

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO.162 OF 2016

IN

CHAMBER SUMMONS NO.1990 OF 2007

IN

CHAMBR SUMMONS NO.212 OF 2007

IN

EXECUTION APPLICATION (L) NO.57 OF 2007

IN

AWARD DATED 4TH APRIL, 1997

ALONGWITH

NOTICE OF MOTION (L) NO.1285 OF 2016

IN

APPEAL (L) NO.162 OF 2016

Pratap G. Somaiya S/o. Goverdhandas)
R/o. 1-12-482, Siddamber Bazar, Near)
Rajadhani Hotel, Hyderabad and also)
residing at Taruna Housing Society,)
Block No.A-3, D.V. Dayal Road, Mulund)
(West), Mumbai.)Appellant
(Orig. Claimant)

V/s.

1. Rajesh Thakker, S/o. Prabhudas)
Thakker, having office at 89,)
Mittal Chambers, Nariman Point,)

Mumbai 400 021)
)
2. Satyajit P. Thakker, So. Prabhudas)
Thakkar (Deceased))
)
3. M/s. Prabhudas Hirji & Co.,)
Rep. by its partner Mr. Rajes P.)
Thakker, having office at 89,)
Mittal Chambers, Nariman Point,)
Mumbai 400 021)
)
4. Prabhu Hirji Ice & Cold Storage Ltd.,)
Rep. by its directors Rajesh P.)
Thakker, having office at 89 Mittal)
Chambers, Nariman Point, Mumbai)
400 021 and having factory at 10-11,)
MAFCO, APM Yard, Vashi Turbe,)
Navi Mumbai)
)
5. Asset Reconstruction Company)
(India) Limited, a company incorporated)
under the Companies Act, 1956 and)
registered as a Securitisation and Asset)
Reconstruction Company pursuant to)
Section 3 of the SARFAESI having its)
registered office at 9th Floor, Times)
Tower, Kamala Mills Compound,)
Senapati Bapat Marg, Lower Parel(West))
Mumbai 400 013.)..... Respondents.
(Nos. 1 to 4- Orig.
Resdts. & No.5 -
Orig. Applicant)

ALONGWITH
APPAL (L) NO.245 OF 2016
IN
CHAMBER SUMMONS NO.1990 OF 2007
IN
CHAMBER SUMMONS NO.212 OF 2007
IN
EXECUTION APPLICATION (L) NO.57 OF 2007
IN
AWARD DATED 4TH APRIL, 1997

- | | | |
|---|---|---------------------|
| 1. Rajesh Thakker, S/o. Prabhudas |) | |
| Thakker, having office at 89, Mittal |) | |
| Chambers, Nariman Point, Mumbai - |) | |
| 4000 021. |) | |
| |) | |
| 2. Satyajit P. Thakker, So. Prabhudas |) | |
| Thakkar (Deceased) |) | |
| |) | |
| 3. M/s. Prabhudas Hirji & Co., |) | |
| Rep by its partner Mr. Rajesh P. |) | |
| Thakker, having office at 89, |) | |
| Mittal Chambers, Nariman Point, |) | |
| Mumbai 400 021 |) | |
| |) | |
| 4. Prabhu Hira Ice & Cold Storage Ltd., |) | |
| Rep by its directors Rajesh P. Thakker, |) | |
| having office at 89 Mittal Chambers, |) | |
| Nariman Point, Mumbai 400 021 |) | |
| and having factory at 10-11, MAFCO, |) | |
| APM Yard, Vashi Turbe, Navi Mumbai |) | Appellants. |
| | | (Orig. Respondents) |

V/s

- | | |
|---------------------------|---|
| 1. Pratap G. Somaiya S/o. |) |
|---------------------------|---|

Goverdhandas, R/o. 1-12-482,)
 Siddamber Bazar, Near Rajadhani Hotel,)
 Hyderabad and also residing at Taruna)
 Housing Society, Block No.A-3, D.V.)
 Dayal Road, Mulund (West), Mumbai)
)
 2. Asset Reconstruction Company)
 (India) Limited, a company incorporated)
 under the Companies Act, 1956 and)
 registered as a Securitisation and Asset)
 Reconstruction Company pursuant to)
 Section 3 of the SARFAESI, having its)
 registered office at 9th Floor, Times)
 Tower, Kamala Mills Compound,)
 Senapati Bapat Marg, Lower)
 Parel (West), Mumbai 400 013) Respondents
 (No.1 Orig. Claimant &
 No.2 – Orig. Applicant)

Dr. Milind Sathe, Senior Counsel a/w Mr. Rompal Singh Kohli for the Appellant in APP(L) No.162 of 2016 and for Respondent No.1 in APP(L) No.245 of 2016.

