$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 25.09.2020
Date of Decision: 15.10.2020

\+ O.M.P.(EFA)(COMM.) 6/2016

DAIICHI SANKYO COMPANY, LIMITED ..... Decree Holder
Through: Mr. Arvind K. Nigam, Sr. Adv.
Mr.Arun Kathpalia, Sr. Adv. with Mr. Amit Mishra, Mr. Mohit Singh, Ms. Kanika Singhal, Ms. Samridhi Hota, Mr. Turab Kazmi, Mr. Shivam Pandey, Ms. Saloni Agarwal, Mr. Kunal Chatterji, Mr. Aditya Shanker and Mr. Rohan Jaitley, Advs.

versus

MALVINDER MOHAN SINGH AND ORS..... Judgement Debtors
Through: Ms. Suman Yadav, Mr. Aditya Sarin and Mr. Shobhit Ahuja, Advs. for JD-1, 3, 4 and 13.
Ms. Sonal Gupta, Mr. Manu Bajaj, Ms. Nitika Pandey, Advs. for ICICI.
Mr. Dhruv Mehta, Sr. Adv., Mr. Anuj Berry, Mr.Abhik Chakraborty, Mr. Shikhar Mehra & Mr.Keith Varghese, Advs. for Yes Bank Limited.
Mr.Sanjay Jain, Sr. Adv. with Mr.Saleem Hasan & Mr.Rohit Dahiya, Advs. for Fortis Healthcare Ltd. And Fortis Hospitals Limited.

Mr. Aditya Dewan and Mr. Siddharth Chechani, Advs. for JD-6 to JD-8.
Mrs. Ferida Satarawala Chopra, Mr. Aashish Gupta and Mr. Varun Byreddy, Advs. for garnishee Nos.12 to 14 & 20.
Mr. Akhil Sibal, Sr. Adv. along with Mr. Varun Mishra, Adv. for JD-14, 15,18 & 19.
Mr. Shashank Sharma, Company Secr. For JD-16 & JD17.
Mr. Pradyuman Kaistha, Adv. for Garnishee Best Healthcare Pvt. Ltd.
Mr.Vipin Tyagi, Adv. for Religare Enterprise Ltd. & Religare Finvest Ltd.
Mr.Pratyush Miglani with Mr.Nikhil Varma & Ms.Smriti Varma, Advs. for Garnishee (Ranchem Pvt. Ltd.)
Ms. Archana Lakhotia and Mr. Basit K. Zaidi, Advs. for garnishee Nos.27 and 28.

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI

JUDGMENT

REKHA PALLI, J

E.A. 625/2020, E.A. 668/2020 & E.A. 815/2020

1. The present decision disposes of E.A. Nos. 625/2020, 668/2020 and 815/2020 all pertaining to the proposed auction by Yes Bank Limited (hereinafter referred to as 'the Bank' or 'YBL') of the parcel of

land admeasuring 12 bigha out of the 2.5 acres of property owned by in Khasra Nos. 288-290 situated in the village of Gadaipur, Tehsil Hauz Khas, Mehrauli, New Delhi (hereinafter referred to as 'subject property') which is owned by the Judgment Debtor No. 19 (JD-19). The first application, E.A. 625/2020 has been filed by the Decree Holder (DH) seeking to restrain the auction. The second application, E.A.668/2020 has been filed by YBL seeking modification of the order dated 26.02.2018 passed by this Court whereunder JD-19 was directed to maintain status quo with respect to all its assets. The third application, E.A.815/2020 has been preferred by M/s Fortis Hospitals Ltd.(FHsL) seeking impleadment in EA 625/2020 on the ground that being a creditor of JD-19, it also has a right over its assets and that all claims of FHsL arising therefrom ought to be considered before permitting sale of the subject property by auction.

2. Now, the necessary facts as culled out from the copious volumes of pleadings placed on record may be noted next :

i. On 14.11.2012 a dispute between the Decree Holder (DH) and the Judgment Debtors (JDs), arising out of the Share Purchase and Share Subscription Agreement executed between them on 11.06.2008, was referred to arbitration. The arbitration was held in Singapore and led to the passing of an award dated 29.04.2016 which held the DH entitled to receive a sum of approximately INR 3500 crores, which amount comprised of a principal sum of INR 2562 crores besides interest and costs.

ii. Pursuant thereto, the DH approached this Court by instituting the present enforcement petition on 23.05.2016, while

the JDs challenged the award before the competent courts at Singapore. Notice in this petition was issued on 24.05.2016. On this date, although no interim protection orders were passed, the JDs tendered an assurance through the learned senior counsel appearing on their behalf that they would protect the interest of the DH to the extent of the total sum awarded under the arbitral award and that there would be no *fait accompli*. This assurance was, however, not recorded in the order dated 24.05.2016 at the behest of the learned senior counsel for the JDs who had sought to explain this request as a way to prevent any adverse impact on the JDs' interests in the share market. It was pleaded that since most of the JDs' clients were members of the stock exchange, such a statement may have the effect of diluting the value of their assets, which could possibly compromise this proceeding.

iii. On 25.07.2016, this Court directed the JDs to file affidavits disclosing their assets, which direction was reiterated on 22.08.2016 and 04.11.2016. Consequently, on 02.12.2016, some of the JDs, including JD-19 who owns the subject property, filed their respective affidavit of assets before this Court in sealed covers. The affidavit of JD-19, besides disclosing other assets as held by it on 31.03.2016, also disclosed its ownership over the property being Khasra Nos. 288-290 situated in the village of Gadaipur, Tehsil Hauz Khas, Mehrauli, New Delhi admeasuring 2.5 acres approximately.

