

SUPREME COURT OF INDIA

Maharaji Educational Trust

Vs.

Housing & Urban Development Corporation Ltd.

C.A.No....of 2017

(Arun Mishra and S.Abdul Nazeer,JJ.,)

08.05.2017

JUDGMENT

Arun Mishra,J.,

SLP (Civil)No.9068-70/2017

1. Leave granted.

2. The appeals arise out of common order dated 1.2.2017 passed by the Division Bench of the High Court of Delhi at New Delhi in writ petition and two Letters Patent Appeals (LPAs) arising out of the proceedings before the Debt Recovery Tribunal, New Delhi (for short “DRT”). Maharaji Educational Trust (hereinafter referred to as “the Educational Trust”) had taken a loan of approximately Rs. 75 crores from Housing & Urban Development Corporation Ltd. (for short ‘HUDCO’) and mortgaged properties Nos.1 to 6. The Trust is running several medical colleges, dental college and 700 bedded hospitals. Besides 3000 students are said to be getting education with 700 staff members. The Trust is running several other colleges. It is alleged that its worth is more than Rs.12,000 crores. Proceedings were initiated in 2002 by HUDCO for recovery against the Trust under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as “the Act of 1993”). Though the land was under mortgage with HUDCO, the Trust had exchanged 21 acres of the mortgaged property out of property No.6 with U.P. Avas Evam Vikas Parishad (hereinafter referred to as “the Avas Parishad”). The exchange deed was executed on 4.5.2007. There was a dispute between the parties whether 21 acres of land which has been obtained in exchange from Avas Parishad is to be treated as mortgaged property or not. The application for recovery of loan filed by HUDCO was allowed by the DRT-II on 3.6.2008.

3. An agreement to sell had been entered into by the Educational Trust in favour of M/s. SGS Construction and Development (P) Ltd. (for short ‘SGS Constructions’) qua item No.6 of the property comprising 63.45 acres which also included 21 acres of the property obtained in

exchange from Avas Parishad. The agreement was entered into for a consideration of Rs.154 crores out of which a sum of Rs.9.01 crores was admittedly paid upfront which was deposited by Trust with HUDCO. It was entered into to obtain money to wipe off dues of HUDCO. With respect to specific performance of the agreement arbitration is pending between Educational Trust and SGS Constructions, interim injunction had been passed by the arbitrator with the consent of Educational Trust not to sell the property comprised in item No.6 which is the subject matter of arbitration during its pendency. The order has attained finality. The arbitral tribunal had passed order on 15.1.2011. The Trust and its Chairman submitted an undertaking not to make any alienation for the disputed land which was subject matter of arbitration. Accordingly, status quo was ordered by the arbitrator which order is continuing to operate, is not disputed at the Bar.

4. The DRAT, in appeal vide order dated 6.10.2010 had directed the Educational Trust to pay Rs.50 crores per month to HUDCO till recovery in toto. The DRAT noted in its order that borrower wanted to settle the matter with HUDCO. In spite of taking time they did not do so. It was also noted that the borrower had no intention to apply for one time settlement at Rs.240 crores. Borrower wanted to pay Rs.240 crores whereas HUDCO was claiming Rs.250 crores. However contrary to that proposal was moved for one time settlement of Rs.75.07 crores. It was noted that the borrower had no intention for applying OTS at Rs.240 crores. Authorities were misled. It was also observed by DRAT that the action of borrower borders contempt of court due to lack of direct evidence. Action under the Contempt of Courts Act or section 340 Cr.P.C. had not been initiated. It was observed that the borrower required no sympathy at all and the entire scene was created to take a few dates. Accordingly, the order was passed to pay Rs.50 crores per month till full realization. Thereafter, in case of default, immovable property be sold and HUDCO may be permitted to bring a better purchaser. The order of DRAT has not been complied with by the Educational Trust.

5. The title deed of the property which had been exchanged by the Trust from Awas Parishad was deposited in 2011 with HUDCO. It was also mentioned in the reply that status quo was directed to be maintained by DRT on 26.8.2002 with respect to mortgaged property which order was confirmed on 3.6.2008. The DRT's order to maintain status quo had been violated by the Trust. In the appeal DRAT had ordered payment of interest @ 16.5% on the amount of approximately Rs.148 crores. Agreement to sell could not have been entered into by the Trust. On 19.5.2011 SGS Constructions preferred objections before the Recovery Officer. On 3.8.2011 it was submitted by SGS Constructions that HUDCO admitted that the land obtained by the Educational Trust under exchange deed dated 4.5.2007 was not mortgaged in its favour. On 6.9.2011 Recovery Officer directed sale of remaining mortgaged properties in RC No. 039/2011.