Mr. Y.S. Jahagirdar, Senior Counsel a/w Mr. Vikram Chavan i/b Vikram Chavan for the Appellant in APP(L) No.245 of 2016.

Mr. Venkatesh Dhond, Senior Counsel a/w. Mr. Ashish Kamat, Mr. Shakib Dhorajiwalla, Mr. Harsh Magia, Mr. Anjala Parveen i/b Vidhi Partners for Respondent No.2 in APP(L) No.245 of 2016 and for Respondent No.5 in APP(L) No.162 of 2016.

**CORAM: V. M. KANADE &
MRS SWAPNA S. JOSHI JJ.**

**RESERVED ON: 26th September, 2016
PRONOUNCED ON: 06th October, 2016**

ORAL JUDGMENT: *(Per V.M. Kanade, J.)*

1. Heard Dr. Milind Sathe, learned Senior Counsel appearing on behalf of the Appellant in Appeal (L) No. 162 of 2016, Mr. Y.S. Jahagirdar, learned Senior Counsel appearing on behalf of the Appellant in Appeal (L) No. 245 of 2016 and Mr. Venkatesh Dhond, learned Senior Counsel appearing on behalf of Respondent No.5 in Appeal (L) No.162 of 2016 and for Respondent No.2 in Appeal (L) No.245 of 2016.

2. Appellants are aggrieved by the order passed by the learned Single Judge dated 21/03/2016, by which the learned Single Judge was pleased to direct the Court Receiver who was appointed in respect of the mortgaged properties to hand over the same to the Respondent – Asset Reconstruction Company (India) Limited [For short “ARCIL”]. The learned Single Judge has imposed costs of Rs 10 lakhs and issued contempt notice against the Appellants herein. Since the order challenged in both these Appeals is common, we propose to give a common judgment in both these Appeals.

FACTS:

3. Brief facts which are necessary for understanding the controversy and issues raised in these Appeals are mentioned hereinbelow:-

4. Central Bank of India, which is a Nationalized Bank, granted credit facilities to the following borrowers:-

- 1) M/s. Prabhudas Hirji & Co. (Respondent No.3)
- 2) Prabhu Hira International & Industrial Ltd.
- 3) M/s Satyajit Traders
- 4) Prabhu Hira Ice & Cold Storage Ltd (Respondent No.4)
- 5) Prabhu Hira Travels Ltd.

5. An equitable mortgage was created by deposit of title deeds by Respondent No.3 on 27/09/1997 in respect of the following properties viz. (i) Office premises Flat No.89, 8th Floor, Mittal Chambers, Nariman Point Mumbai 400021 and (ii) Godwon premises Basement No.9, Mittal Chambers, Nariman Point, Mumbai 400021 to secure loans given to Prabhudas Hirji & Co., Prabhu Hira International & Ind. Ltd. & Satyajit Traders.

6. Similarly, on 01/01/1998 an equitable mortgage was created by deposit of title deeds by Respondent No.4 in respect of properties situated at Plot Nos. 10 and 11 near MAFCO Market, APMC Yard, Sanpada, Vashi Navi Mumbai to secure the loans granted to Prabhu Hira Ice & Cold Storage Ltd.

7. The said equitable mortgages were extended from time to time. Sometime in the year 2003 all these five accounts were declared as

Non-performing Asset (“NPA”) as per the guidelines of Reserve Bank of India.

8. On 07/03/2003, Central Bank issued notice under Section 13(2) of the SARFAESI Act calling upon the Respondents to repay the outstanding amount of Rs 8,28,22,035.32 with further interest within 60 days of receipt of the notice.

