaintiffs title and possession in respect of their land and flats?
 - v) Whether the jurisdiction of Civil Court is barred in view of Sec.34 of the SARFAESI Act?
 - vi) To what other relief (relief's) are the plaintiffs entitled?
6. In order to substantiate his case the plaintiffs have examined five numbers of witnesses and have proved seventy three numbers of documents on their behalf. On the other hand the defendants have examined two numbers of witnesses and have not proved any documents on their behalf.

7. **Findings**

Issue No.(i) and (vi)

For the sake of convenience issue no.(i) and (vi) shall be taken up for consideration first as the other issues are based on whether the Civil Court has jurisdiction to deal with the matter.

Issue numbers (I) and (vi)

The question relating to jurisdiction depends upon facts and circumstances of the case – based on which it can be determined as to whether the Civil Court's Jurisdiction can be invoked or not.

- l) An evaluation of the oral evidences adduced reveals as follows:

PW 1 who is the plaintiff no.1 reiterates the plaint averments concerning the suit land; the apartment consisting of 16 flats; defendant no.3 proposing to erect the apartment with the assistance of defendant no.2; the apartment having 16 flats, 4 belonging to the landowner and 12 to the flat owners who entered into an agreement with the land owner; the plaintiffs entering into an agreement with the promoter defendant no.2 for construction of their flats; their entering into an agreement with defendant no.3 first and then with the construction agent defendant no.2; execution of RSDs in their favour after construction of the flats. PW 1 states that he had entered into the following agreements - land agreement, construction agreement with promoter; and then registered sale deed was executed. PW 1 states that he has filed certificate of SBI indicating submission of original documents including registered sale deed, certificate indicating advancing of loan and money receipts showing payment of money to defendant no.2. PW 1 reiterates the plaint averments concerning collusion between defendant no.2 and 3 and asserts that there was no necessity of securing loan from defendant no.1 as the customers have paid the price of land and the cost of construction. PW 1 reiterates the plaint averments concerning notice by defendant no.1 on 17.09.04, WP (c) No.3315/05; the plaintiffs' application for intervention before the Hon'ble Court; defendant no.1 demanding payment from the flat owners; WP (c) No.6903/05 and dismissal of the same with liberty to the plaintiffs to seek remedy in the Civil Court; defendant no.1 hanging possession notice on the apartment KumudaTowers on 12.3.07; the promoter and land owner not being competent to create encumbrance in respect of KumudaTowers. PW 1 states that defendant no.1 cannot question their title as he did not

challenge such title in the Hon'ble Court.

PW 1 proves the letter dtd.1.10.04 of SBI, Industrial Estate Branch, BBSR, as Ext.1; letter dated.25.09.07 as Ext.2; land agreement dated.5.10.99 as Ext.3; construction agreement dated.5.10.99 as Ext.4; certified copy of RSD No.454 dated.24.1.01 as Ext.5; the money receipts (12 in number) as Ext.6 to 6/l ; certified copy of order sheets in WP (c) No.6903/05 as Ext.7; certified copy of final order in WP (c) No.6903/05 dated.12.12.05 as Ext.8; the possession notice issued by defendant no.1 dated.12.3.07 as Ext.9.

PW 2 who is the plaintiff no.2 reiterates the plaint averments and corroborates the evidences of plaintiff no.1, PW 1. PW2 reiterates the plaint averments concerning the suit land; the apartment consisting of 16 flats; defendant no.3 proposing to erect the apartment with the assistance of defendant no.2; the apartment having 16 flats, 4 belonging to the landowner and 12 to the flat owners who entered into agreements with the land owner; the plaintiffs entering into an agreement with the promoter defendant no.2 for construction of their flats; their entering into respective agreements with defendant no.3 first and then with the construction agent, defendant no.2; execution of RSDs in their favour after construction of the flats . PW 2 states that he had entered into the following agreements - land agreement, construction agreement with promoter; and then registered sale deed was executed. PW 2 states that he has filed certificate of Canara Bank, Rourkela indicating submission of original documents including registered sale deed, letter dated 2-12-2002 indicating sanction of loan in his favour and money receipts showing payment of money to defendant no.2. PW 2 reiterates the plaint averments concerning collusion between defendant no.2 and 3 and asserts that there was no necessity

of securing loan from defendant no.1 as the customers have paid the price of land and the cost of construction. PW 2 reiterates the plaint averments concerning notice by defendant no.1 on 17.09.04, WP (c) No.3315/05; the plaintiffs' application for intervention before the Hon'ble Court; defendant no.1 demanding payment from the flat owners; WP (c) No.6903/05 and dismissal of the same with liberty to the plaintiffs to seek remedy in the Civil Court; defendant no.1 hanging possession notice on the apartment Kumuda Towers on 12.3.07; the promoter and land owner not being competent to create encumbrance in respect of Kumuda Towers. PW 2 states that defendant no.1 cannot question their title as he did not challenge such title in the Hon'ble Court.

PW 2 proves the certificate of Canada Bank dated.11.10.07 as Ext.10; the certificate of Canada Bank dated.1.12.02 as Ext.11; an agreement with M/S Rajalaxmi Promoters Pvt. Ltd., dated 22.9.99 as Ext.12; the agreement for construction of flats dtd.22.9.99 as Ext.13; the certified copy of RSD no.8698 dtd.5.12.03 as Ext.14; the money receipts in separate sheets as Ext.15 to 15/f.

PW 3 who is the plaintiff no.5 reiterates the plaint averments and corroborates the evidences of PW 1 and 2. PW3 reiterates the plaint averments concerning the suit land; the apartment consisting of 16 flats; defendant no.3 proposing to erect the apartment with the assistance of defendant no.2; the apartment having 16 flats, 4 belonging to the landowner and 12 to the flat owners who entered into an agreement with the land owner; the plaintiffs entering into an agreement with the promoter defendant no.2 for construction of their flats; their entering into an agreement with defendant no.3 first and then with the construction agent defendant no.2; execution of RSDs

in their favour after construction of the flats. PW 3 states that he had entered into the following agreements - land agreement, construction agreement with promoter; and then registered sale deed was executed. PW 3 states that he has filed certificate of SBI, BBSR, RCE campus indicating submission of original documents including registered sale deed, certificate indicating advancing of loan and money receipts shown payment of money to defendant no.2. PW 3 reiterates the plaint averments concerning collusion between defendant no.2 and 3 and asserts that there was no necessity of securing loan from defendant no.1 as the customers have paid the price of land and the cost of construction. PW 3 reiterates the plaint averments concerning notice by defendant no.1 on 17.09.04, WP (c) No.3315/05; the plaintiffs' application for intervention before the Hon'ble Court; defendant no.1 demanding payment from the flat owners; WP (c) No.6903/05 and dismissal of the same with liberty to the plaintiffs to seek remedy in the Civil Court; defendant no.1 hanging possession notice on the apartment KumudaTowers on 12.3.07; the promoter and land owner not being competent to create encumbrance in respect of KumudaTowers. PW 3 states that defendant no.1 cannot question their title as he did not challenge such title in the Hon'ble Court.

PW 3 proves the letter dated 26.9.07 issued by SBI, RCE Campus Branch, Bhubaneswar as Ext.16; the certificate letter dated 1.2.13 by SBI, RCE Campus, Branch, Bhubaneswar as Ext.17; the land agreement dated 5.10.99 between himself and M/S Rajlaxmi Promoters Pvt. Ltd., as power of attorney holder of Birendra Kumar Singh as Ext.18; the construction agreement dated 5.10.99 as Ext.19; the certified copy of RSD No.1923 dated 14.3.02 as Ext.20; money receipts (15 in number) in

respect of payment in favour of M/s Rajlaxmi Promoters Pvt. Ltd., as Ext.21 to 21/n.