6. HUDCO issued demand notice on 19.9.2011 under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'), and also issued possession notice on 21.11.2011. The High Court of Judicature at Allahabad in W.P. No.11669/2011 stayed further proceedings in respect of agricultural land. In view of the interim order of High Court vacant possession was restored

to the Educational Trust. On 6.9.2011 Recovery Officer directed for sale of remaining mortgaged properties from serial Nos.1 to 5 vide orders dated 22.11.2011 and 9.1.2012. On 25.1.2012 on the prayer made by the Educational Trust, HUDCO was restrained from proceeding against 5 mortgaged properties. HUDCO preferred miscellaneous appeal as against order before DRAT.

7. DRT vide order dated 5.6.2013 while deciding the appeal against order of Recovery Officer preferred by the Trust challenging the attachment of their bank accounts directed Recovery Officer to decide the objections on merits and proceed against the bank accounts in case the subject property was not sold within 6 months. On 25.6.2013 DRAT directed sale of agricultural land by HUDCO by way of private treaty under the SARFAESI Act.

8. In the meantime SGS Constructions had paid stamp duty and got the agreement registered. On 25.9.2013 High Court of Allahabad had passed an order in W.P. No.11669/2011 and directed status quo to be maintained with respect to 21 acres of property which was obtained in exchange by the Trust from Avas Parishad. It was also clarified that the order passed by the High Court shall not affect interim order passed by the arbitrator directing maintenance of status quo. In the special leave petition which was preferred before this Court for quashing the said order dated 25.9.2013 this Court decided C.A. Nos.4494-96/2015. This Court noted that by the time of proceedings for recovery of debt, the amount had amassed to more than Rs.433 crores under the SARFAESI Act. It was also noted that prayer had been made by SGS Constructions that properties Nos.1 to 5 be sold and not to sell property No.6 which was subject matter of agreement. As the matter was pending before DRT at Delhi, this Court opined that it was not for the High Court Bench at Lucknow to declare the property as unencumbered and to direct demarcation of 21 acres of land as unencumbered property as this question was required to be decided by DRT where the objections of SGS Constructions were pending. Nor High Court could have decided question of accession under section 70 of the Transfer of Property Act (for short "TP Act") in writ jurisdiction. This Court also did not decide the said question and set aside the order passed by Lucknow Bench of the High Court of Allahabad on the ground that the matter which was pending at DRT, Delhi could not have been agitated before Lucknow Bench. As the property was situated at Ghaziabad, Lucknow Bench had no territorial jurisdiction to entertain the writ petition, this Court held that order passed by the High Court was required to be set aside as no cause of action had arisen at Lucknow. This Court also did not comment on the validity of registration of agreement as writ petition (C) No.38596/2013 in this regard was pending before High Court of Allahabad, and it would be for High Court to adjudicate upon aforesaid questions. It is apparent that this Court did not decide the various questions on merits and the order of Lucknow Bench was set aside on the ground for want of territorial jurisdiction only. No doubt about it that this Court commented adversely upon the attempt to get questions adjudicated by the High Court which were required to be dealt with in SARFAESI proceedings.

9. On 20.5.2015 in W.P. (C) No.2604/2013 High Court observed that Recovery Officer would give due weight age to the mandate of order dated 25.6.2013 passed by the appellate

tribunal while deciding objections pending before him. Before the Recovery Officer applications were filed which were dismissed on 1.7.2015. Division Bench of the High Court of Delhi in LPA No.385/2015 on 1.7.2015 directed Recovery Officer to decide all the questions raised by a party before him in accordance with law, uninfluenced by the observations made by Single Judge in his order dated 20.5.2015.

10. As against the order dated 1.7.2015 appeal was preferred by SGS Constructions before DRT on 3.7.2015. Appeal was dismissed on 10.7.2015. However vide order dated 13.7.2015 High Court in W.P. (C) No.2604/2013 directed Recovery Officer to decide the objections keeping in view issues involved in the case. On 14.7.2015 SGS Constructions preferred an appeal against the order passed by DRT before DRAT. On 21.7.2015 High Court in W.P. (C) No.2604/2013 stayed the execution/adjudicatory proceeding relating to objections pending before Recovery Officer. On 29.7.2015 SGS Constructions preferred W.P. (C) No.7261/2015 for expeditious settlement of dispute between the parties and indicated its willingness to clear the dues of HUDCO.

11. The Educational Trust also filed W.P. No.4987/2016 before the High Court challenging notice dated 26.4.2016 issued by HUDCO proposing to classify the Educational Trust and its trustees as willful defaulters. Writ petition was disposed of vide order dated 27.5.2016 with a direction that HUDCO after hearing the Educational Trust shall take a decision on the matter on or before 30.6.2016. Time was extended by 31.8.2016 on the prayer made by HUDCO in W.P. (C) No.4987/2016. On 8.12.2016 HUDCO again moved an application. Further eight weeks' time was granted by the High Court to HUDCO to pass the order. Ultimately, vide order dated 30.1.2017 Trust had been declared as wilful defaulter.