iv. On 06.03.2017, in response to the grievance raised by the DH that JD Nos. 14 and 19 had not fully disclosed their assets,

the Court granted these JDs one more week to furnish an additional affidavit bearing complete particulars of all their unencumbered assets. In compliance with these directions, both these JDs filed additional affidavits on 14.03.2017 disclosing their unencumbered assets. Pertinent to this decision is the affidavit filed by JD-19 which was accompanied by a certificate issued by its Chartered Accountant on 06.02.2017 to the effect that as on 31.12.2016, the said JD held unencumbered investments in debentures and equity and preference shares bearing a book value of INR 4996.68 crores with an estimated fair value of INR 3453 crores as on 31.12.2016. It was further stated by the Chartered Accountant that besides these unencumbered assets, JD-19 had also extended loans and advances to various entities which had a book value of INR 2707.39 crores within estimated realizable value of INR 252.59 crores. From this report, it appeared that JD-19 had enough unencumbered assets to satisfy the awarded amount.

v. On 31.01.2018, even though JDs' challenge to the award was still pending before the Courts in Singapore, their objections under Section 48 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') came to be rejected by this Court. Then the JDs, aggrieved by the order dated 31.01.2018, approached the Supreme Court which, on 16.02.2018, upheld the order of this Court. These sequence of events implied that the award dated 29.04.2016 was now enforceable before this Court w.e.f. 31.01.2018.

vi. Consequently, on 19.02.2018, this Court directed JD Nos. 14 and 19 to maintain status quo with respect to the assets as disclosed in their affidavits dated 02.12.2016 and 14.03.2017. On the next date, i.e., 26.02.2018, this Court, while issuing a series of directions against the JDs, issued warrants of attachment with respect to all the unencumbered assets of JD Nos. 14 and 19 which were disclosed in their respective affidavits dated 14.03.2017. These JDs were further directed to continue maintaining status quo in respect of all other assets in which they bore any interest whatsoever.

vii. On 23.03.2018, since the parties were in dispute on the aspect of whether the assets of JD Nos. 14 and 19 would be adequate to satisfy the decretal amount, this Court appointed a Chartered Accountant to carry out a valuation of their unencumbered assets as had been attached vide order dated 26.02.2018. Upon learning about the appointment of a Chartered Accountant by the Court, YBL, on 04.05.2018, wrote a letter to him stating that JD-1 had executed personal guarantees to secure the loan under TL-2, which remained unpaid, and now debt recovery proceedings had begun whereunder JD-1 had been directed, on February 2018, to maintain status quo in respect of all his assets.

viii. After the Court Commissioner had undertaken a valuation of the JDs' unencumbered assets and this Court allowed their sale, some shares owned by JDs were accordingly sold and a sum of INR 9,39,21,500/- realized therefrom was deposited with

this Court. The DH then filed E.A. 936/2018 seeking withdrawal of the sale proceeds, which was opposed by JD Nos. 1, 14 and 19 on the ground that YBL, Axis Bank and ICICI Bank had already instituted proceedings against them for recovering outstanding dues, and therefore, the amounts realized from the sale of their assets, ought not to be released to the DH. In fact a similar request was also made on behalf of YBL on that day but this Court noticed that none of the banks, till then, had managed to obtain a decree against the JDs in any of the pending recovery proceedings and, therefore, directed release of the amount of INR 9,39,21,500/- in favour of the DH.

ix. The petition was thereafter adjourned from time to time and throughout this period, various orders were passed by this Court with respect to the JDs' assets. It is on 13.07.2020 that the DH, claiming to have learnt of an e-auction notice issued by the Bank, filed E.A.625/2020 seeking an order restraining YBL from proceeding with the sale of the subject property by auction, proposed to be held on 20.07.2020. The primary plea of the DH in this application was that the subject property could not be auctioned since the order of this Court passed on 26.02.2018 required JD-19 to maintain status quo with respect to the subject property, and the same could not be auctioned without obtaining the leave of this Court. The Bank replied to this application on 16.07.2020 by stating that the subject property was covered only by the initial order dated 19.02.2018, but the subsequent order passed on 26.02.2018 was applicable only to the unencumbered

assets. However, while undertaking to defer the proposed auction, it also filed E.A. 668/2020 on 21.07.2020 praying that the order dated 26.02.2018 be clarified/modified to exclude the subject property, especially since the recovery proceedings with respect to TL-2 are already pending before the learned Debt Recovery Tribunal.

3. On 08.08.2020, M/s Fortis Hospitals Ltd. (FHsL) a 100% owned subsidiary of M/s Fortis Healthcare Limited, also filed an application (E.A. No. 815/2020) seeking its impleadment in E.A. No. 625/2020 on the ground that, having extended loans to JD-19 indirectly, it also had a charge over the assets of JD-19 which included the subject property. This applicant, therefore, prayed for an opportunity to be heard before deciding the issue of modifying the order dated 26.02.2018, or permitting the auction to take place.

4. Consequently, all the three applications, E.A. 625/2020 filed by the DH, E.A. 668/2020 filed by YBL and E.A. 815/2020 filed by the FHsL are being decided together. Before dealing with the rival submissions of the parties, it may be useful to take a quick note of the credit facilities and corresponding mortgages, out of which the claims of the Bank arise.

i. Vide a facility letter dated 20.02.2015, the Bank sanctioned a loan amount of INR 500 crores to JD-14 and, to secure the same, JD-19 pledged its assets, including the subject property, in favour of the Bank. This credit facility shall henceforth be referred to as Term Loan I (TL-I). The loan agreement under TL-1 was executed on 08.04.2015, the title

deed of the subject property was handed over by JD-19 to YBL on 29.05.2015 and the corresponding mortgage deed was executed on 15.07.2015

ii. A few years later, while TL-1 was still alive, JD-14 availed a second credit facility from YBL by way of a Facility Letter dated 23.12.2016 for a further sum of INR 565 crore (hereinafter referred to as 'Term Loan 2 or TL-2). The Bank released a partial sum of INR 225 crore to JD-14 under TL 2 on 23.12.2016 itself and executed the loan agreement subsequently on 17.01.2017. As per these facility and loan agreements, the same properties mortgaged under TL-1 were set to be offered as security under TL-2. Thus, although JD-14 fully repaid the amount borrowed under TL-1 on 23.02.2017, a deed of mortgage with respect to the subject property was again executed in favour of the Bank under TL-2 on 01.03.2017.

iii. On 30.07.2019, JD-14 was notified as a Non Performing Asset (NPA) and by that time had begun defaulting in its obligations to the Bank under TL-2. Aggrieved, the Bank instituted debt recovery proceedings against some of the JDs and these proceedings are presently pending adjudication before a debt recovery tribunal.