PW 4 who is the father of Sumy Saraf, the plaintiff no.4 states that he is deposing on behalf of his daughter who is ill, as he is acquainted with the facts of this case and is looking after this case on behalf of his daughter. PW 4 further states that he has direct knowledge concerning execution of agreement and registration of sale deeds in respect of property involved in present dispute as well as payment of money to defendant no.2. He is acquainted with the signature of his daughter. PW 4, was present at the time of execution and registration of the documents, has paid all the money to the landowner and construction agent at different times on behalf of his daughter who is staying outside the state. PW 4 corroborates the evidences of PW 1, 2 and 3 and reiterates the plaint averments concerning the suit land; the apartment consisting of 16 flats; defendant no.3 proposing to erect the apartment with the assistance of defendant no.2; the apartment having 16 flats, 4 belonging to the landowner and 12 to the flat owners who entered into an agreement with the land owner; the plaintiffs entering into an agreement with the promoter defendant no.2 for construction of their flats; their entering into an agreement with defendant no.3 first and then with the construction agent defendant no.2; execution of RSDs in their favour after construction of the flats. PW 4 states that his daughter had entered into the following agreements - land agreement, construction agreement with promoter; and then registered sale deed was executed. PW 4 states that he has filed the said deeds and money receipts showing payment to defendant 2. PW 4 reiterates the plaint averments concerning collusion between defendant no.2 and 3 and asserts that there was no necessity

of securing loan from defendant no.1 as the customers have paid the price of land and the cost of construction. PW 4 reiterates the plaint averments concerning notice by defendant no.1 on 17.09.04, WP (c) No.3315/05; the plaintiffs' application for intervention before the Hon'ble Court; defendant no.1 demanding payment from the flat owners; WP (c) No.6903/05 and dismissal of the same with liberty to the plaintiffs to seek remedy in the Civil Court; defendant no.1 hanging possession notice on the apartment KumudaTowers on 12.3.07; the promoter and land owner not being competent to create encumbrance in respect of KumudaTowers. PW 1 states that defendant no.1 cannot question their title as he did not challenge such title in the Hon'ble Court.

PW 4 proves the agreement dated 10.9.99 as Ext.22; construction agreement with defendant no.2 as Ext.23; RSD No.6032 dated.14.8.02 as Ext.24; the signature of the plaintiff no.4 daughter of PW 4 with which he is acquainted as Ext.24/a ; the signature of the power of attorney holder who signed in the presence of PW 4 as Ext.24/b ; the money receipts issued by defendant no.2 as Ext.25 to 25/g.

PW 5 who is the plaintiff no.3 reiterates the plaint averments and corroborates the evidences of PW 1, 2, 3 and 4 concerning the suit land ; the apartment consisting of 16 flats; defendant no.3 proposing to erect the apartment with the assistance of defendant no.2; the apartment having 16 flats, 4 belonging to the landowner and 12 to the flat owners who entered into an agreement with the land owner; the plaintiffs entering into an agreement with the promoter defendant no.2 for construction of their flats; their entering into an agreement with defendant no.3 first and then with the construction agent defendant no.2; execution of RSDs in their favour after

construction of the flats. PW 5 states that he had entered into the following agreements - land agreement, construction agreement with promoter; and then registered sale deed was executed. PW 5 states that he has filed certificate of PNB, Bapujinagar indicating submission of original documents including registered sale deed and original money receipts issued by defendant 2. PW 5 reiterates the plaint averments concerning collusion between defendant no.2 and 3 and asserts that there was no necessity of securing loan from defendant no.1 as the customers have paid the price of land and the cost of construction. PW 5 reiterates the plaint averments concerning notice by defendant no.1 on 17.09.04, WP (c) No.3315/05; the plaintiffs' application for intervention before the Hon'ble Court; defendant no.1 demanding payment from the flat owners; WP (c) No.6903/05 and dismissal of the same with liberty to the plaintiffs to seek remedy in the Civil Court; defendant no.1 hanging possession notice on the apartment KumudaTowers on 12.3.07; the promoter and land owner not being competent to create encumbrance in respect of KumudaTowers. PW 5 states that defendant no.1 cannot question their title as he did not challenge such title in the Hon'ble Court.

PW 5 proves the forwarding letter issued by PNB dated 1.2.13 as Ext.26; the agreement for land between himself and defendant no.3 as Ext.27; the construction agreement dated 22.3.2000 as Ext.28; the certified copy of RSD no.5906 dated 25.10.2000 as Ext.29; the certified copy of money receipts (4 in numbers) by Senior Manager PNB as Ext.30 to 30/c respectively.

DW 1 who is the defendant no.2 states that he knows all the plaintiffs who are his customers and sold flat nos.202, 203,

002, 201, 003 to the plaintiffs and received sale consideration on behalf of M/S Rajlaxmi Promoters Pvt. Ltd., from each of the plaintiffs towards their respective flats and land are delivered possession to them. He being the power of attorney holder of Birendra Kumar Singh executed agreement and sale deeds with the plaintiffs. The land owner defendant no.3 has got two flats in Kumuda Towers as his proportionate share and put the same as security mortgage before ORHDC (defendant no.1) and therefore, the flats allotted to the plaintiffs are not secured assets given by him (DW.1) to ORHDC. While sanctioning loan the defendant no.1 ORHDC, never questioned him nor questioned the land owner about mortgage as they knew that the loan has been required for construction of apartment and should be allotted to different purchasers including the plaintiffs. The mortgage created by him (DW.1) in favour of the defendant no.1 was to the extent of two nos of flat only and not the entire apartment and land over which the apartment is erected. He (DW.1) being the GPA Holder of the land owner executed and registered five different sale deeds in favour of the plaintiffs and with others and delivered possession to them and the plaintiffs are in peaceful possession of their respective plots. To bridge the gap between the receipt of money from customers and payments towards construction, he (DW.1) took loan from ORHDC and is paying the loan on installment basis. There is no collusion between him and the landowner (B. K. Singh). He has repaid all most all the loan to ORHDC.

DW 2 who is defendant no.3 states that he knows defendant no.2 and the plaintiffs. He was the land owner where the Kumuda Towers stands. He had executed a power of attorney in favour of defendant no.2 for construction of apartment and accordingly agreement was executed between

himself and defendant no.2. The plaintiffs and other customers were arranged by defendant no.2 and defendant no.2 invested money to construct the flats and defendant no.2 was engaged by the plaintiffs for construction of their flats. He (DW 2) got 28% of the total construction as his proportionate share as per the agreement. Defendant no.2 denies signing on any consent letter to mortgage his landed property. The plaintiffs and other customers paid their consideration for the proposed flats to defendant 2. In order to harass him and the flat owners, OHRDC has initiated proceedings against him and affixed notice on the flats.

II) An evaluation of the documentary evidences reveals as follows:

Ext.1 is the certificate issued by Branch Manager SBI, Bhubaneswar, I.E. Branch to the effect that Gopeswar Behera (Plaintiff no.1) has availed Housing Loan for construction of flat no.202, KumudaTower, Plot no.101, Surya Nagar Unit-7, Bhubaneswar; it is further, stated that Gopeswar Behera has deposited his sale deed in original in order to create equitable mortgage.

Ext. 2 is a document concerning sanctioning of Rupees Eight lakhs as Housing Loan to Gopeswar Behera by SBI, Bhubaneswar, I.E. Branch.