12. By impugned order dated 1.2.2017 High Court has directed Recovery Officer to consider and decide objections raised by SGS Constructions with regard to property No.6. The order of Recovery Officer dated 1.7.2015 as confirmed by DRT on 10.7.2015 and DRAT by order dated 20.7.2015 were set aside and the applications filed by SGS Constructions were allowed as prayed, for amendment of its objections. High Court also observed that the DRT shall decide all pending applications which are filed including the claim of SGS Constructions that property No.6 being an agricultural land is beyond the purview of SARFAESI Act and pass an appropriate order. High Court further directed status quo to be maintained in respect of property Nos.1 to 6. Aggrieved by the order, Educational Trust as well as SGS Constructions preferred appeals in this Court.

13. The Educational Trust in appeal has urged that SGS Constructions has no right on the basis of agreement to sale dated 26.8.2010 and the property has been mortgaged to HUDCO. Agreement-holder cannot raise any objection. Item No.6 of property should be sold first for recovery of dues of HUDCO. High Court has erred in setting aside orders dated 1.7.2015, 10.7.2015 and 20.7.2015 passed by Recovery Officer, DRT and DRAT respectively. By setting aside orders the High Court has protracted the process and prolonged the recovery process. High Court has erroneously held that under section 17 of SARFAESI Act there is automatic protection against sale of property No.6. On the basis of registered agreement no

right could accrue to SGS Constructions and unilateral registration has been questioned in a writ petition pending before the High Court of Allahabad. Right of HUDCO is paramount. SGS Constructions cannot be permitted to contend that property No.6 is agricultural land. SGS Constructions had no locus to sustain its objections. Futile writ petition was filed before Lucknow Bench, order passed in which was set aside by this Court. The combined value of the properties items 1 to 6 of appellant is approximately Rs.1000 crores and SGS Constructions had offered a mere sum of Rs.400 crores under the garb of clearing the dues of Educational Trust owed to HUDCO. The fetter has been imposed by the High Court by impugned order. SGS Constructions is trying to unsettle and dislodge the livelihood of various individuals who are attached to running of medical college, dental college and hospitals at property Nos.1 to 5 and attempting to create hurdles in education process of three thousand students getting education in medical college, dental college and hospital. There are 700 employees working in institutions running for the last 22 years. The Educational Trust is suffering interest approximately Rs.2 crores per month. It would be in the interest of public money that recovery proceedings take place at an early date. Value of property No.6 is approximately Rs.776 crores. That should be first put to public auction to derive its best value.

14. SGS Constructions in the appeal filed has questioned the order of High Court on the ground that the offer of settlement made by appellant had not been taken into consideration. There is no decision rendered by the High Court on merits of the case and proposal for settlement would have cleared entire dues of HUDCO which, in turn, has not taken effective measures for recovery for a long period. The offer of appellant is viable and would bring the dispute to a quietus and public money due towards HUDCO shall also be recovered in the process. On the one hand medical and dental colleges and hospital are being run but payment is not being made. Medical college and other immovable property from S.Nos.1 to 5 is subject matter of mortgage i.e. non-agricultural property and is liable to be sold under SARFAESI Act in recovery proceedings. Agricultural land i.e. item No.6 cannot be sold under SARFAESI Act and applying the principle of marshalling under section 56 of TP Act, SGS Constructions being agreement-holder has a right that property Nos.1 to 5 should be sold first and only if the dues are not satisfied item No.6 of property to be sold and not otherwise.

15. It was urged on behalf of Educational Trust that only property No.6 should be directed to be sold and the High Court has erred in passing impugned order. Right of marshalling of property under section 56 of TP Act cannot be exercised by SGS Constructions. It was also submitted that the exchanged property has to be treated as accession to property under the mortgage with HUDCO by virtue of provisions contained in section 70 of TP Act. Property which has been exchanged is thus liable to be sold and though arbitrator had passed an order of maintenance of status quo with respect to item No.6 of property, this Court has ample power under Article 142 to vacate the order. The order passed by arbitral tribunal should be vacated and this Court should direct sale of property No.6 which is worth Rs.776 crores and its sale would be enough to satisfy dues of HUDCO. It would not be appropriate to direct sale of property Nos.1 to 5 as prayed by SGS Constructions, as that would disturb running of

medical and dental colleges and hospital. It would be detrimental to the interest of the education of large number of students as well as employees.

16. It was submitted on behalf of Trust that this Court has also commented adversely on filing of petition before the Lucknow Bench by SGS Constructions the order passed was held to be without jurisdiction. Agreement was not duly stamped and registered as required in State of U.P. It was stamped and got registered unilaterally. Its registration has been questioned before High Court of Allahabad. Thus on the basis of such agreement no right accrued to SGS Constructions. The amount of Rs.9 crores had been paid under the agreement. The Trust is ready to refund a sum of Rs.27 crores to it as such this Court should direct sale of property item No.6 so as to satisfy dues of HUDCO.