5. Now, keeping in view the fact that it is the bank which is seeking to auction the subject land, arguments were first advanced by Mr.Dhruv Mehta, learned senior counsel appearing on behalf of YBL. In support of his plea that the Bank has a right to auction the subject property, Mr. Mehta made the following submissions:

i. To begin with, the Bank was never aware of the order dated 26.02.2018 passed by this Court. In fact, it was not even aware that the subject property was one of the assets disclosed by JD-19 in its 02.12.2016 affidavit as this disclosure was made in a sealed cover, and the Bank had not been served a copy of this Affidavit until 13.07.2020. Thus, the Bank had no way of knowing earlier that status quo had been purportedly directed to be maintained with respect to this property or that the order dated 26.02.2018 had been passed by this Court. In fact, its previous appearances in these enforcement proceedings were unrelated to the subject property. In these circumstances, it cannot be said that YBL was aware of any such status quo order or that the Bank was in willful violation of any order passed by this Court. Furthermore, since the Bank's exclusive charge over the subject property stood crystallised in 2015 and continued in March 2017, it could not possibly be affected by an order passed on 26.02.2018, which was much later and only directed attachment of the unencumbered assets of JD-19. Without prejudice to the aforesaid, it has also been contended that in any event, the award whereunder the DH claims to have a right to the subject property could only be considered a decree for the purpose of enforcement w.e.f. 31.01.2018, i.e., the date on which the objections of the JDs under Section 48 of the Act stood rejected. Thus, till 31.01.2018, all charges created on the subject property were in the clear and remained unaffected.

ii. Notwithstanding the repayment of the entire loan amount under TL-1 on 23.02.2017, YBL's charge over the subject property which was cemented by 15.07.2015, predated the award or the order of stay, and continued by virtue of the mortgage created on 01.03.2017 under TL-2. Thus, since the subject property was pledged as security in favour of the Bank under both TL-1 and TL-2, and the charge under the latter was created while the former was still subsisting, the Bank has had a continuing charge over the subject property since 15.07.2015, at least. The fact that the two mortgage deeds created this charge was also notified at the office of the Registrar of Companies by filing necessary documents, all of which remain in public domain. After 30.07.2019, once JD-14 began defaulting on the repayments under TL-2, the Bank had a right to enforce the security thereunder, i.e., the subject property, and recover the outstanding sums as a 'secured creditor' under the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act'). It is contended that pursuant to the event of default under TL-2, the debts owed by JD-14 to the Bank under TL-2 have mushroomed and the outstanding dues of this JD stand at INR 465 crores today. Disallowing the auction would imply that the Bank would be unable to recover these dues and suffer a fiscal setback. It is also submitted that the Bank's interest in the subject property in terms of Sections 2(zb) and 2(zf) of the SARFAESI Act, gives it a prior statutory right over

the subject property under Section 26E of the SARFAESI Act. As a result, notwithstanding these enforcement proceedings, once JD Nos. 14 and 19 failed to respond to the notices issued under Sections 13(2) and 13(4) of the SARFAESI Act by the Bank, it was compelled to institute recovery proceedings before the learned Debt Recovery Tribunal. In support of this claim, reliance is placed on Sections 34 and 35 of the SARFAESI Act which provide that the SARFAESI Act is a self-sustaining code which stipulates that debts due to secured creditors have to be paid first and all actions carried out under the statute, which includes issuance of the e-auction notice by YBL and institution of the debt recovery proceedings, prevail over any action carried out under the Code of Civil Procedure, 1908 whereunder the present enforcement proceedings have been instituted. Thus, mere assurance given by some of the JDs in these enforcement proceedings, which assurances were never specifically given by JD-19, could not alter the nature of statutory rights accruing to the Bank under the SARFAESI Act. It is in line with the debt recovery proceedings that the Bank proceeded to issue the public notice on 07.02.2020 for sale by conducting e-auction of the subject property. Simultaneously, even though this auction could not fructify, the Bank had already moved an application under Section 14 of the SARFAESI Act before the learned Chief Metropolitan Magistrate, Saket Courts, Delhi seeking appointment of a receiver to take over possession of the subject property, which was granted on 19.03.2020. Subsequently, the

Bank published the second auction notice in leading newspapers on 01.07.2020. It is thirteen days after that that the DH approached this Court by way of E.A. 625/2020 averring that the proposed auction violates the restraint order dated 26.02.2018, which compelled the Bank to file E.A. 668/2020 seeking modification of the order dated 26.02.2018. Although the DH has sought to exclude the subject property from the application of SARFAESI Act on the ground that the property has been described as an 'agricultural land' in the valuation report dated 01.11.2019, but this argument completely ignores that the subject property is actually a farmhouse, with a built up structure existing on it for the last many years. This implies that the character of the subject property is no longer agricultural. On this aspect, reliance has been placed on the decision of the Supreme Court in ***ITC Limited v. Blue Coast Hotels Limited & Ors.*** *(2018) 15 SCC 99* to contend that the purpose of Section 31(i) of the SARFAESI Act are intended to protect agricultural lands utilized and owned by agriculturists, not lands which are not being put to agricultural use. It has also been contended that in case DH feels aggrieved by the Bank's decision to exercise its rights under the SARFAESI Act, the only remedy available to it is the preference of an application under Section 17 of the SARFAESI Act before the Debt Recovery Tribunal (DRT), not an application before this Court in these enforcement proceedings.

iii. It is, therefore, prayed that the applications moved by DH and Fortis be dismissed and the application preferred by the Bank, being E.A 668/2020, be allowed in order to enable the Bank to enforce its security interest over the subject property under the SARFAESI Act, and recover the amounts due to it.