Ext.3 is land agreement between Rajalaxmi Promoters Pvt. Ltd. and Gopeswar Behera dated 5.10.99. Rajalaxmi Promoters is represented by Santanu Kumar Pattanaik who is the power of attorney holder on behalf of Birendra Kumar Singh (Defendant no.3). In the said agreement it is stated that Birendra Kumar Singh has absolute indefeasible proprietary right over Hal khata no.163/51, plot no.22. Some relevant recitals of the agreement reveals as follows: Gopeswar Behera was interested to

purchase impartible proportionate undivided interest in land in question for construction of a flat in Kumada Tower. The first Party i.e., Rajalaxmi Promoters agreed to sale impartible proportionate undivided share for consideration of Rs fifty one thousand forty eight (Rs.51,048); the second party was to pay an earnest of rupees ten thousand (Rs.10,000) to acquire impartible proportionate undivided share at the time of execution of agreement between him and the owner and the balance of rupees forty one thousand forty eight was payable by Gopeswar Behera to the owner on or before registration. The second party will have the right to construct and acquire flat no.202 in second floor Block-A, having a super built area of 1418 sq. feet. The second party shall have to enter into a separate agreement with the builder simultaneously with the execution of the agreement conferring power and authority upon the builder to construct a unit on his behalf on payment of construction cost as mutually agreed upon. The first party Rajlaxmi Promoters shall not have the obligation to execute sale conveyance in favour of Gopeswar Behera till payment of full construction cost to the builder. The owner shall not have any right over the unit to be constructed by the party of the second part through the builder in the event the second party (Gopeswar Behera) pays the total consideration amount to the first party. And the second party shall have exclusive right title and interest over his unit together with common areas.

Ext.4 is the construction agreement dated 5.10.99 between Rajlaxmi Promoters and Gopeswar Behera. Thus, Ext.4 has been executed between the power of attorney holder of the owner vide Ext 3 and Gopeswar Behera on the same day as Ext.3. The recitals of the said agreement reveal as follows: Hal Khata no.163/51 plot no.22 under Mouza-Surya Nagar of area

Ac 0.246 decimals is the exclusive and absolute property of Birendra Kumar Singh. The purchaser had approached the proposed builder/developer (first party) to construct the apartment in question and had verified and accepted the building plan sanctioned by BDA. The built up area of flat no.202, A type on second floor is 1418 sq. feet and the amount to be paid by the purchaser towards construction cost is rupees nine lakh thirteen thousand two hundred thirty six. In clause 5 it is stated that in the event the purchaser avails loan from any financial institution the loan amount if sanctioned shall be paid by the financial institution directly to the first party/builder. In clause 8 it is stated that upon completion of construction of the apartment and receipt of entire construction cost for the unit as well as common areas and facilities, the builder shall execute a document in writing delivering possession. In page 15 the payment scheduled is stated including- the payment to be made at the time of booking, 1st, 2nd, 3rd, 4th, to 10th installments.

Ext.5 is the certified copy of registered sale deed bearing no 454 dated 24.1.01. The vendor is Birendra Kumar Singh represented through his GPA holder M/s Rajalaxmi Promoters Pvt. Ltd., represented by its Managing Director Santanu Kumar Pattanaik. The vendee is Gopeswar Behera (plaintiff no.1). The schedule of property sold constitutes an area of 416.07 sq. feet out of Ac 0.246 decimals of plot no.22, khata no.163/51. In the recitals of the said deed it is stated that the vendor had got approved building plan from BDA for construction of apartments and the vendee shall develop the premises in accordance with the rules of BDA and BMC so far as his undivided proportionate share and interest is concerned together with the other purchasers of similar interest at his own cost expenses and responsibility. It is declared that the concerned property is

free from all encumbrance, litigations, disputes, liens, attachments and charges. The vendee has paid full sale price prior to the execution of sale deed and the receipt of the same is acknowledged and admitted by the vendor.

Ext.6 to 6/l are receipts of various amounts by Rajalaxmi Promoters Pvt. Ltd., from Gopeswar Behera, the plaintiff no.1 in respect of flat no.202, Kumada Towers purporting to be towards booking amounts and installments.

Ext.7 is the certified copy of order sheet in WP(C) No.6903/05. The present plaintiffs and the defendants are the parties. OP 1 (present defendant no.1) is directed not to take any coercive action against the petitioners (present plaintiffs) who are the owners of flat nos.002, 003, 201, 202 and 203 of the apartment of Kumada Towers, Surya Nagar, Bhubaneswar.

Ext.8 is the certified copy of WP(C) No.6903/05. The present plaintiffs are the petitioners and the present defendants are the Ops. It has been held by the Hon'ble Court that in WP(C) No.3315/05 the promoter M/s. Rajalaxmi Promoters Pvt. Ltd., has challenged the action of the Ops and Rajalaxmi Promoters was directed to deposit a sum of Rs.20,00,000 (twenty lakh) and it was directed that on deposit of the same no coercive action shall be taken against the petitioner U/s.13 (4) of SARFAESI Act. It has been held by the Hon'ble Court that *"But the aforesaid order has not been complied with and ultimately the writ application was withdrawn on 20.05.2005 giving an option to the O.P. No.1 to file a contempt application xxxxxx When the promoter itself against whom notice U/s.13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act was issued, has withdrawn the writ petition, the present writ petition at the behest of the residents/owners of the flats of the apartment "Kumadaa Tower",*

impugning the self-same notice issued to the Promoter, which was challenged in the earlier writ petition, is not maintainable.” It has also been observed that *“The writ petition has full of disputed facts and cannot be decided in a proceeding under Article 226 of the Constitution.”*

Ext.9 is the possession notice under rule-8 (1) of SARFAESI Act by Odisha Rural Housing and Development Corporation Limited. It is stated in the recitals of Ext.9 that a demand notice dtd.17.09.04 was issued upon the borrower M/s. Raj Laxmi Promoters Pvt. Ltd to repay the amount mentioned in the notice being Rs.67,02,385 (sixtyseven lakhs two thousand three hundred eighty five). In the column meant for the description of the immovable property the following is written *“ All the part and parcel of the property consisting of M/s. Rajlaxmi Promoters Pvt. Ltd.”, Kumuda Towers”, Hal Khata No.163/51, Plot No.22, Area Ac 0.246 decimals, Mouza- Suryanagar, Bhubaneswar, Dist-Khurda. [Flats No- 002, 003, 201, 202, 203]”*

Ext.10 is the certificate issued by Canara Bank Rourkela that Bhaskar Sahoo has availed Housing Loan for purchase of flat no.203, Kumuda Towers plot no.101, Surya Nagar, Unit-7 Bhubaneswar-3.

Ext.11 is the sanction memorandum concerning Housing Loan to Bhaskar Sahoo (plaintiff no.2) in respect of an amount of Rs.9,80,000 (Nine lakh eighty thousand).

Ext.12 is the land agreement dated 22.09.99 between M/s. Raj laxmi Promoters Pvt. Ltd. Represented thorough its M.D. Santanu Kumar Pattanaik , power of attorney holder on behalf of Birendra Kumar Singh and Bhaskar Sahoo (plaintiff no.2). In the recitals of the said deed it is stated that that Birendra Kumar Singh has absolute indefeasible proprietary

right over Hal khata no.163/51, plot no.22. Some relevant recitals of the agreement reveals as follows: Bhaskar Sahu was interested to purchase impartible proportionate undivided interest in land in question for construction of a flat in Kumuda Tower. The first Party i.e, Rajalaxmi Promoters agreed to sale impartible proportionate undivided share for consideration of Rs eighty five thousand (Rs.85,000); the second party was to pay an earnest of rupees ten thousand (Rs.10,000) to acquire impartible proportionate undivided share at the time of execution of agreement between him and the owner and the balance of rupees seventy-five thousand was payable by Bhaskar Sahu to the owner on or before registration. The second party will have the right to construct and acquire flat no.201 in second floor Block-4, having a super built area of 1317 sq. feet. The second party shall have to enter into a separate agreement with the builder simultaneously with the execution of the agreement conferring power and authority upon the builder to construct a unit on his behalf on payment of construction cost as mutually agreed upon. The first party Rajlaxmi Promoters shall not have the obligation to execute sale conveyance in favour of Bhaskar Sahoo till payment of full construction cost to the builder. The owner shall not have any right over the unit to be constructed by the party of the second part through the builder in the event the second party (Bhaskar Sahoo) pays the total consideration amount to the first party. And the second party shall have exclusive right title and interest over his unit together with common areas.