17. It was urged on behalf of SGS Constructions that in view of order passed by arbitral tribunal for maintaining status quo, property item No.6 cannot be sold. The Trust and its Managing Director had submitted undertaking before Arbitral Tribunal. Apart from that it being an agricultural land property cannot be sold under SARFAESI Act. In addition thereto agreement-holder has a right under section 56 of TP Act of marshalling of property that is to say property which is subject matter of agreement and arbitral proceedings should be sold by mortgagee only when by sale of other properties dues of HUDCO are not satisfied. Property item No.6 is subject matter of agreement as matter is sub judice before arbitral tribunal cannot be sold at this stage. Only that portion of mortgaged property can be sold later on which is necessary for satisfying dues of HUDCO, only if an outstanding amount remains and its dues are not satisfied by sale of property Nos.1 to 5 after decision of arbitral tribunal. Apart from that it was submitted that property which had been exchanged i.e. 21 acres from Avas Parishad could not be said to be an accession to property within the purview of section 70 of TP Act. It is an unencumbered property as the property 21 acres which was in fact mortgaged had been given by Educational Trust to Avas Parishad in an illegal manner. Thus the property which was under mortgage could not have been exchanged and property which was given to Avas Parishad by Educational Trust continues to be under mortgage with HUDCO which would have first right on it. Thus property which has been given by Avas Parishad in exchange after acquisition of land was unencumbered and not under mortgage, it cannot be said to be an encumbered property thus cannot be sold for satisfying the dues of the Trust as the agreement to sale has been entered into by Trust with SGS Constructions Ltd., with respect to 63 acres which includes 21 acres of unencumbered property. The conduct of the Educational Trust has been noted by DRAT, it has never intended to settle dues in spite of running institutions and possessing assets of more than Rs.12,000 crores and is a willful defaulter bound to pay the whopping money, it has taken the huge amount from SGS Constructions also and now wants to resile from its obligation. SGS Constructions is ready to clear dues of HUDCO by purchasing to purchase properties No. 1 to 6 which offer ought to have been considered on merits by High Court. Educational Trust is running chain of other educational institutions but is not making payment and is a wilful defaulter.

18. It was submitted on behalf of HUDCO that proceedings are collusive between SGS Constructions as well as the Educational Trust. Nobody intends to pay public money and HUDCO be permitted to sell property, in particular item No.6 so as to realize the dues.

19. When the matter came to this Court on earlier occasion this Court had set aside the order passed by Lucknow Bench of Allahabad High Court on the ground that it had no territorial jurisdiction to entertain the writ application with respect to matter of DRT at Delhi and property situated at Ghaziabad, as such the main seat at Allahabad could have entertained the petition. It could not have been entertained by Lucknow Bench of said High Court for want of territorial jurisdiction. This Court did not decide the question as to accession under section 70 and left it open for DRT and attempt which was made by SGS Constructions to demarcate 21 acres of land as unencumbered property was also set aside on the ground of territorial jurisdiction and that this was the matter to be decided not by High Court but it was required to be decided in the proceedings of the DRT.

20. The Educational Trust is running various institutions and hospitals but at the same time it is not making payment of dues of loan amount to HUDCO by which money it established them. The DRAT in its order dated 6.10.2010 in Appeal Nos. 120/2008 and 124/2008 has noted conduct of Trust and recorded the following findings :

“74. From the above said facts and circumstances the following points emerge: (b) Before HUDCO they moved OTS for Rs.240 crores whereas HUDCO was claiming Rs.250 crores or more. However, the Court was informed that OTS was for Rs.75.07 crores only. The earlier OTS moved for Rs.80 to 90 crores had found no favour with the HUDCO authorities. How it could have agreed to the proposal of Rs.75.07 crores only. Even after I heard the final arguments, the borrowers moved yet one more application for not announcing the judgment as they wanted to settle the matter with HUDCO. I gave them 15 days more time. It transpired that they had again made proposal in the sum of Rs.75.07 crores. It is apparent that the borrowers want to bid for time on one pretext or the other. In this respect mala fides are writ large on them.

(e) At best, it can be said that the borrowers had no intention to apply for OTS at Rs.240 crores. The authorities were, however, misled. Meeting of minds is the sine qua non of an agreement coercion, force, misrepresentation, fraud or anything of the like have no place at all. Although, the action of the borrowers borders the contempt of court, yet due to lack of mens rea, lack of proper and direct evidence not touching the heart of the problem, it would not be worthwhile to initiate action under the Contempt of Courts Act or under Section 340 Cr.P.C.

(f) However, at the same time, the conduct, misrepresentation and bizarre behaviour of the borrowers cannot be swept under the carpet. It is very easy to gauge into antecedents of borrowers particulars that of Dr. Mahalingam who is responsible and liable for admitted interpolations and alterations. Can allegations against Mr. Naresh Chandra and two/ three officers of HUDCO without being substantiated by any cogent and plausible evidence come to the rescue of the borrowers? All these facts and circumstances will be put in the scales of Justice and their pros and cons would be evaluated as per law. One fact is clear that the borrowers deserve no sympathy at all.