6. Mr.Akhil Sibal, learned senior counsel for JD Nos.14 and 19 has supported the Bank's claim over the subject property. He has submitted that the stand of JD Nos. 14 and 19 is that the charge over the subject property in favour of the Bank was indeed created prior to passing of the order dated 26.02.2018, and thus neither the Bank nor the JDs had violated the orders of this Court. However, notwithstanding the aforesaid, he urged that JD Nos. 14 and 19 were agreeable to the sale of the subject property by e-auction so that the proceeds could be used to satisfy the claims of either YBL or the DH, as may be determined by this Court.

7. I have also heard Mr.Sanjay Jain, learned senior counsel appearing on behalf of Fortis Hospitals Limited (FHsL), i.e. the applicant in E.A.815/2020, who has primarily urged the following:

i. FHsL had advanced several loans to JD Nos.16, 17 and M/s Best Healthcare Pvt. Ltd., by way of secured inter-corporate deposits/loans, which monies were surreptitiously transferred by them to JD-19, as is evident from the two orders passed by the Securities Exchange Board of India (SEBI) on 17.10.2018 and 19.03.2019. Having taken the loans on completely unrelated pretext, these entities had ultimately routed these monies for the benefit of JD-19, which was its promoter entity. These loans,

secured by creating a charge on all the assets of Best and JD Nos. 16 and 17, were eventually transferred to JD-19, among other entities, either directly or indirectly by routing them through multiple companies. Therefore, JD-19 which benefitted from the loans extended by FHsL in the end, is a debtor of FHs. Conversely, as a creditor of JD-19, FHsL has a higher right over the assets of JD-19 for the purpose of recovering loans, than the DH has under an arbitral award.

ii. It is, therefore, prayed that FHsL also be impleaded in E.A. 625/2020 since the prayers therein materially affect the status of the subject property. It is also prayed that even if the auction were to be permitted, the sale proceeds ought to be retained in Court to enable FHsL to recover its dues, for which purpose a civil suit i.e., CS(OS) 468/2019 titled M/s Fortis Hospital Limited Vs. M/s Best Healthcare Private Limited & Ors., is already pending adjudication before another Bench of this Court.

8. The DH has vehemently opposed not only the proposed sale of the subject property by e-auction, but has also opposed any modification of the order dated 26.02.2018. Mr.Avind Nigam and Mr.Arun Kathpalia, learned senior counsel appearing for the DH have primarily raised two submissions:

i. The first being that, contrary to its averments, the Bank was aware that this Court was seized of these enforcement proceedings which involved appropriating the assets of JD-19; this is evident from the letter addressed by the Bank to the court-

appointed Chartered Accountant on 04.05.2018 and the order passed by this Court on 08.05.2018, which records an appearance on behalf of the Bank. Therefore, the decision of the Bank to attempt auctioning the subject property, despite knowing about these proceedings and without obtaining permission from this Court, reflects its malafide and shows that it is colluding with the JDs. Moreover, the Bank is deliberately misreading the order passed by this Court on 26.02.2018 to claim that they do not apply to the subject property. Plainly, the status quo order passed on 19.02.2018 extended to both encumbered and unencumbered assets of JD-19 but in its subsequent order passed on 26.02.2018 this Court, while attaching the unencumbered assets of JD-19, also went on to direct the JDs in paragraph 6 to continue maintaining status quo for all their assets 'in which they have any interest whatsoever'. As a result, the Bank's contention that the subject property can be auctioned and are untouched by the order dated 26.02.2018, is completely erroneous.

ii. All claims of the Bank pertaining to being a 'secured creditor' under the SARFAESI Act and accruing certain rights therefrom, as also its opposition to E.A. 625/2020 under the SARFAESI Act are completely misplaced. The fact is that the subject property is an 'agricultural land', which is evident even from the Bank's own valuation report of the subject property dated 01.11.2019, thereby exempting it from the ambit of SARFAESI Act as per Section 31(i) thereof. By relying on

Section 150(3) of the Delhi Reforms Act, it has been contended that the decision in ***Blue Coast*** *(supra)* does not apply to the facts of the present case because a property would continue to be agricultural in nature, even if it is found to be falling within the revenue state or bears a construction thereon as per the plan sanctioned on 18.07.2002. It is also contended that the creation of charge over the subject property under TL-2 is suspicious because (1) the credit facility was extended hastily, on the heels of the award passed on 29.04.2016 against JD Nos. 14 and 19, (2) notwithstanding their verbal assurance to this Court that there would be no faith accompli and that they would preserve their assets for satisfaction of the decretal amount, JD Nos. 14 and 19 still went on to mortgage the subject property all over again for an enormous loan amount of INR 565 crores, (3) the Bank was required to be provided the security documents by the JDs and execute a loan agreement prior to disbursing the sums, yet in complete violation of its statutory duty and contractual obligations, the Bank disbursed an enormous sum of INR 225 crores to JD-14 on 23.12.2016 without adhering to any of these procedures. The Bank's plea that the charge created over the subject property under TL-1 was extended by TL-2 and was continuous is debunked in view of the fact that TL-1 admittedly stood repaid on 23.02.2017 and the mortgage under TL-2 was created much later on 01.03.2016. Thus, the mortgage under TL-2 ought to be regarded as a fresh charge over an unencumbered land. This second mortgage was another attempt on the Bank's

part to collude and enable JD-19 to fritter away its assets and render the award unenforceable. Even the Bank's act of prematurely releasing the partial loan amount violated the conditions of its own loan agreement as also the directives of RBI's Master Circular dated 01.07.2015. By refusing to adhere to ethical banking practices, bypassing its own requirements under the loan agreement and failing to approach this Court for seeking permission to auction the subject property, when it is publicly known that all assets of the JDs herein are subject to judicial orders, YBL has failed to act as a bonafide Banker. On this aspect, DH has moved another application, i.e., E.A. 819/2020, which seeks to trace the modus operandi of the JDs herein who have successfully diluted their shareholding in Fortis Healthcare Limited (FHL) with the help of various bankers and financial institutions, including YBL. Since E.A. 819/2020 is presently pending before this Court, it is prayed that the sale of the subject property by auction ought not to be permitted till EA819/2020 is decided by this Court. In this regard, reference has been made to the decision of the Supreme Court in ***Vinay Prakash Singh Vs. Sameer Gehlaut*** *Contempt Petition (C) No. 2120 of 2018* in *SLP(C) No. 20417/2017* passed on 15.11.2019 which holds these very same JDs guilty of colluding with a financial institution to purposefully dilute its assets, violate its own undertakings before this Court, and render the award unenforceable.