Ext.13 is a construction agreement dated 22.09.1999 between Rajlaxmi Promoters Pvt. Ltd., represented through its M.D. Santanu Kumar Pattanaik as the builder and Bhaskar Sahoo as the prospective purchaser. Thus, Ext.13 has been

executed between the power of attorney holder of the owner vide Ext 12 and Bhaskar Sahoo on the same day as Ext12. The recitals of the said agreement reveal as follows: Hal Khata no.163/51, plot- 22, Mouza-Surya Nagar is the exclusive and absolute property of Birendra Kumar Singh. The purchaser had approached the proposed builder/developer (first party) to construct the apartment in question and had verified and accepted the building plan sanctioned by BDA. The built up area of flat no.203, on second floor, type-4 is 1317 sq. feet and the amount to be paid by the purchaser towards construction cost is rupees ten lakh sixty thousand . In clause 5 it is stated that in the event the purchaser avails loan from any financial institution the loan amount if sanctioned shall be paid by the financial institution directly to the first party/builder. In clause 8 it is stated that upon completion of construction of the apartment and receipt of entire construction cost for the unit as well as common areas and facilities, the builder shall execute a document in writing delivering possession. In page 12 the payment scheduled is stated including- the payment to be made at the time of booking 1st, 2nd, 3rd, 4th, to 10th installments.

Ext.14 is the certified copy of RSD no 8608 Dt 5.12.13. The vendor is Rajlaxmi Promoters Pvt. Ltd as the power of attorney holder on behalf of the Birendra Kumar Singh. The vendee is Sri Bhaskar Sahoo. In page 4 it is stated that the vendor has got approved building plan for construction of apartments from BDA vide letter no.4729/BP/Dt.19.05.99. The schedule of property constitutes 90 feet X 120 feet out of area Ac 0.246 decimals of plot no.22, of khata no.163/51. It is stated that the interest transferred to the purchaser is proportionate undivided share of Ac 0.008 decimals out of Ac 0.246 decimals has given in the sketch map where a residential house has

been constructed bearing flat no.203 in the 3rd floor of the apartment. In the recitals of the said deed it is stated that the vendor had got approved building plan from BDA for construction of apartments and the vendee shall develop the premises in accordance with the rules of BDA and BMC so far as his undivided proportionate share and interest is concerned together with the other purchasers of similar interest at his own cost expenses and responsibility. It is declared that the concerned property is free from all encumbrance, litigations, disputes, liens, attachments and charges. The vendee has paid full sale price prior to the execution of sale deed on the date of agreement and the receipt of the same is acknowledged and admitted by the vendor.

It is pertinent to mention with reference to the documents executed in favour of Bhaskar Sahu, plaintiff no 2 that while Ext 12 refers to flat no 201, Ext 13 refers to flat no 203, the area and floor remaining same i.e., 2nd floor 1317 square feet . In contrast Ext 14 refers to flat 203 as in Ext 13- but the floor and square feet area is different- i.e., third floor of area 1102 square feet. Such inconsistency may be on account of variation in terms of contract, misrepresentation or mistake.

Ext.15 is the receipt concerning receiving of Rs.60,000(sixty thousand) from Bhaskar Sahoo by Rajlaxmi Promoters Pvt. Ltd in respect of flat no 203.

Ext.15/a to 15/f respectively are receipts concerning payments to Rajlaxmi Promoters by Bhaskar Sahoo in respect of flat no.203KumudaTowers.

Ext.16 is a certificate issued by SBI, RCE campus,Bhubaneswar. It is certified that J. Subhasundar (plaintiff no.5), Deputy Manager of SBI has availed Housing Loan in flat no.003 ofKumudaTowers, plot no.101, Surya Nagar,

Unit -7, Bhubaneswar.

Ext.17 is the certificate issued by SBI, RCE campus that Joachim Sabhasundar has availed Housing Loan and has deposited the original sale deed with them.

Ext.18 is the land agreement dtd.05.11.1999 between Rajlaxmi Promoters Pvt. Ltd., represented by its M.D. Santanu Kumar Pattanaik and Joachim Sabhasundar.

Perusal of Ext.18 and comparison of the same with Ext.12, land agreement between the present first party and Bhaskar Sahoo (plaintiff no.2) reveals that similar assertions have been made in the recitals of Ext.18 as in the recitals of Ext.12 concerning Birendra Kumar Singh being the owner of khata no.163/51, plot no.22. Sale of impartible proportionate undivided share in respect of land in favour of the vendee; condition that the second party shall have to enter into a separate simultaneous agreement with builder; an obligation of second party to take pay full construction cost to the builder and exclusive right, title, interest of the vendee over the unit and common areas after fulfillment of the conditions concerning payment of consideration to land owner and construction cost to builder. Scheduled "A" of the deed constitutes Hal plot no.22, under Hal khata no.163/51 of area of Ac 0.246 decimals at Mouza-Surya Nagar Bhubaneswar. The consideration amount to be paid to the owner is Rs.47,808 (forty thousand eighty hundred eight) and the earnest money is Rs.10,000. By virtue of the deed the second party has the right to construct flat no.003 in ground floor, block-A having a super built area of 1328 sq. feet.

Ext.19 is the construction agreement between Rajlaxmi Promoters Pvt. Ltd., represented through its M.D. Santanu Kumar Pattanaik called the builder and Joachim Sabha Sundar

the prospective purchaser on 5th October 1999. A perusal of Ext.19 and comparison with Ext.13 (executed between the same builder and plaintiff no.2) reveals similar recitals concerning Birendra Kumar Singh being the original land owner; an agreement between the land owner and the builder (present first party of Ext.19), conferring authority upon the builder to select prospective purchasers; the purchaser acquiring the right/licence to construct apartment at his own cost in the multi storied apartment called Kumuda Towers; the purchaser having verified and accepted the building plan sanctioned by the BDA, the obligation of the builder to execute the document in writing delivering possession upon completion of construction of the apartment and payment of construction cost. The cost of construction has been valued as Rs.8,55,232 (eighty lakh fifty five thousand two hundred thirty two). The apartment to be constructed is flat no.003 and ground floor "C" type with super built area of 1328 sq. feet; booking amount and the five installment amounts have been specified.

Ext.20 is the certified copy of RSD No.1923 dtd 15.03.2002 executed between Birendra Kumar Singh, defendant no.3, and Joachim Sabha Sundar, the plaintiff no.5. In the recitals of the said deed it is stated that the vendee is the absolute owner of Khata no.163/51, plot no.22 of area Ac 0.246 decimals at Mouza-Surya Nagar, Bhubaneswar. Similar averments concerning ownership over the said plot have been made as the recitals of Ext.14. It is stated that the vendor has got approved building plan for construction of apartment from BDA on 19.05.99 and the construction is to be made by the vendee. The sale consideration is stated to be Rs.61,500 (sixty-one thousand five hundred). The schedule of property constitutes an area of 350 sq. feet (Ac 0.008 decimals) out of Ac 0.246 decimals of

plot no.22, revenue khata no.163/51 Mouza. Surya Nagar. The deed consists of a declaration that the concerned property is free from all encumbrances, litigations, disputes, liens, attachments and charges etc.

Ext.21 to 21/a are receipts concerning payment of different amounts by Joachim Sabha Sundar, plaintiff no 5 in favour of defendant no.2. Rajlaxmi Promoters Pvt. Ltd., in respect of flat no.003/Kumadaa Towers as booking amounts and installment amounts and towards registration of the flat. It is pertinent to mention that vide Ext 21 (money receipt) there is reference to flat 203 and the other receipts refer to flat 003; the same may be on account of typographical error.