Since all these drama was created to take a few dates, therefore, instead of taking action under the Contempt of Court Act and Section 340 Cr.P.C. it would be worthwhile to come to the main point and action be initiated accordingly.”

21. It is apparent from averments made by the Trust itself that it has more than 700 employees and 3000 students are taking education but it is shocking and surprising that the amount due to HUDCO taken as loan in 1995 is not being paid which has amassed to approximately Rs.480 crores at present.

22. It is also apparent that there are several rounds of litigation in spite of order of DRAT with respect to loan amount having attained finality, is not being honoured for recovery which proceedings under the SARFAESI Act had also been initiated by HUDCO but sans any result. The history of the case as projected clearly indicates that it has virtually become impossible to realize the dues owing to various litigations pending and filed by parties or some other third persons.

23. It is not disputed at the Bar with respect to item No.6 the arbitral tribunal had passed an order on the basis of an undertaking given by Trust and its Managing Director, for directing maintenance of status quo, and the said order has not been vacated and it has not been questioned by any of the parties. Oral prayer has been made to this Court in course of arguments to vacate the same in exercise of power under Article 142 of the Constitution of India. However as the interim order of arbitral tribunal has not been questioned before us in any proceedings, it would not be appropriate to vacate the interim order in the absence of it being challenged. It appears that on one hand the Educational Trust is trying to convey that property No.6 be sold first at the same time it has undertaken not to do so before arbitral tribunal and not questioned the order of arbitral tribunal rather has consented to order of arbitral tribunal that property No.6 not be sold. Parties are expected not to blow hot and cold. Conduct is unfair and inconsistent and indicative of dilly-dallying tactics on the part of the Educational Trust. However, there is yet another aspect that HUDCO is not bound by interim order of arbitral tribunal to the extent of approximately 43 acres of property comprised in Item No.6 and it would have first charge on said mortgaged property, hence, it is permitted to sale 43 acres of land initially mortgaged with it by Educational Trust. Remaining 21 acres of land obtained in exchange was unencumbered and cannot be said to be accession for reasons mentioned hereinafter.

24. However at the same time it appears that in spite of having means, running colleges and hospital the Educational Trust is not paying the amount to HUDCO and the Educational Trust has been declared as willful defaulter by HUDCO as per order dated 30.1.2017. It is necessary to safeguard the interest of HUDCO. Even after the order of DRAT, the Educational Trust has not cleared the long pending dues of HUDCO. As observed by DRAT, the Trust is not paying the amount in spite of having been given the facility of making payment in instalments. It would not be appropriate to expect HUDCO to wait till eternity. In view of the order passed by appellate tribunal, it would be open to HUDCO to sell 43 acres of initially mortgaged land comprised in Item No.6 and other mortgaged properties No.1 to 5

and which had been mortgaged by the Educational Trust to HUDCO. However as medical colleges, dental college and hospitals are running and Educational Trust is obviously earning from them, cannot claim that the mortgaged property cannot be sold. However before sale we deem it appropriate to give one more opportunity to the Educational Trust to make payment to HUDCO. We deem it appropriate to direct HUDCO as well as the Trust to make an endeavour to settle the amount within a period of one month and the amount which may be settled between the parties be paid within a period as may be mutually agreed. In case no settlement is reached between HUDCO and the Educational Trust and if the Educational Trust fails to come forward with appropriate offer acceptable to HUDCO and start payment from the month of June, 2017 as may be agreed between the parties, it would be open to HUDCO to realize the amount in accordance with law by taking resort to mechanism available to it under the rules as expeditiously as possible.

25. It was submitted on the strength of decision in *Balakrishnan v. Malaiyandi Konar*¹ that only that part of the property should be sold which may be necessary to satisfy the decree. There is no dispute with aforesaid proposition and Recovery Officer shall take care to sell only that part of the property which is enough to satisfy the amount to be realized. Sale of entire mortgaged property is not necessary.

26. When the matter had been heard finally and reserved for orders by this Court, precisely various submissions were raised in this Court had also been argued before the Recovery Officer. Propriety required that Recovery Officer should have waited for the decision of this Court. We direct DRT not to associate said Recovery Officer any more with proceedings. This Court heard and reserved the matter on 31.3.2017. Matter has been argued before Recovery Officer subsequently and order dated 24.4.2017 has been passed to the effect that item No.6 property is mortgaged land and it has been held that no interest has accrued to the objector by virtue of agreement to sell which has been entered into by the Educational Trust. It has also been held by Recovery Officer that 21 acres of land which had been obtained by the Educational Trust in exchange with Avas Parishad, has to be treated as accession of land within the purview of section 70 of TP Act and there is deposit of title deeds also. Thus the land obtained in exchange is to be treated as mortgaged land.