9. Since the Respondents failed to repay the outstanding amount, on 14/05/2003 Central Bank took measures under Section 13(4) of the SARFAESI Act and took physical possession of the office premises situated at 89, Mittal Chambers, Nariman Point, Bombay (“office premises”) mortgaged by Respondent No.3.

10. Respondents filed Writ Petition No.1368 of 2003 challenging the constitutional validity of the SARFAESI Act and the measures taken by the Bank. This Writ Petition was filed on 13/06/2003. Petition was disposed of by Judgment and Order dated 17/06/2003, directing Central Bank to restore physical possession of the office premises but it was permitted to retain symbolic possession of the premises. Respondents were restrained from creating third party rights and/or interest in the office premises.

11. Central Bank of India filed five Original Applications in DRT-II between October 2003 and January, 2004. Apex Court in *Mardia*

*Chemicals Ltd. vs. Union of India*¹ upheld the constitutional validity of the SARFAESI Act. In view of this Judgment of the Apex Court, Writ Petition No.1368 of 2003 filed by the Respondents was disposed of and the liberty was granted to the Respondents to approach DRT.

12. According to the Appellants, an Award was passed by consent by the Arbitrator who was appointed by the Appellants on 04/04/1997. We will make a reference to the gist of the Award and the manner in which the Award was passed at subsequent stage. But almost after a period of 8 years, in 2006 Appellants filed Execution Petition No.90 of 2006 before the Civil Court, Hyderabad, seeking execution of the purported Award dated 04/04/1997. The Civil Court at Hyderabad by its Order dated 11/08/2006 appointed an interim Receiver and directed parties to approach the Courts at Mumbai for appointment of Receiver within six months from the date of the order as the properties were lying within the jurisdiction of Mumbai Court.

13. Accordingly, fresh Execution Application (L) No. 57 of 2007 along with the Affidavit in support came to be filed by the Appellants in this Court. Chamber Summons No.212 of 2007 was taken out by the Appellants for appointment of Court Receiver of the said three mortgaged properties on 09/02/2007. In this Chamber Summons, on 04/04/2007 Consent Terms were filed by the Appellants and

¹ AIR 2004 SC 2371

Respondent Nos. 1 to 4 in March, 2007. In view of the Consent Terms filed, this Court took the Consent Terms on record and disposed of the Chamber Summons as well as the Execution Application in terms of the Consent Terms so filed.

14. Central Bank of India filed Chamber Summons No.1268 of 2007 on 04/08/2007, after it came to know about the Award and the Consent Terms which were filed in execution proceedings. Chamber Summons was filed for setting aside the order dated 04/04/2007 passed by this Court and, secondly, leave was sought to proceed under the SARFAESI Act to sell the mortgaged properties and recover the sale proceeds. This Chamber Summons was disposed of by this Court by an order dated 14/08/2007 and the Court was pleased to observe that the Court was not inclined to interfere at that stage and liberty was granted to file fresh Chamber Summons.

15. Thereafter, on 01/10/2007, Central Bank addressed a letter to the Court Receiver placing on record the Order dated 14/08/2008 and asked him to handover possession of the three mortgaged properties, so that they could proceed under the provisions of the SARFAESI Act.

16. The Court Receiver declined to handover possession since there was no specific order to that effect from the Court. Central Bank filed second Chamber Summons No.1990 of 2007, seeking direction from this Court directing the Court Receiver to handover physical possession

of the three mortgaged properties for the purpose of taking measures under the SARFAESI Act. The learned Single Judge by an Order which was pronounced on 21/03/2016 allowed the Chamber Summons in terms of prayer clause (a) and directed the Court Receiver to handover peaceful possession of the three mortgaged properties to the Respondent – ARCIL in whose favour the debt was assigned by the Central Bank. The learned Single Judge also issued notice to the Appellants and Respondent Nos. 1 to 4 in Chamber Summons, asking them to show cause why action for contempt should not be taken against them for playing fraud upon the Court and abusing the process of law while obtaining the order dated 04/04/2007. The Court also directed that they should pay costs to the tune of Rs 10 lakhs to the Respondent/ARCIL

SUBMISSIONS OF THE APPELLANT IN APPEAL (L) NO.162 OF 2016:

17. Dr. Milind Sathe, the learned Senior Counsel appearing on behalf of the Appellant firstly submitted that there was gross delay in delivering the judgment in the Chamber Summons by the learned Single Judge and, therefore, on that ground alone the impugned order was liable to be set aside. He submitted that Chamber Summons No.1990 of 2007 was heard and reserved for judgment on 18/11/2015. He then submitted that the Judgment was pronounced on 21/03/2016 in the open Court, stating that the Chamber Summons was allowed. However, operative part and copy of the judgment was

not made available on that date. He submitted that a copy of the said Judgment was uploaded on 03/06/2016. In the meantime, since the copy of the Judgment and Order was not made available and the Appellant was asked to deposit costs of Rs 10 lakhs, immediately an appeal was filed on 15/04/2016 without annexing the copy of the Judgment and Order. He submitted that the impugned Judgment was uploaded on 03/06/2016 after a lapse of almost seven months. He then submitted that in view of the law laid down by the Apex Court on account of enormous delay in pronouncing the Judgment, the impugned order was liable to be set aside. He relied on the following Judgments.

(i) *Anil Rai & Ors vs. State of Bihar*¹

(ii) *R.C. Sharma vs. Union of India & Anr.*²

(iii) *Joint Commissioner of Income Tax, Surat Vs. Saheli Leasing Industries Ltd.*³

18. He then submitted that the impugned order passed by the learned Single Judge was barred by the principle of *res judicata*. He submitted that the first Chamber Summons was filed by the Central Bank of India vide Chamber Summons No.1268 of 2007, seeking two-fold reliefs; one for setting aside the Order dated 04/04/2007 and the other for granting leave to proceed under the SARFAESI Act. He

1 2002(3) Bom.C.R. 360

2 2004(3) Bom.C.R. 450

3 2010 DGLS (Soft) 283

submitted that the first relief was not granted by the learned Single Judge Mr Justice S.J. Vazifdar (as he then was). However, according to Dr. Sathe, limited liberty was granted to apply for the same subsequently after the Bank adopted proceedings against the Court Receiver including the proceedings under the Securitization Act. He submitted that the Bank took out second Chamber Summons on 11/12/2007, seeking almost similar reliefs. He submitted that by virtue of the impugned order, the order passed by the learned Single Judge dated 04/04/2007 appointing the Court Receiver was set aside though this order was neither challenged nor the prayer was made by the Bank for setting aside the same. He submitted that the second Chamber Summons in which the impugned order was passed was not maintainable since it was barred by the principle of *res judicata* or doctrine of constructive *res judicata*

19. Dr. Sathe, then contended that the Bank by filing Chamber Summons was seeking to challenge the order passed by the earlier Single Judge in the first Chamber Summons. He submitted that only limited liberty was given to the Bank. He submitted that therefore the impugned order was liable to be set aside on that ground also. He then contended that though several submissions were made on behalf of the Appellant before the learned Single Judge, these submissions were not dealt with or considered and he submitted that this was on account of long lapse of time between the arguments which were advanced by both the parties and the actual dictation of the Judgment.

He invited our attention to all the grounds which were taken by the Appellant in the affidavit-in-reply filed to the Chamber Summons. He submitted that none of these points were considered. He then submitted that the learned Single Judge was not called upon to decide the validity of the Award which was passed by the Arbitrator on 04/04/1997 and even then the learned Single Judge had given a finding that the Award was sham and bogus. He submitted that this case was not made out even by the Respondent/Bank in their affidavit in support of the Chamber Summons. He therefore submitted that it was not open for the learned Single Judge to give a finding on the issue which was not canvassed and no relief was claimed by the Respondent/ARCIL on the said issue.

20. Dr. Sathe then submitted that the relief sought by the ARCIL to whom the debt was assigned by the Central Bank of India was ex facie bad in law and therefore the Chamber Summons was not maintainable. He submitted that the scope and ambit of the Chamber Summons was restricted as per the High Court (Original Side) Rules and, therefore, the Chamber Summons seeking this relief could not have been filed in the proceedings which were disposed of by virtue of the Consent Terms filed before the learned Single Judge on 04/04/2007. Reliance was placed on the Judgment of the Apex Court in *Rafiq Bibi (D) by Lrs vs. Sayed Waliuddin (D) By Lrs*¹ and particularly on para 9 of the said Judgment. He submitted that in collateral

1 2003 DGLS (Soft) 684 : 2003 AIR (SC) 3789

proceedings therefore, without challenging the Award, the relief claimed by the ARCIL could not have been asked or granted. He then submitted that even under Section 34 of the SARFAESI Act, Civil Court does not have jurisdiction to entertain any suit or proceedings in respect of any matter which came within the purview of Debt Recovery Tribunal or the Appellate Tribunal.