iii. Thus, while reiterating that the Bank ought to be restrained from selling the subject property by auction in the light of the order dated 26.02.2018 which does need to be modified in any manner, the DH prays that EA 668/2020 and EA 815/2020 be dismissed by this Court. Without prejudice to the aforesaid, the DH has also prayed that even if the subject property is permitted to be auctioned, the same should be done under the supervision of a Court Commissioner and the sale proceeds thereof ought to be deposited in Court, subject to the outcome in E.A. 819/2020.

9. Having heard learned counsel for the parties and perused the record, the following three issues arise for my consideration:

i. Whether the order dated 26.02.2018 was applicable to the subject property and disentitled YBL from auctioning the property without obtaining the leave of this Court?

ii. Whether YBL has made out a case for modification of the order dated 26.02.2018 and sale of the subject property by auction?

iii. If the subject property is permitted to be auctioned, can the sale proceeds be appropriated by YBL or should they be deposited in Court?

10. In order to decide the first issue as to whether the subject property was covered by the order dated 26.02.2018 it would be necessary to note the relevant extracts of both the orders passed by this Court on 19.02.2018 and 26.02.2018 which read as under:-

i. The order dated 19.02.2018

"Learned counsel appearing for respondents states that the main counsel is indisposed today and requests for an adjournment.

At request, adjourned to 26.2.2018.

In the meantime, till the next date of hearing, respondents No.1 to 4,6 to 8 and 13 to 19 will maintain status quo with regard to their assets asdisclosed in the affidavit dated 2.12.2016 and affidavit filed by respondent Nos.14 and 19 dated 14.3.2017.

Dasti"

ii. The order dated 26.02.2018

"1. My attention has been drawn by the learned senior counsel for the respondents/judgment debtors to the two affidavit dated 14.03.2017 filed on behalf of respondents/judgment debtors No.14 and 19 containing the list of their unencumbered assets. It is also pointed out that as far as the other respondents/judgment debtors are concerned, their affidavit dated02.12.2016 listing their assets are on record but the assets stated in the affidavit would also include the assets which are said to be encumbered.

2. Let warrants of attachment be issued for all the assets stated by respondents/judgment debtors No.14 and 19 in their affidavit dated14.03.2017.

3. The other respondents/judgment debtors will within two weeks from today file affidavits giving up-to-date list of all the unencumbered assets.

4. Till the next date of hearing, respondents/judgment debtors No.14 and19 will also not operate the bank accounts stated at serial No.11 of its affidavit dated 02.12.2016 other than for payment of salary and statutory dues.

5. A garnishee order be also issued in terms of Order 21 Rule 46A CPC regarding the debts due to respondents/judgment debtors

No.14 and 19 as stated by them in their affidavit dated 02.12.2016 to the creditors as elaborated in Annexure B to the affidavit for respondent No.14 and Annexure C to the affidavit of respondent No.19, respectively.

6. Other than the assets dealt herein above, the respondents/judgment debtors shall continue to maintain status quo for all their other assets in which they have any interest whatsoever.

7. List on 23.03.2018"

11. In order to appreciate the effect of these orders, it is pertinent to note that while the first affidavits of assets filed by JD Nos. 14 and 19 on 02.12.2016 set out all their assets, both encumbered and unencumbered, and unmistakably mentioned the subject property, the subsequent affidavit dated 14.03.2017 only set out their unencumbered assets and did not include the subject property. Therefore, when the order dated 19.02.2018 directed status quo to be maintained with respect to all the assets of JD Nos. 14 and 19 as provided in their affidavits dated 02.12.2016, this interim protection also included the subject property and was operative till the next date of hearing. It is against this backdrop that the order dated 26.02.2018 assumes importance as on this date the Court, while directing attachment of all the unencumbered assets of JD Nos. 14 and 19 set out in their respective affidavits filed on 14.03.2017, gave specific directions to the JDs, in Paragraph 6 of the order, to maintain status quo with respect to all their remaining assets. The necessity of this paragraph arose against the background that these enforcement proceedings touch upon numerous assets of the JDs and it, thus, may not have been practicable

for the Court to specifically refer to each of them in every direction it was passing. By contending that the order dated 26.02.2018 only refers to the unencumbered assets of JD-19, while directing its attachment, the Bank is pushing a narrow interpretation of the order dated 26.02.2018 which arises out of a selective reading of paragraph 2 and complete dismissal of paragraph 6. Thus, on a harmonious construction of the order passed on 26.02.2018, I am inclined to agree with the DH that the subject property, despite being encumbered, was specifically covered by the initial order of status quo passed on 19.02.2018, which interim protection was extended by the order dated 26.02.2018. It appears that even the Bank is conscious of this position and that, perhaps, may be the primary reason which compelled it to move E.A. 668/2020 for modification of the order dated 26.02.2018, without prejudice to its contention in E.A. 625/2020 that the order of status quo as directed on 26.02.2018 does not apply to the subject property. In the light of these facts, I have no hesitation in holding that the direction to maintain status quo, contained in the order dated 26.02.2018, was applicable to the subject property. This precluded YBL from auctioning the property without obtaining the leave of this Court and/or seeking modification of these orders.