27. With respect to the mortgaged property no doubt about it that the law is that the first charge would be of the mortgagee that is HUDCO. In the case, properties 1 to 5 and out of item No.6 property, approximately 43 acres are admittedly under mortgage with HUDCO. The entire property No.6 was comprised of approximately 63.50 acres, out of this 21 acres had been exchanged by the Educational Trust with Avas Parishad, whether same is encumbered is in dispute. The question is whether it is the case of accession to the property. Section 70 of TP Act is extracted hereunder :

“70. Accession to mortgaged property.-If, after the date of a mortgage, any accession is made to the mortgaged property, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to such accession.”

28. Section 70 refers to the mortgagee's right to accessions to the mortgaged property. Section 63 deals with the expression "accession to mortgaged property" where mortgaged property in possession of the mortgagee has, during the continuance of the mortgage, received any accession, the mortgagor, upon redemption shall, in the absence of a contract to the contrary, be entitled as against the mortgagee to such accession. There can be natural accessions which are incorporated in the mortgaged property, from part of the mortgagee's security, and revert to the mortgagor upon redemption.

29. The doctrine of accession is limited to cases where the security in existent and has not been destroyed altogether and the mortgagor thereafter acquires, while keeping the security intact, a new right which is called accession. In the instant case the property which is 21 acres under mortgage, could not have been transferred by the Educational Trust free from encumbrances to Avas Parishad at all. As the property was encumbered, the charge of HUDCO would remain on the existing property which was actually under the mortgage deed. Thus the property which has been taken by Avas Parishad from the Educational Trust could not be said to be unencumbered and was subject to mortgage and it was not legally permissible for Educational Trust to give it to Avas Parishad as unencumbered property.

30. Black's Law Dictionary defines the expression "accession" with respect to property thus:

"4. The acquisition of title to personal property by bestowing labor on a raw material to convert it to another thing <the owner's accession to the lumber produced from his land - Also termed (in Roman law) accessio. See ADIUNCTION (2). Cases: Accession 1.

"Accessio is the combination of two chattels belonging to different persons into a single article: as when A's cloth is used to patch B's coat, or a vehicle let on hire-purchase has new accessories fitted to it." R.F.V. Heuston, *Salmond on the Law of Torts* 113 (17th ed. 1977).

5. A property owner's right to all that is added to the property (esp. land) naturally or by labor, including land left by floods and improvements made by others <the newly poured concrete driveway became the homeowner's property by accession>. In Louisiana law, accession is the owner's right to whatever is produced by or united with something, either naturally or artificially. La. Civ. Code arts. 483, 490, 507. Cf. ANNEXATION. 6. An improvement to existing personal property, such as new shafts on golf clubs.

"The problem of accessions arises infrequently, judging from reported cases, but an obvious instance of the difficulty arises where a motor vehicle is being financed by a secured party and the debtor in possession of necessity acquires a new engine or new tires for the vehicle If the seller of the engine or tires reserved a security interest

at the time the goods were installed, the seller should prevail over the vehicle's secured party, with a right to remove the accessions. Conversely, if the sale were on open credit with no security interest reserved, or if the seller acquired a security interest after installation of the goods, then the financier of the vehicle should prevail.” Ray D. Henson, Handbook on Secured Transactions Under the Uniform Commercial Code 4-22, at 93 (2ded. 1979).

7. The physical uniting of goods with other goods in such a manner that the identity of the original goods is not lost. UCC 9-102(a)(1). “

31. It is apparent from the aforesaid definition that it is not a case of acquisition of title to personal property. It is necessary that in the combination which has been formed into a single article, existing property is not lost. In the facts of the instant case it cannot be said that it is so. Apart from that as specified in aforesaid point (7) above that accession is physical uniting of goods with other goods in such a manner that the identity of original goods is not lost. In the instant case identity of the original mortgaged property is lost and 21 acres of land is no more available. Thus it is not the case of uniting.

32. In The Law Lexicon by P. Ramanatha Aiyar, 2nd Edn. 1997, “accession” has been defined thus:

“Accession is a mode of acquiring property as an addition to existing property by natural growth or by application of human labour. (See Cent. Dict.) In its broadest sense it may be defined to be the means by which title to the increments to one’s property movable or immovable, is acquired, whether by natural or artificial means (as) accession of a province to an Empire. In the restricted sense, in which it is generally used in law, it applies to the acquisition of title to the increments to one’s movable property, brought about by artificial means, such as labour or the addition of material other than the intermixture of goods or things of the same kind. (Anderson L. Diet. ;Bl. Comm. 404 ; Black's Law Dictionary ; BurriU, 2 Kent Comm. 360, etc.)

In Roman Law accession is the general name given to every accessory thing, that has been added to a principal thing from without and has been connected with it, whether by the powers of nature or by the will of man, so that in virtue of this connection it is regarded as part and parcel of the thing. *Sheo Pagan Prasad v. Bhagwati Dubey*².