21. He then submitted that ARCIL had assigned properties to private Concern viz. M/s. Wonder Precious Stone Trading Pvt. Ltd., which was not a Securitization Company as contemplated under Section 3 of the SARFAESI Act. Reliance was placed on the Balance-sheets of the said Company of the Financial Years 2013-14 and 2014-15, which, according to him, reveal that the private Concern M/s. Wonder Precious Stone Trading Pvt. Ltd had acquired the said properties. He then submitted that the case of fraud was not alleged and was not even the subject matter of the Chamber Summons. He also submitted that pleadings/submissions/defence of the Appellant were not considered. He invited our attention to several issues which, according to him, were pleaded but were not considered by the Court.

22. Lastly, he submitted that the impugned Judgment and Order did not discharge the Court Receiver and the Judgment of the learned Single Judge dated 04/04/2007 in execution proceedings, is continued to be in operation. He submitted that the judgment on which the reliance was placed by the learned Counsel for the Respondent/ARCIL

was not applicable to the facts of the present case.

SUBMISSIONS OF THE APPELLANT IN APPEAL (L) NO.245 OF 2016:

23. Mr. Jahagirdar, the learned Senior Counsel appearing on behalf of the Appellant in Appeal (L) No. 245 of 2016, apart from adopting submissions of the learned Senior Counsel Dr. Sathe for the Appellant in connected Appeal (L) No.162 of 2016, firstly submitted that the assignment between ARCIL and Central Bank of India was challenged before the DRT. Secondly, he submitted that the claim of equitable mortgage of the Central Bank of India was denied and was under adjudication. Thirdly, he submitted that the locus of ARCIL was not crystalized before DRT. It was fourthly submitted that the assignment of debt by Central Bank of India to ARCIL was arbitrary and questionable. It was submitted that though the outstanding debts as claimed in oral submissions are to the tune of Rs 94 crores, there was no reason to assign the debt to ARCIL at Rs 9.11 crores, though higher offer of Rs 10.17 crores was given by the Appellants. He submitted that the impugned order was based on presumptions and assumptions and it was not corroborated and substantiated in material particulars by leading evidence. Lastly, it was submitted that the ARCIL's intention was to grab the property instead of recovery of debt.

SUBMISSIONS OF THE RESPONDENT/ARCIL:

24. On the other hand, Mr. Venkatesh Dhond, the learned Senior Counsel appearing on behalf of the Respondent/ARCIL submitted that this was a classic case where it could be shown and demonstrated that dishonest debtors in order to frustrate the steps being taken under the SARFAESI Act had relied on back dated Arbitration Award which was designed to frustrate the claim of ARCIL for recovery of the debts due from the Appellants. He submitted that the entire chronology of events including contents of the Award which was passed by consent of both the parties clearly demonstrated that the Appellants who had taken loan from Central Bank of India, had obtained an order by filing Consent Terms which were designed in such a way that the mortgaged properties would remain with the Court Receiver, yet the possession would continue indefinitely with the judgments debtors. He submitted that in the said proceedings, it was alleged by the claimants before the Arbitrator that they had a claim of Rs 50 lakhs against the Appellants herein and the Respondents in the said Arbitration Petition agreed to repay the said Rs 50 lakhs in installments which were payable during the period of eight years. He also submitted that the sequence of events and contents of the Award would demonstrate that the Award was back dated in the year 2006 to defeat the claim of the Central Bank of India. He submitted that the Consent Terms were filed by the alleged claimants and respondents in this Court and by playing a fraud on this Court, the Order dated 04/04/2007 was obtained by them. He

has invited our attention to the Award passed, the manner in which the Award was obtained and also the manner in which the Consent Terms were filed in execution proceedings. He submitted that it was inconceivable that the party who owed an amount of Rs 50 laks to the claimants in the Arbitration Award would be allowed to be continued as an agent of the Court Receiver for an indefinite period of time. He submitted that this was a special device to defeat the claim of the Central Bank of India, which was assigned to ARCIL.