Ext.22 is the land agreement between defendant no.2 Rajlaxmi Promoters Pvt. Ltd., and Sumy Saraf, the plaintiff no.4, dated 10.9.99 . Rajlaxmi Promoters is represented by its Managing Director Santanu Kumar Pattnaik. Comparison of Ext.22 with Ext.18 and Ext.12 reveal similar assertions concerning Birendra Kumar Singh being the original owner of Hal Khata no.163/51, plot no.22; agreement of the first party to sale impartible proportionate undivided share to the second party in respect of the land covered in the deed; the second party to have exclusive right, title, interest over the common areas and facilities on payment of consideration for impartible proportionate share in land and construction cost; "A" scheduled property in the deed being described as Hal plot no.22, khata no.163/51 of area Ac0.246 decimals of Mouza-Surya Nagar. The consideration amount has been fixed as Rs.67,550 (sixty seven thousand five hundred fifty) in respect of sale of undivided proportionate share in land and the earnest money at Rs.10,000. The first party has agreed that the second party shall have the right to construct flat no.201 in second floor, block no.4 having a

super built area of 1428 sq. feet in the building with name and style as Kumuda Towers.

Ext.23 is the construction agreement dated 10.09.99 between Rajlaxmi Promoters Pvt. Ltd., and Sumi Saraf the plaintiff no.4. Perusal of the said deed and comparison of the same with Ext.13 reveals similar recitals concerning ownership of Hal khata no.163/51 plot no.22 , agreement between the land owner and builder conferring authority upon the builder to select prospective purchasers; the purchaser acquiring licence to construct apartment at his own cost under the scheme of agreements; the owner having agreed to transfer proportionate impartible undivided share in land; approved building plan by BDA. The construction cost has been fixed at Rs. 11,49,540 (Eleven lakh forty nine thousand five hundred forty. The builder is to construct a flat having super built up area of 1428 sq. feet on second floor, type 4, flat no.201 of the proposed multi storied complex. The builder shall execute a document in writing delivering possession upon completion of construction and payment of construction cost. The payment schedule reveals the amount to be paid at the time of booking and 10 installment amounts. The agreement consists of similar assertions as other construction agreements that in case of loan incurred by the purchaser from any financial institution, payment shall be made directly by the financial institution to the builder.

Ext. 24 is the RSD No.6032 dated 14.08.02 executed between defendant no.2 on behalf of the defendant no.3 and plaintiff no.4. A perusal of Ext.24 and comparison of the same with the other sale deeds executed such as Ext.20, Ext.5 etc., reveals similar recitals concerning the vendor being the absolute owner of the suit land; the vendor having got approved plan for construction from BDA; and the construction to be made by the

vendee; transfer of undivided proportionate interest in the schedule of property in favour of the vendee; a declaration that the property is free from all encumbrances, litigations, disputes, liens, attachments and charges etc. An undivided and proportionate share and interest measuring an area of Ac 0.008.8 decimals (386 decimals) out of Ac 0.246 decimals is transferred in respect of plot no.22 khata no.163/51 Mouza-Surya Nagar. (plot no. not stated in the scheduled). It is stated that the vendee had paid full sale price prior to the sale deed.

Ext.25 to 25/g are receipts issued by Rajalaxmi Promoter Pvt. Ltd., in favour of Sumy Saraf (plaintiff no.4) in respect of flat no.201 Kumada Tower.

Ext.26 is the certificate of PNB that commander Deepak Pati had obtained Housing Loan and that documents including sale deed, money receipts and allotment letter have been held by the bank in original.

Ext.27 is the land agreement between Rajalaxmi Promoter Pvt. Ltd., represented through its MD. Shantanu Kumar Pattnaik on behalf of Birendra Kumar Singh and Commander Deepak Pati. The said agreement consists of similar statements as the other land agreements relating to ownership of the land , agreement to sale undivided proportionate interest in land to the purchaser, condition that the purchaser shall have to enter into construction agreement with the builder for construction of his unit. The consideration amount is Rs.68,300/- earnest money is Rs.10,000/- and the balance amount to be paid is 58300. According to the terms of agreement the purchaser will construct and acquire Flat no. is 002 on ground floor. It is pertinent to mention that blank space remain against block number and area in square feet.

Ext.28 is the construction agreement between Rajalaxmi

Promoter Pvt. Ltd., represented through MD Shantanu Kumar Pattnaik called the builder and Commander Deepak Pati dated 23-02-2000. Similar statements have been made in the said agreement as other construction agreements concerning – the concerned land, exclusive ownership of Birendra Kumar Singh; condition that if any loan amount is sanctioned in favour of the purchaser by any bank or financial institution the same shall be paid by the bank directly to the builder. Construction cost of Rs.8,98,700 is to be paid by the purchaser to the builder. The flat to be constructed is of super built up area of 1418 sq. feet on ground floor “A” type bearing no.002. Under the heading payment schedule there is reference to total cost and the percentage to be paid from 1st to 5th installments; but the amounts to be paid have not been written against the entries concerning booking and 1st to 5th installments.

Ext.29 is the RSD No.5966 dated 25.10.2000 executed between Rajalaxmi Promoter Pvt. Ltd., power of attorney holder on behalf of Birendra Kumar Singh and Commander Deepak Pati. The schedule of property constitutes undivided proportionate share of Ac 0.009.2 decimals out of Ac 0.246 decimals of plot no.22 under khata no.163/51 Mouza-Surya Nagar. In page 6 it is stated that the vendee has paid full sale price prior to execution of sale deed on 23.2.2000. Similar statements as the other RSDs in favour of the plaintiffs have been made concerning approved building plan for construction of apartments from BDA; declaration that the said property is free from all encumbrances , litigations , disputes, liens attachments and charges .

Ext.30 to 30/c are certified copies of money receipts certified by PNB in respect of booking and installment of flat no.002KumudaTower received from Commander Deepak Pati.

III) After a careful evaluation of the available evidences and documents on record and submission of the counsels the following is revealed.

Defendant 1 is evasive concerning the date of mortgage. The crux of the case is whether the mortgage in favour of defendant number 1 was created prior to or after or in between the period during which- construction agreement, land agreement, and registered sale deeds were executed in favour of the plaintiffs. Neither party has led any evidence concerning the date of execution of the mortgage deed in favour of defendant 1. However the specific assertion of defendant number 1 in para 4 of plaint is that land which has already been mortgaged cannot be later sold- indicating that the mortgage in favour of the defendant 1 was prior to the the sale deeds in favour of the plaintiffs. It is also stated in WS of defendant 1 that the agreements and sale deeds between the plaintiffs and defendant 2 and 3 are an after thought and encumbrance certificate had been submitted by defendant 2 at the time of mortgage- which indicates an assertion that the agreements and sale deeds in favour of the plaintiffs are subsequent to the mortgage in favour of defendant 1. The date of the alleged mortgage is a fact which is specifically within knowledge of the defendant number 1 and 2 ; and not a fact specifically within the knowledge of the plaintiffs.

Section 103 of the Evidence Act reads as " The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

A question which comes to the mind is as to why the defendant number 1 is silent as to the date of mortgage – especially when the date is very relevant to the case? On one

hand defendant 1 claims that the mortgage is prior to the sale deeds – on the other hand the defendant number 1 has neither led any evidence nor made any statement on the date of such mortgage. Thus defendant number 1's conduct is evasive concerning the date of mortgage.

IV) Relevant documents have not been proved in this case. It is pertinent to mention that the alleged mortgage deed by defendant no 2 in favour of defendant 1 has not been proved by any of the parties. Neither defendant 1, nor defendant 2 who are parties to the said deed have proved the deed. None of the plaintiffs have taken steps for proof of the said deed. Further the power of attorney executed by defendant 3 in favour of defendant 2 has not been proved. Defendant 1 bank who has made reference to terms of the said power of attorney , has not submitted any copy of the document. Defendant 2 and defendant 3 have also not submitted any document concerning the terms of the said power of attorney. Thus two documents which are vital to this case have not been proved. Defendant 1 has admitted knowledge concerning the power of attorney executed by defendant 3 in favour of defendant 2; a prudent man would believe that the said GPA or its certified copy(being a registered deed as stated in para 4 of WS of defendant1) is in custody of defendant 1 . The mortgage deed is also in custody of defendant 1. A question arises as to why defendant 1 has not filed the said documents. The mortgage deed can throw light as to what property was mortgaged; and the date of mortgage. The registered GPA can throw light as to what defendant 2 was authorized to mortgage.