12. Now coming to the second issue, which in fact is the primary issue in these applications and an aspect on which the parties have made submissions at great length, is there any merit in the Bank's prayer for modification of the order dated 26.02.2018? In support of the modification, YBL has placed reliance on the Loan Agreements executed on 08.04.2015 and 17.01.2017 and the corresponding

mortgage deeds executed on 15.07.2015 and 01.03.2017 respectively to urge that the subject property stood mortgaged to it as on 15.07.2015, which led to creation of a charge thereupon in favour of the Bank and the same was extended on 01.03.2017. The Bank has, thus, urged that since 15.07.2015, it has held a security interest over the subject property within the meaning of section (zf) of SARFAESI Act, which continues till date. This interest, it contends, was created much before the order dated 26.02.2018 was passed by this Court and therefore the order passed on that date was passed without providing the Bank an opportunity to be heard on this aspect. On the other hand, the DH, while not disputing that the initial charge over the subject property was indeed created by JD-19 on 29.05.2015 under TL-I, has mainly tried to find fault with the very creation of the second charge on 01.03.2017 on numerous grounds as noted hereinabove. The primary grievance against the second charge is that it was created on 01.03.2017, once the foreign award had already been passed in favour of the DH and was in public knowledge. Yet, despite being aware of the enormous liabilities of JD-14 under the foreign award which exceeded INR 3500 crores, the Bank still chose to ignore this liability, hastily bypass legal and contractual requirements to prematurely disburse partial loan amount to them and proceeded to grant them an enormous loan under TL-2, which was higher than the loan under TL-1. The creation of the charge a second time has also been opposed for being in violation of the several oral undertakings given by the JDs to this Court that they would protect the interests of the DH to the extent of the total sum awarded under the arbitral award dated 29.04.2016, and that there

would be no fait accompli. Thus, it has been contended that the creation of charge over the subject property under TL-2, being violative of these assurances, was fraudulent and collusive; the charge itself being marred by several illegalities, cannot be upheld and the status quo order passed on 26.02.2018 should not be modified to enable the Bank to auction the subject property. Even though JD-19 has made submissions in support of the Bank's case, I find no reason to refer to them considering the fact that most of its arguments pertain to the documents on record which have already been carefully considered by this Court.

13. Undisputedly, the record shows that the Bank's mortgage over the subject property under TL-1 crystallised following a chain of events which began upon the issuance of the Facility letter for TL-1 on 20.02.2015, execution of the loan agreement on 08.04.2015, the handing over of the title deeds of the subject property on 29.05.2015 and execution of the mortgage deed on 15.07.2015. All of this, admittedly, was much prior to the passing of the arbitral award dated 29.04.2016. Further, it is a matter of fact that notwithstanding the presentment of the enforcement petition on 23.05.2016 and the order dated 04.11.2016 requiring the JDs' to disclose their assets, it is only on 31.01.2018 that this Court dismissed the JDs' objections under Section 48 of the Arbitration Act against enforcement of the arbitral award, which order was confirmed by the Supreme Court on 16.02.2018.Thus, there can be no doubt about the fact that the arbitral award dated 29.04.2016, of which the DH is seeking enforcement, was held to be enforceable by this Court only w.e.f 31.01.2018.

14. The charge on the subject property under TL-2 began with the credit facility letter issued on 23.12.2016, which was followed by the execution of a loan agreement on 17.01.2017. Although TL-1 stood repaid on 23.02.2017, the subject property remained in the Bank's possession and JD-19 handed title deeds of the subject property to YBL on 28.02.2017 as constructive delivery, which was promptly followed by the mortgage deed executed on 01.03.2017. Evidently even TL-2 and the creation of charge thereunder took place much prior to 31.01.2018. Further, it remains undisputed that till 31.01.2018, the orders of status quo dated 19.02.2018 and 26.02.2018, which have been duly considered hereinabove, had not been passed. Notwithstanding the injunction against some of the JDs issued in February 2018 in the debt recovery proceedings instituted by the Bank, the fact remains that till 31.01.2018, there was no order whatsoever passed by any Court restraining any of the JDs from dealing with their assets because of their assertion that their then-existing assets were sufficient to satisfy the awarded amount.

15. However, can it be said that the encumbrance over the subject property was hidden from the DH or this Court? This does not appear to be the case. It is an admitted fact that JD-19 had disclosed the subject property in its 02.12.2016 affidavit, which set out both its encumbered and unencumbered assets, and consciously left it out of the affidavit filed on 14.03.2017 which only pertained to its unencumbered assets. These affidavits, brief in nature, can be compared to arrive upon the conclusion that the subject property was evidently an encumbered asset, which knowledge was also open for the

DH to deduce. Additionally, the fact that JD-19 had created a charge in respect of the subject property on 01.03.2017 was public record, since the certificate of charge had been registered with the Ministry of Corporate Affairs. It appears that the DH failed to raise any grievance whatsoever on this ground at that point, it neither contended that the subject property had been wrongfully excluded from the 14.03.2017 affidavit nor did it challenge any encumbrance over the subject property. Having failed to challenge this matter at that stage, the DH is now proscribed from adopting these grounds to oppose the auction or challenge the creation of the charge under TL-2 in favour of the Bank or claim that the subject property was not an encumbered asset on the date of passing of the award.

16. On the issue of modification, the DH has also urged, by relying on Para 2.5.2(ii)(c) of the Master Circular issued by the Reserve Bank of India (RBI) on 01.07.2015 and the loan agreement dated 17.01.2017, that it was contractually and statutorily requisite for YBL to verify the documents furnished by JD-19 and execute the loan agreement before disbursing an enormous sum of INR 565 crores to JD-14 under TL-2. The circular dated 01.07.2015 was issued by the RBI to all scheduled commercial banks, which includes YBL, and contained statutory and other restrictions which set down the parameters for making loans and advances. Further, a perusal of Annexure I to the facility letter dated 23.12.2016 and the Clause 4 of the loan agreement dated 17.01.2017 reveals certain conditions precedent for disbursal of loan included execution of the loan agreement and furnishing of all security documents. Thus, although