1. coming to as an addition ; the mode of acquiring property by which the owner of a corporal substance (as land or cattle) becomes the owner of addition by growth, increase or labour ; any property so acquired (S. 63, T.P.Act); 2. coming to the throne [S. 57(5), Indian Evidence Act]; 3. coming to an office [S. 57(7), Indian Evidence Act]; 4. increase by something added ; 5. assent (art. 57, Geneva Conventions Act).” Emphasis is on addition to the existing property. Then there can be addition by natural or artificial means. The property obtained in exchange could not be said to be

accessory thing to the remaining mortgaged land which was not exchanged with Avas Parishad.

33. Accession to property has also been defined in aforesaid Law Lexicon with reference from Encyclopaedia of Laws of England. Same is extracted hereunder

“Accession of Property. The Law of alluvion is a branch of the general law regarding accession to property. The Law of accession may be stated as follows. Where any corporeal substance, over which rights of property are exercised, receives an addition, increase or improvement, either in a natural way, as by the growth of fruits or the pregnancy of animals, or in an artificial way, as by the erection of houses on land, receding of a river or lake, such addition, increase or improvement falls primarily to the owner of the original substance. (Encyc. of the Laws of England).”

34. In Oxford Dictionary “accession” has been defined and relevant portion is extracted thus:

“accession

2 a new item added to an existing collection of books, paintings, or artefacts. An amount added to an existing quantity of something; substantial accessions of gold.

> Verb [with obj.] (usu. Be accessioned) record the addition of (a new item) to a library, museum, or other collection.

- ORIGIN late 16th cent. (in the general sense ‘something added’): from Latin accession(n-), from the verb accedere ‘approach, come to’ (see ACCEDE)”

Emphasis is on addition to the existing property, quality or title.

35. The Privy Council in Elizabeth Webster & Ors. Herbert Power, George Henry Davenport, and Robert Burke 1867-69 Vol. 2 ILR 69 had considered the version of accession and meaning of the word ‘increase’ of the original subject-matter for attracting the provisions of section 70 of TP Act. The Court has laid down thus:

“The first question which suggests itself to their Lordships’ consideration is :-- What was included in the Plaintiffs’ original Mortgage ? It was admitted at the Bar that the answer to be given to the question whether the Mortgage included any sheep brought upon the Run which were not the issue of those that were on the Rune at the date of the Mortgage, if considered with reference to the mere words of that instrument, must depend upon the construction which their Lordships put upon the word “increase.” Their Lordships, looking at the deed, and seeing that “increase” is always spoken of as the increase, not of a flock, but as the increase of

those sheep which were originally the subject of the Mortgage, are clearly of opinion, that it must be taken to mean the natural increase, or the offspring of those original sheep.”

36. The question of accession has been dealt with by various High Courts. In *Krishna Gopal v. Miller*³, *Macleod v. Kissan*⁴ and *Atmukur v. Chetty v. Thimpurasundar*⁵ it has been laid down that if the mortgagor builds on the property mortgaged, the building forms part of the mortgagee's security. Same is true with respect to land formed by alluvion or dilluvion as laid down in *Saila Bala v. Swerna Moyee*⁶. Even machinery fixed by bolts and nuts to the concrete floor of a building in certain circumstances may be an accession to which the mortgagee is entitled, as laid down in *PMPM Chettyar Firm v. Siemens Ltd*⁷.

37. In *Baljit Singh v. JI Cunnington*⁸ where only the building was mortgaged and not the site, it was held that the site cannot be deemed to be an “accession” to the mortgaged property. In *Nannu Mal v. Ram Chander & Ors.*⁹ in the background of the fact that the auction purchasers at a prior mortgage's sale, removed a shed, and built a small house on land mortgaged. A puisne mortgagee who had not been made a party sued to enforce the mortgage, the court laid down that the mortgagee was entitled to have the house sold as an accession to the property mortgaged. It was also a case of improvement in existing property.

38. Enlargement of estate is also an accession. The section is not limited to physical accretions or additions. In case there is increase of interest, the same is also covered under purview of section 70 as held in *Sidheshwar Prasad v. Ram Saroop*¹⁰. In case mortgagor had only the leasehold rights and had acquired freehold rights during subsistence of the mortgage, the same has to be treated as an accession to the property. Addition of occupancy rights or some other such rights with respect to the existing property should also be an accession to the mortgaged property. If the mortgagor discharges a prior encumbrance existing at the date of the mortgage, the increase in the value of the estate is for the benefit of the mortgagee. A clearance of the adjoining waste land by the mortgagor is not an accession within the meaning of section 70 as observed in *Tay Gyi v. Maung Yan*¹¹. Thus in our opinion property 21 acres obtained in exchange by Educational Trust cannot be said to be accession within the purview of section 70 of TP Act.