V) Defendant 1 seems to have made suppression of materials and not come out with clean hands for reasons discussed here under:

Besides the owner share, the specific flats of the plaintiffs are not the only flats in Kumuda Towers ; admittedly there are several other flats in Kumuda Towers – as is revealed from the numbers and floors of the flats.

Therefore there is every possibility that while Kumuda apartment or the land over which Kumuda apartment stands has been mortgaged to defendant 1 by defendant 2; defendant 1 seeks to recover dues not from the entire property mortgaged; but from the flats of the five numbers of plaintiffs only. Under description of immovable property in the possession notice vide Ext 9 the following is written.

“All the part and parcel of property consisting of M/s Rajalaxmi promoters pvt Ltd, 'Kumadaa Towers', Hal khata no 163/51, plot number 22 Area Ac 0.246 decimals Mauza – Suryanagar, Bhubaneswar, Dist- Khurda.
(Flats No- 002, 003, 201, 202, 203)”

Suppose for the sake of argument land was mortgaged to defendant 1 prior to sale to the plaintiffs- why recovery is sought to be made only in respect of the flats of the plaintiffs and not other flats.

A question remains as to why no documents have been filed by defendant 1 as already discussed.

All these discussions establish that defendant 1 has certainly not come out with clean hands. Defendant 1 has made suppression of material facts which remain shrouded – and remained silent and evasive about relevant matters such the date of mortgage; and such silence is voluble especially because defendant 1 has repeatedly stressed in the WS that mortgage to defendant 1 is prior to the sale deeds in favour of the plaintiffs.

VI) As discussed, defendant 1 has not come out with clean hands. The plaintiffs have proved sufficient documents to establish that they have taken loans from different banks and paid for their respective flats- consideration has been paid by the plaintiffs. Under such a circumstance if the plaintiffs will be denied from their purchased property on account of prior mortgage if any- it would mean fraud on the plaintiffs by defendant 2(and not defendant 1). But in such a case, if mortgage is in respect of the whole property , and recovery of such mortgage amount is made from the flats of the plaintiffs only(ie a portion of the entire mortgaged property) – such act on part of defendant 1 would indicate collusion of defendant 1 with defendant 2 or defendant 3 or both; and such act would prejudice the plaintiffs as what remains after recovery of mortgage dues is to be proportionately distributed among the subsequent transferees.

V) It is pertinent to discuss about what seems to have been mortgaged and connected fraudulent act of defendant 2. There is controversy concerning what exactly has been mortgaged.

The possession notice vide Ext 9 reveals that the flats of only the plaintiffs were mortgaged. But from the WS of defendant 1 it seems that the concerned land and not specific flats of the plaintiffs had been mortgaged. In para 4 of the WS of defendant 1 the property mortgaged has been described as “the land” twice; in para 5 of the WS it is described as “the land” at one place and “security / mortgage property’ at another place; in para 7 of the said WS the morgaged property has been described as “the entire apartment”. In para 9 of the WS it is stated that the defendant has taken possession of the apartment “Kumadaa Towers”. Thus while in first part of the WS the property mortgaged has been referred to as “the land” thereby meaning

the land on which "Kumadaa Towers" stand; in the second part of the WS there is reference to "Apartment" thereby meaning that the apartment "Kumadaa Tower" had been mortgaged. Thus from the recitals of the WS it seems that the land or apartment with land was mortgaged in the concerned deed. So a question arises as to why possession notice was hanged only in respect of the specific flats of the plaintiffs to the exclusion of other flats.

In the second part of para 4 of WS of defendant 1 it is stated that as per the registered power of attorney, between defendant 3 and defendant 2, the promoter/builder can sale transfer and assign various constructed areas except the owner share. This statement in the WS is relevant as to what was mortgaged- it means that defendant 1 by virtue of power of attorney is empowered to mortgage other flats , but not the owner's share. This may indicate why vide Ext 9 possession notice was affixed only in respect of the flats of the plaintiffs . This indicates either fraud by defendant 2 upon the plaintiffs or fraud and collusion between defendant 2 and 1. This statement in the WS is contradictory to the evidence of defendant2 who as dw1 has repeatedly stated that two flats of the owner(defendant 3) were mortgaged by him and the flats of the plaintiffs were not secured assets given to OHRDC. Thus contradictory assertions have been made in the WS of defendant 1 and evidence of defendant 2 as to what the defendant 2 was empowered to mortgage and had mortgaged. Thus either defendant1 in his WS or defendant2 in his evidence have made a false statement. The possibility of defendant 2 making a false statement is more likely as defendant 2 is silent in his WS which has been filed along with defendant 3 about what had been mortgaged(entire land/apartment or specific flats). Further the conduct of defendant 2 is clearly fraudulent because he created mortgage

in favour of defendant 1(bank)and interests in favour of the plaintiffs concerning the same properties.

VII) Thus, an analysis of all the documents reveals that prior to execution of registered sale deed in favour of plaintiff no.1, Plaintiff no.1 had paid price of land (as admitted by landowner in Ext.6) and cost of construction as proved vide Ext.6 to 6/1 (money receipts by the promoter public builder). The land agreement vide Ext 3 reveals that it was mandatory for a purchaser to enter into simultaneous agreement with the builder. A declaration has been made in the RSD vide Ext.6 that the scheduled land is free from all encumbrances, litigations, disputes, liens, attachments and charges. If the said declaration is accepted to be correct for the sake of argument – it would imply that the concerned property was sold to the plaintiff no.1 prior to creation of the alleged mortgage in favour of defendant no.2, Bank. If the said declaration is taken to be a false declaration – it would mean that fraud has been committed upon the plaintiff no.1; and it would also seem that Rajalaxmi Promoters Pvt. Ltd., who is the GPA holder of the owner has played a role in such fraudulent act. Similar land agreements ,construction agreements and RSDs have been executed between the other plaintiffs and defendant 2 and 3. So the possibility of fraud by defendant 2 on all the plaintiffs seems likely. In any case, the defendant 2 has either sold mortgaged property or has mortgaged property already sold. Act of defendant 2 has been fraudulent.

VIII) It is pertinent to focus on the conduct of defendant no.2 the power of attorney holder of the land owner who has allegedly mortgaged the concerned property to defendant no.1, Bank. In the WS which has been filed by defendant no.2 and defendant no.3 together there is reference to availing loan from

defendant no.1 Bank and it is stated that due to cyclonic effect construction was delayed and interest on loan aggravated due to non-delivery of apartment in time. In Para 15 of the WS it is stated that loan was obtained due to enhanced cost of construction and to meet the immediate need for completion of apartment. From the above pleadings it seems that the alleged mortgage was entered into after land agreement and construction agreements were entered into between the plaintiffs and defendant no.2 and 3 prior to mortgage to the bank; but the date of mortgage has not been stated in the WS of Defendant no.2 and 3. Further, the WS is silent as to what exactly was mortgaged which gives the impression that the entire land or apartment was mortgaged. In contrast to the said WS, defendant no.2 as DW 1 has made reference to two numbers of flats of the owner in Kumada Apartment which were given as security mortgage before ORHDC and the flats allotted to the plaintiffs were not secured assets given to ORHDC. Defendant no.2 as DW 1 has categorically emphasized that the mortgage created by him was in respect of two numbers of flats and not the entire apartment and land. It seems that the conduct of Defendant no.2 is not clean; the WS has been filed by Defendant no.2 and Defendant no.3 together and the WS is silent about mortgage of two flats of the owner's share; but, in his evidence DW1 (Defendant no.2) states that he had mortgaged two flats of the owner. The DW 2 who is defendant no.3 has stated in his evidence that he has not signed on any concerned letter to mortgage his landed property. Thus, it seems from the WS of defendant no.1 that the entire apartment or land was mortgaged; but, the WS of defendant no.2 and defendant no.3 is silent about what was exactly mortgaged and there is reference to obtaining loan from defendant no.1, bank due to mounting cost of

construction; in contrast defendant no.2 as DW 1 has stated in his evidence that two flats of the owners share were mortgaged by him. In view of such contradictory assertions as to what was mortgaged – in the absence of the mortgage deed, it cannot be determined as to what exactly was mortgaged. The possession notice vide Ext.9 specifies only the flats of the plaintiffs. While the bank has referred to the entire apartment/land in WS.