DH may be justified in contending that the premature disbursal of the loan amount under TL-2, prior to execution of the requisite documents, may not be strictly in consonance with the Loan Agreement or the RBI circular in question, that does not alter the fact that the Bank was still in possession of the requisite security for these loan amounts. However, the fact remains that the Bank was, on 23.12.2016, already in possession of the relevant documents for the securities proposed to be pledged under TL-2 as they were the same as those pledged under TL-1. In essence, while it is true that TL-1 and TL-2 were separate facilities which were not extensions of each other, it is also true that they were contiguous and overlapped with each other. Therefore, it cannot be said that these amounts were released without producing requisite security. The only aspect with merit in this limb of the DH's submission is that the loan amount under TL-2 could not have been released prior to the *execution of the Loan Agreement* on 17.01.2017 or, at best, 01.03.2017. However, this also does not have any significant bearing considering that, admittedly, between 23.12.2016 (date of disbursal of INR 225 crores under TL-2) and 01.03.2017 (date of execution of the mortgage deed), no injunction was issued by any Court which restrained JD-19 from creating a charge on the subject property. Moreover, the mere existence of a foreign arbitral award, which was still to qualify the threshold of Section 48 under the Arbitration Act, could not be a ground to urge that no credit facility could be extended to any of the JDs or no charge could be created on their assets. This threshold was crossed only on 31.01.2018, and in these circumstances, I find no merit in the contentions of the DH that

the Bank, while extending the credit or executing the mortgage deed, was in violation of any pending legal proceedings or deliberately attempting to circumvent the award.

17. There is another aspect on which both sides have made extensive submissions, namely, the applicability of SARFAESI Act in the light of the fact that the property, despite being used as a farmhouse, has been described as an 'agricultural land', in the valuation report filed by the Bank itself. The Bank has contended that once it held a pre-existing charge on the subject property since 01.03.2017, then by virtue of Section 26E of the SARFAESI Act, the rights of the Bank as a secured creditor has greater priority viz. those of the DH under a foreign award which was upheld only on 31.01.2018 after this Court rejected the JDs' objections thereto under Section 48 of the Act. *Per contra*, by relying on the Bank's own valuation report of the subject property dated 01.10.2019, the DH has contended that the subject property is an agricultural land which exempts it from the applicability of the SARFAESI Act as per Section 31(i) therein and, therefore, the Bank cannot use the provisions of the SARFAESI Act to substantiate its claims. In rejoinder, the Bank has contended that it is not the description of the property, but its use which would determine its true nature and the consequent applicability of the SARFAESI Act.

18. Having considered the provisions of Section 17 read with Sections 34 and 35 of the SARFAESI Act, I find that this statute is a self-contained code which specifically ousts the jurisdiction of civil court in respect of any matter which a debt recovery tribunal is empowered to deal with. In fact the Act specifically prohibits grant of

injunctions by any court or authority in respect of any action taken or to be taken in pursuance of any power conferred thereunder. Therefore, whether SARFAESI Act applies to the subject property or not ought to be determined in the appropriate proceedings instituted under that Act. I also find that, in the light of Section 17 of the Act, it cannot be said that the DH is without any remedies as it is always at liberty to prefer an appropriate application before the learned Debt Recovery Tribunal. In any event, insofar as these proceedings are concerned, irrespective of whether SARFAESI Act would apply or not, the fact remains that there was a charge over the subject property in favour of YBL, as early as on 15.07.2015. This charge certainly continued in favour of YBL with effect from 01.03.2017, which was in public knowledge, and therefore it is apparent that the property was indeed encumbered much prior to 19.02.2018 or 26.02.2018.

19. In the light of the discussion thus far, I am of the view that charge over the subject property in favour of the Bank precedes the orders of status quo passed on 19.02.2018 and 26.02.2018. In this regard, an additional point emerging from the record, but not argued by the parties, is that apparently the JDs had been consistently assuring this Court, last on 14.03.2017, that they had unencumbered shares, investments and receivables which were valued higher than the awarded amount. In fact, the emphasis of all their assurances before this Court was that their shareholding in Fortis Healthcare Limited (FHL) through Fortis Healthcare Holding Private Limited (FHHPL) was in itself adequate for this purpose. This is also reflected by the fact that on 11.08.2017, much prior to the order dated 19.02.2018, the

Supreme Court had directed maintenance of status quo, as on 11.08.2017, with regard to the shareholding of FHHPL in FHL. It also emerges that on 15.02.2018 the Supreme Court clarified that the orders of 11.08.2017 and 31.08.2017 were only applicable to those assets which were unencumbered as on the dates of those orders. In a similar vein, I also do not see any reason to continue the order of status quo in respect of those properties of the JDs which already stood encumbered in favour of third parties, which in this case is YBL, as on the date on which the status quo orders were passed. Ultimately, the facts of the present case show that the subject property stood encumbered before any of the status quo orders were passed; to continue these directions further and deny the Bank its right to recover the outstanding dues under TL-2, especially in the prevailing economy which has been left terribly strained on account of the global pandemic, would be a travesty of justice.

20. Thus, I am inclined to accept the Bank's prayer for modification of the order dated 26.02.2018 insofar as the subject property is concerned. It is, therefore, clarified that the status quo order passed on 26.02.2018 would not be applicable to the subject property and will not have any bearing on the right of YBL to deal with the same in accordance with law.