39. In the instant case the property was exchanged by the Educational Trust with Avas Parishad in the year 2007. Agreement had been entered into with SGS Constructions on 26.8.2010 for a sum of Rs.154 crores in order to pay the dues of HUDCO and a sum of more than Rs.9 crores had also been paid to Educational Trust which was deposited by it with HUDCO. Deposit of title deed has been made by Educational Trust subsequently on 27.7.2011 with HUDCO but prior to that an agreement to sale had been entered into for the aforesaid 21 acres of land which was unencumbered. Thus at the time when the agreement had been entered into, the property was unencumbered and was not under mortgage with HUDCO. Thus agreement with regard to 21 acres was not interdicted by interim order of DRT. Thus SGS Constructions by making a huge payment of Rs.9 crores had acquired a right over the said unencumbered property. Thus HUDCO will not have the first right to sell

the 21 acres of land which was unencumbered which was subject matter of agreement to sell. HUDCO will have the right for other mortgaged properties to realize the dues at the first instance.

40. In the instant case it is apparent that the Educational Trust is a wilful defaulter and has built the property, colleges, hospitals from the money borrowed from HUDCO. It was the bounden duty of the Educational Trust to pay back the money to HUDCO. Thus no equitable principle comes to their rescue as despite running the institutions for the last 22 years, they have not paid back the amount. Once they want to run their colleges, hospitals etc. built up with the help of money advanced by HUDCO, obviously they must honestly ooze out the advantage which they are deriving from the institutions but it has become a general scenario that the persons who earn money with help of hefty loans, in spite of running institutions which have been set up by the money lent to them, they are not making payment of dues. Consequently, they will have no right to run the institutions in such a dishonest manner. The increase of non-performing assets in banks is one of the offshoots of such murky deals. It is shocking that despite having means, earning profits, they are not interested in making payment. Time has come when they have to be dealt with sternly and with an iron hand so as to make them pay public dues. We expect the Educational Trust to make payment of the amount which has swelled up to approximately to Rs.480 crores by now and make payment otherwise they will have to face the consequences. Not only that, they have taken the money from HUDCO but from other incumbents i.e. SGS Constructions also but not interested in making payment in spite of running several institutions. There were orders which were passed earlier with respect to bank accounts also, but to our dismay, we have not been addressed as to what happened to those orders. Be that as it may. It is made clear that in case the Educational Trust wants to run institutions, they are bound to make payment and as they are liable to pay, they should pay in all fairness all sums which they have borrowed sans any ifs and buts. It is what is expected of them. Otherwise courts will have to step in and take action in case dues remain unpaid and bottlenecks are created by one way or the other in realization of dues. It is not only startling but also shocking to note that a giant institution which is imparting education to about 3000 students involving manpower of about 700 personnel is finding it difficult to pay the loaned amount and is coming up with lame excuses to shirk its responsibility.

41. It was also submitted on the strength of decision in *Suraj Lamp & Industries Pvt. Ltd. v. State of Haryana & Anr*¹²., *Raheja Universal Ltd. v. NRC Limited & Ors*¹³.; and *M.L. Aggarwal v. Oriental Bank of Commerce & Ors*¹⁴. that the agreement entered into was not registered as such no right could accrue as per provisions of Section 54 of TP Act prevailing in State of Uttar Pradesh. However we refrain to comment finally on the said issue. However, fact remains that the registration of agreement has been made subsequently and stamp duty of more than Rs.4 crores has been paid. Effect thereof has to be considered in appropriate proceedings/arbitral tribunal.

42. Thus we direct as under :

“(1) That Educational Trust is directed to settle scheme of repayment with HUDCO within one month and to start payment of dues w.e.f. month of June, 2017.

(2) On failure of Education Trust as per aforesaid direction or in case of default it would be open to HUDCO to sale approximately 43 acres of the land which was mortgaged with it to realize its dues in the legally permissible manner.

(3) In case the proceeds from sale of approximately 43 acres of land are not sufficient to satisfy the dues of HUDCO, it would be open to sale property No. 1 to 5 or its part which may be necessary for realization of the outstanding dues.

(4) However, 21 acres of property which has been obtained in exchange from Awas Parishad cannot be sold. It is only in the circumstance if Arbitrator disallows the claim of SGS Constructions for purchase of 21 acres of said property can be sold not otherwise. That too if dues of HUDCO remain outstanding after sale of approximately 43 acres of land out of Item No.6 mortgaged initially and property item No. 1 to 5 which are under mortgage. Let the Arbitrator also expedite the matter and decide the proceedings as far as possible within two months.

43. With the aforesaid directions and modification in the order of the High Court, the appeals stand disposed of. No costs.

¹(2006) 3 SCC 0049

²AIR 1949 Pat. 0099

³(1902) ILR 29 Cal. 0803

⁴(1906) ILR 30 Bom 0250

⁵AIR 1965 Mad 0185

⁶AIR 1939 Cal. 0275

⁷(1933) ILR 11 Rang 0322

⁸AIR 1984 All 0209

⁹AIR 1931 All. 0277

¹⁰AIR 1963 Pat. 0412

¹¹146 IC 0674

¹²(2012) 1 SCC 0656

¹³(2012) 4 SCC 0148

¹⁴128 (2006) DLT 0407 (DB)