IX) A vital question is whether the mortgage created in favour of defendant no.1 was prior to the interests created in favour of the plaintiffs or subsequent to the interest created in favour of the plaintiffs by virtue of the construction agreements and the land agreements executed in favour of the plaintiffs. Defendant no.2 has not come out with clean hands as he has made inconsistent statements in his WS and evidence. Defendant no.1 has not proved the power of attorney executed in his favour – which could have thrown light on the extent to which he was authorized. Defendant no.2 has not taken any steps to obtain or submit any copy of the alleged mortgage deed in favour of defendant no.1 which could have thrown light on the facts and circumstance of the case.

X) Possibility of mortgage being prior to SARFAESI Act exists. On 21 June 2002, the SARFAESI Act was brought into force by repealing the ordinance. However, according to Sec.42(2) the ordinance shall be deemed to have been done or taken under the corresponding provisions of this act. Thus, this clause proposes to repeal Securitisation and Reconstruction of Financial Assets and Enforcement Security Interest Ordinance 2002. The said clause proposes to save things done or action taken under the said ordinance. In the present case if the assertion of defendant no.1 in the WS is taken as correct and if

for the sake of argument it is accepted that prior to interest created in favour of the plaintiffs by virtue of construction agreements and land agreements the mortgage in favour of defendant no.1 took place – the same would indicate that prior to or in the year 1999 the mortgage deed was executed in favour of defendant no.1 which would mean that the SARFAESI Act had not come into existence when mortgage in favour of defendant no.1 took place. The plaintiffs have entered into agreements with promoter and land owner in 1999; the registered sale deeds were executed in the years 2000, 2001, 2002, 2003. if mortgage to D1 was prior to – construction agreements and land agreements by plaintiffs in 1999- the SARFAESI act had not come into existence by then. Defendant1's silence on the date of mortgage keeps the reality shrouded.

- XI) Section 34 of the SARFAESI Act reads as “No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under this Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).” Thus, the Jurisdiction of the Civil Court is barred in respect of matters over which the DRT or the Appellate Tribunal is empowered under the Act. U/s.34 the Civil Court is also prohibited from issuing any injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the SARFAESI Act. Thus, the provisions of Sec.34 exclude the jurisdiction of the Civil Court in relation to matters which DRT or the Appellate Tribunal is empowered to determine; in other words aggrieved borrower or any person

can file an application in the DRT U/s.17 of the Act and the aggrieved person can appeal to the Debt Recovery Appellate Tribunal. U/s.18 against the order of DRT.

According, to section 17 (1) of the SARFAESI Act. “ Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, (may make an application along with such fee, as may be prescribed,) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.”

It is pertinent to mention that in the proviso to Section 17 (1) it is stated that “Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.” Earlier it was compulsory to deposit 75% of claim ; the act has been amended. c

The Apex Court has clarified as to who is an as aggrieved person held in “United India Insurance Co. Ltd. V. Jyotsnen Sudhir Bhai Patel and Ors. (2003) 7 SCC 212=2003(5) supreme 529 “Aggrieved person is a person who suffered legal grievance or who is wrongly deprived or refused or something.”

Section 17 (3) of the SARFAESI Act lays down that if the DRT comes to the conclusion that the measures taken by the secured creditor are not in accordance with the provisions of this Act and rules made there under it may declare the recourse to one or more measures referred to in Sec.13 (4) as invalid and restore possession of the secured assets to the borrower.

Thus, Sub-Section-3 of Section 17 of SARFAESI Act contemplates that if the DRT decides that the measures taken by the secure creditor U/s.13(4) are invalid, possession of the assets can be restored to the borrower. With reference to

Section 17 (3) reference may be made to the decision in *Misons Leathers Ltd., v. Canara Bank* reported in I (2008) BC 440 (DB) (Madras H.C.) that “All such grounds, which render the action of the Bank/financial institutions illegal can be raised in the proceedings U/s.17 of the Act before the debts recovery tribunal”.

Taking these discussions into consideration it seems that DRT is empowered to deal with the matter and the present plaintiffs can be called “Aggrieved persons” with reference to Section 17(1) of SARFAESI Act. Reference may be made to the decision in *Ram Kumar v. Rabinder Kumar Gulati*, II (2007) BC 224 (Delhi H.C), wherein it is held that “*The Civil Court cannot poach into the jurisdiction of the DRT as it is not armed with that power*”. Further, reference may be made to the decision in *Branch Manager, State Bank of India, Commercial Branch Ongole v. Chinigepalli Lathangi*, III (2007) BC 35 (A.P.H.C.) wherein it is held that “*Therefore Sec.34 of the Act prohibits exercising of jurisdiction of the Civil Court and also not to interdict by passing any interim order. The DRT above is authorized to pass any interim order. The party should approach only DRT for getting interim order under Section 17 of the Act*”.

- XII) As per decision of the Apex Court in the *Mardia Chemicals Case* to a limited extent jurisdiction of the Civil Court can be invoked when the element of fraud is pleaded against the secured creditor. As already discussed the defendant bank has not come out with clean hands. There is a caution against cleverly drafted complaints which create the illusion of fraud. So the first question is whether in the present case the complaint has been cleverly drafted to create the illusion of fraud; this does not seem to be the case because as already discussed the defendant no.1 has not come out with clean hands. Either there

is fraud or collusion or suppression of materials. But the exact facts which constitute such fraud, collusion or suppression of materials are not known. This is because vital documents have not been proved. Because there is smoke the existence of fire seems obvious; but the fire cannot be seen; and it is not known as to who created the fire. A question arises as to whether the Civil Court can draw adverse inferences because defendant no.1 (Bank) has not come out with clean hands. In this respect reference may be made to the decision in Shree Bharat Co. Op Bank Ltd. V. Vilasben Lalchand Kothari, IV (2011) BC 361 (Guj. (D.B) wherein it is held that adverse inference can be drawn as the civil court had passed direction and the bank deliberately avoided production of documents. However in the present case no direction was given to the defendant bank for production of documents.

In *Mardia Chemicals v. Union of India* the Apex Court held that to a limited extent the jurisdiction of the Civil Court can be invoked . It has been held that “ *However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages.*” So, the question arises as to whether the circumstance of the present case come under the limited range of circumstance as described in the aforesaid decision for invocation of the jurisdiction of the Civil Court. As discussed the defendant no.1 (Bank) does not seem to have acted fairly and in good faith. At the same time defendant no.2 has also not come out with clean hands and seems to have acted fraudulently.