21. While deciding this issue, due regard has been paid to the submissions of FHsL in E.A. 815/2020 which has raised the grievance that in the light of the inter-corporate deposits/loans it extended to M/s Best Healthcare and JD Nos. 16 and 17 on 01.07.2017, which were subsequently misappropriated in various ways to benefit JD-19, it also

has a right to the assets of JD Nos.1,6,15,16,17 and 19 and deserves to be impleaded in EA 625/2020. FHsL has relied on the orders passed by SEBI to substantiate these allegations of misappropriation, and claims that since the subject property is owned by JD-19, who is the wrongdoer, any proceeds obtained from the sale thereof by auction, ought to be retained till the civil suit it has instituted for recovery of its outstanding dues is finally decided. FHsL has also claimed that the sale proceeds may be utilized later, under directions of the Court, to recover the amounts owed to it by JD-19. Having examined the orders dated 17.10.2018 and 19.03.2019 passed by SEBI, I find that even if FHsL has a valid claim against the JDs, the same still needs to be adjudicated by this Court in CS(OS) 468/2019. As on date, there is no valid decree in favour of FHsL, and therefore it cannot claim any precedence over the claim of YBL or even the DH. On the other hand, as discussed thus far, the subject property which stands mortgaged in favour of the Bank, on a prior date by way of specific mortgage deeds to that effect, cannot be claimed by any other party for the purpose of discharging *other* obligations of the JDs and nothing turns on these objections. I, therefore, find no reason to implead FHsL in E.A. 625/2020 or accept their prayer for retention of the sale proceeds from auction, to secure their interests,

22. Moving on to the third issue, how should the sale proceeds from the auction of the subject property be appropriated? On the one hand, the Bank has prayed for the amounts to be deposited in an escrow account maintained by it. On the other hand, there is an application filed by the DH being E.A. 819/2020 wherein serious allegations have

been raised against YBL, among several other Banks and financial institutions, as also JD Nos. 14 and 19 for colluding with each other in order to fritter away the shareholding of the said JDs in Fortis Healthcare Limited (FHL). The application, which is yet to be heard by this Court, has to be considered in the light of the decision in ***Vinay Prakash Singh*** *(supra)* wherein the Supreme Court has found JD Nos. 1 and 19, among other parties, to be guilty of willfully disobeying several judicial orders to dilute their shareholding in FHL by pledging shares in favour of Banks in exchange for loans. The factual matrix of that contempt proceeding involved a challenge to the practice of JD Nos 1 and 6 of obtaining loans by pledging FHHPL shares in FHL in favour of Indiabulls Housing Finance Limited, a financial institution. Whereas, in E.A.819/2020, similar allegations have been raised against these JDs and 17 other banks and financial institutions, including YBL. The prayers in E.A. 819/2020 pertaining to YBL read as under:

i. *Set aside the creation of 35,646,406 Fortis Healthcare Limited shares held by Fortis Healthcare Holdings Private Limited in terms of Table A – Wrongful pledges created – Yes Bank Limited*
ii. *Pass a consequential order of attachment and sale of 35,646,406 Fortis Healthcare Limited shares held by Fortis Healthcare Holdings Private Limited*

In the alternative to the above,

iii. *Direct Yes Bank Limited to deposit a sum equivalent to the value of 35,646,406 Fortis Healthcare Limited shares held by Fortis Healthcare Holdings Private Limited as on 21 June 2017 before this Hon'ble Court*

23. These prayers make it clear that the DH is challenging the Bank's decision to extend credit facilities to JD Nos. 14 and 19 by creating pledges against 35,646,406 shares of FHHPL in FHL. Another prayer flowing therefrom is for the issuance of a direction to the Bank to deposit a sum equivalent to the value of the aforesaid shares before this Court. The application replicates these prayers against 16 other banks and financial institutions for having created pledges in a similar manner, which has contributed towards a total dilution of the JDs' unencumbered shareholding in FHL by 72,504,482 shares between March 2016 and September 2018. Since the JDs' shareholding in FHL was one of the key assets through which they were hoping to satisfy the awarded amount, these allegations are serious and require to be examined in depth. Though the Bank has not filed its reply in E.A. 819/2020, these allegations are similar to those in ***Vinay Prakash*** *(supra)* wherein such a modus operandi was already declared illegal by the Supreme Court. This, coupled with the fact that it is a matter of public record that the Bank's management was, in the recent past, mired by allegations of financial irregularities, it certainly does not seem appropriate to direct release of the amounts received from sale of the subject property by auction into an escrow account maintained by the Bank until E.A. 819/2020 is finally decided by this Court. In any event, once this prayer for permission to deposit the sale proceeds in the escrow account is premised upon an intent to preserve them, I am of the view that it would serve the interest of justice to have this amount deposited with this Court for the present, till E.A. 819/2020 is decided.

24. Before I conclude, notwithstanding the fact that the prayer for modification of the status quo order passed on 26.02.2018 is being accepted, there is another issue which needs to be considered - Should YBL be permitted to conduct the e-auction on its own, or should a Court Commissioner be appointed to oversee the process of auction?

The DH appears to have several apprehensions regarding the Bank's ability to conduct the auction in a transparent manner, primarily stemming from all its arguments noted thus far, especially the hasty and premature manner in which the Bank decided to disburse INR 225 crores to JD-14 without needing to execute the requisite security documents or loan agreement. The fact that the disbursement was carried out in this manner is not denied by the Bank, who has sought to explain this departure from contractually stipulated procedures as a matter of practice with long-standing borrowers. However, without proffering any comment on these divergent stands, I am of the view that, in order to avoid any future controversy regarding the transparency of the auction, it would be appropriate to appoint a Court Commissioner to supervise the auction of the subject property. At the same time, it is made clear that the auction would be conducted by YBL itself, and the Court Commissioner is only being entrusted with the responsibility of supervising the same. Accordingly, Mr. Arvind Verma (Mob. +9810016330), Senior Advocate is appointed as the Court Commissioner for the purpose supervising the auction of the subject property by the Bank and shall be paid an amount of INR 2 lakh to be equally borne by the DH and the Bank

25. In the light of the aforesaid, the applications are being disposed of with the following directions:

i. EA 668/2020 is partly allowed. The order dated 26.02.2018 passed by this Court stands modified insofar as the subject property is concerned and the Bank is at liberty to conduct sale by auction of the subject property to recover the outstanding dues under TL-2. The auction shall be conducted under the supervision of Mr. Arvind Verma, the Court Commissioner. It is further directed that the proceeds from the sale by auction shall be deposited with the Registrar General of this Court by way of a fixed deposit, until further orders in this regard are passed by this Court.

ii. In view of the above, the other applications, namely E.A. 625/2020 and E.A. 815/2020, stand dismissed.

(REKHA PALLI)
JUDGE

OCTOBER 15, 2020
gm