- XIII) To sum up- defendant no 2 has acted fraudulently. The plaintiffs have been victimized on account of fraudulent act of defendant 2. The defendant bank has not come out with clean hands. Fraud if any by defendant bank has not been specified in the pleadings. Vital documents have not been proved; certain facts remain shrouded. Under such a circumstance it cannot be said that the jurisdiction of the civil court can be invoked.
- XIV) In accordance with the decision in *Mardia Chemicals Limited v. Union of India* the jurisdiction of the Civil Court can be invoked when the secured creditor is alleged to be fraudulent. Therefore, fraudulent act on part of defendant no.1 will enable the civil court to invoke jurisdiction. But, fraudulent act on part of defendant no.2 will not enable the Civil Court to exercise jurisdiction - unless, it is a case of collusion between defendant no.1 and defendant no.2. It seems that the defendant bank is not fair and has not acted in good faith in its dealings. But, the pleadings must clearly disclose fraud or irregularity on the basis of which relief is sought. If the facts could have been known possibility exists that the present case might have come within the limited range of circumstance when jurisdiction of civil court can be invoked in the interest of justice. But as discussed the exact nature of fraud or unfair dealing if any by defendant bank is not known. Facts constituting, fraud etc., by defendant bank are not specified in pleadings. Without such specification jurisdiction of civil court cannot be invoked. It has already been discussed that defendant 2 has acted fraudulently. But fraudulent act by defendant no 2 and not the bank will not arm the civil court with the authority to invoke its jurisdiction.
- XV) As discussed the defendant bank is silent about the date of mortgage; neither the defendant bank nor the other defendants

have submitted the power of attorney allegedly executed by defendant no.3 in favour of defendant no.2. None of the plaintiffs have endeavoured for production of the original or certified copy of two most vital documents i.e., the mortgage deed to the bank and the power of attorney deed executed by defendant no.3 in favour of defendant no.2. It cannot be known as to the extent to which defendant no.2 was empowered by virtue of the power of attorney executed in his favour by defendant no.3. It also cannot be known as to what exactly was mortgaged by defendant no.2 and whether defendant no.2 was entitled by virtue of the alleged power of attorney executed in his favour to create the mortgage deed. The terms of mortgage to the bank are not known. Further, it is not known as to what was mortgaged. Although, from the pleadings of defendant no.1 (bank) it seems that the entire land or building was mortgaged; from Ext.9 it seems that only the flats allotted to the plaintiffs were mortgaged. Admittedly, there are other apartment owners besides the plaintiffs in Kumuda Towers. But the possession notice vide Ext.9 was hanged in respect of the flats of the plaintiffs and not the entire apartment Kumuda Tower as it seems from the recitals of Ext.9. So a question arises as to why none of the plaintiffs have raised objection to the possession notice in respect of their flats only. A prudent man will not believe that it slipped from the notice of the plaintiff's that possession notice was hanged only in respect of their flats. But the plaint is silent and no objection has been raised to the effect that the bank is not fair in its dealings because possession notice has been hanged only in respect of the flats of the plaintiffs while the entire apartment or the entire concerned land was mortgaged.

XVI) Taking these discussions into consideration it seems that

the Civil Courts lacks jurisdiction to deal with the present matter and the DRT is empowered to deal with the matter. Taking into consideration the above discussions the jurisdiction of the Civil Court is barred under the provisions of Section 34 of the SARFAESI Act. Accordingly, the suit is not maintainable. Accordingly, issue no. (i) and (vi) are answered.

Issue No.(iii):

The plaintiffs have claimed for a declaration that the mortgage created by defendant no.2 and 3 in favour of defendant no.1 is not binding on them. When the mortgage deed itself has not been proved and when the terms of the said deed are not known it is not practically possible to give any declaration in respect of the alleged mortgage. Further, as already discussed the Civil Court lacks jurisdiction to deal with the matter. Accordingly issue number (iii) is answered in negative.

Issue no.(ii), (iv) and (v)

Section 34 of the SARFAESI Act is a bar to the jurisdiction of Civil Court. In the present case if it could have been held that the jurisdiction of the Civil Court is not ousted U/s.34 on the ground of fraudulent act on part of the defendant bank or otherwise – the jurisdiction of Civil Court to give consequential relief of permanent injunction would not have been ousted.

In view of the above discussions the plaintiffs are not entitled to get any relief and have no cause of action to file the suit. Accordingly, these issues are answered.

Order

The suit be and the same is dismissed on contest against the defendants, but under the circumstances without any cost.

Advocate's fee be assessed at the contested scale.

**Civil Judge (Jr. Divn.)
Bhubaneswar**

The Judgment is dictated, corrected and pronounced by me in the open Court today i.e., on the day of 23rd April, 2014 under my seal and signature.

**Civil Judge (Jr. Divn.)
Bhubaneswar**

List of witnesses examined on behalf of the plaintiffs:

P.W.1 Gopeswar Behera
P.W.2 Bhaskar Sahu
P.W.3 Joachim Sabh Sundar
P.W.4 Bira Kishore Saraf
P.W.5 Deepak Pati

List of witnesses examined on behalf of the defendants:

D.W.1 Santanu Kumar Pattanaik
D.W.2 Birendra Kumar Singh

List of exhibits mark on behalf of the plaintiffs:

Ext.1 Original Letter dtd.1.10.07 of SBI, Industrial Estate Branch, BBSR
Ext.2 Letter dtd.28.09.07
Ext.3 Land agreement dtd.5.10.99 between M/s Rajalaxmi Promoters Pvt. Ltd., and plaintiff no.1
Ext.4 Construction agreement dtd.5/10/99
Ext.5 RSD No.454 dtd.24.01.2001
Ext.6 to 6/l Money receipt in favour of M/s Rajalaxmi Promoter Pvt. Ltd.,
Ext.7 Certified copy of Order sheet in W. P. (C)No.6903/05 of Honourable High Court of Orissa.
Ext.8 Certified copy of final order dtd.13.12.05
Ext.9 Possession notice issued by defendant no.1 dtd.12.3.07

Ext.10	Certificate of Canara Bank dtd.1.10.07
Ext.11	Certificate of Canara Bank dtd.2.12.07
Ext.12	Original agreement with M/s. Rajalaxmi Promoters Pvt. Ltd., dtd.22.9.99
Ext.13	Original agreement for construction of flats dtd.22.9.99
Ext.14	Certified copy of RSD No.8608 dtd.5.12.03
Ext.15 to 15/f	Money receipts
Ext.16	Letter dtd.26.9.07 issued by SBI, RCE Campus Branch, BBSR
Ext.17	Certificate letter dtd.1.02.12 by SBI, RCE Campus, BBSR
Ext.18	Land agreement dtd.5.10.99 between plaintiffs & M/s. Rajalaxmi Promoters Pvt. Ltd., as power of attorney holder Virendra Kumar Singh
Ext.19	Construction agreement dtd.5.10.99
Ext.20	Certified copy of RSD no.1923, dtd.15.03.02
Ext.21 to 21/n	Money receipts in respect of payment in favour of M/s. Rajalaxmi Promoters Pvt. Ltd.,
Ext.22	Land agreement (unregistered) dtd.10.9.99 between M/s Rajalaxmi Promoters Pvt. Ltd.,
Ext.23	Construction agreement between M/s Rajalaxmi Promoters Pvt. Ltd., with Sumy Saraf
Ext.24	RSD No.6032 dtd.14.08.02
Ext.24/a	Signature of plaintiff's daughter
Ext.24/b	Signature of the power of attorney holder
Ext.25 to 25/g	Money receipts issued by M/s Rajalaxmi Promoters Pvt. Ltd.,
Ext.26	Forwarding letter dtd.1.2.13 issued by PNB
Ext.27	Agreement for sale executed between plaintiffs & Birendra Kumar Singh
Ext.28	Construction agreement dtd.23.2.2000, between M/s Rajalaxmi Promoters Pvt. Ltd & Plaintiffs
Ext.29	Certified copy of RSD no.5966 dtd.25.10.2000
Ext.30 to 30/c	Certified copies of money receipts by Senior Manager, PNB

List of exhibits mark on behalf of the defendants:

Nil

**Civil Judge(Jr.Divn.)
Bhubaneswar.**