25. He then submitted that the contention of Dr. Sathe, the learned Senior Counsel that the arguments made by the Appellants were not considered, was without any substance. He submitted that immediate course of action which was available to them was to approach the learned Single Judge and point out this fact or to file an affidavit of an Advocate who appeared before the learned Single Judge in support of the contention. He submitted that it was well settled that whenever any allegation was made in respect of the court proceedings, record of the Court was binding on the parties. He relied on the Judgment of the Apex Court in *State of Maharashtra vs. Ramdas Nayak*¹ and few other Judgments.

26 He then submitted that since the properties were in possession of the Court Receiver, ARCIL had no other option but to approach this Court to seek possession. He then submitted that the contention that

¹ 1982 AIR 1249

the Chamber Summons was barred by the principle of *res judicata* was without any substance. He invited our attention to the specific liberty granted by the learned Single Judge. He then submitted that there was a disturbing trend viz of using sham and bogus back dated arbitral awards as a device to defeat the legitimate rights of parties. He invited our attention to the order passed by the learned Single Judge of this Court (Mr. Justice S.J. Kathawalla, J.), who has exposed this practice in Santosh Kumar Bagaria vs. Vinod Kumar Jhunjhunwala and others and Soheli E. Kazi [Arbitration Application (L) No.809 of 2015 in Arbitration Petition No.140 of 2015]. He submitted that the learned Single Judge, after recording the statement of Arbitrator Mr. Soheli Kazi who admitted that he had not passed the Award and also recording the statements of other parties, directed that investigation should be made by the Police and the FIR be lodged. He submitted that this Court had rejected the application for anticipatory bail filed by the said accused. He submitted that by a remarkable coincidence all these three persons viz Mr. Ashok Saraogi, Ms. Ivy Tuaro and Mr.Soheli Kazi who had appeared in the said case of Santosh Kumar Bagaria (supra) were also involved in one way or other in the present proceedings. He submitted that therefore judicial probe was necessary in order to find out the manner in which this device is used for defeating the claim of the Banks and other Financial Institutions.

REASONS, FINDINGS AND CONCLUSION:

27. We have heard both the parties at length and we have given our anxious consideration to the submissions made by the all the learned Senior Counsels who have appeared before us for the respective parties. We would like to deal with the submissions made by the Appellants and Respondent/ARCIL on each point.

28. The first point which was argued was that the arguments advanced by the learned Counsel for the Appellants before the learned Single Judge were not considered or dealt with by the learned Single Judge. In our view, it is not possible to accept this contention. Firstly, it is well settled that the Court has to be guided by what is observed by the Court in its order and is not expected to rely upon the subsequent statement made by the party or advocate questioning the record of the Court. The Apex Court in *State of Maharashtra vs. Ramdas Nayak*¹ has come down heavily on this practice of allegations being made against the learned Judges recording submissions and arguments or non-consideration of arguments. In this case, concession made by the learned Senior Counsel was recorded by the learned Single Judge. When the matter travelled to the Apex Court, this finding was questioned and it was sought to be argued that no such concession was made by the learned Senior Counsel who had appeared in the Court. Rejecting the said contention, the Apex Court

1. 1982 AIR 1249

has observed in para 4 of its judgment as under:-

4. When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A. K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in *Somasundaran v. Subramanian* AIR 1926 PC 136). We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well settled that statements of fact as to what transpired at the hearing, recorded in the judgment of the court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent, upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (Per Lord Buckmaster in *Madhusudan v. Chanderbati* , AIR 1917 PC 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate

cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.”

Similarly, in other judgments also, this Court as well as the Apex Court have observed that if a party feels aggrieved by any finding recorded by the Trial Court, option before the litigant or his Advocate is to approach the same Court again. It is an admitted position that no such application for modification or review of the impugned order passed by the learned Single Judge was filed, though it was sought to be argued that when the Appeal was filed copy of the judgment and order was not available. In our view, the Appellants could have immediately approached the learned Single Judge after a copy of the Judgment was made available on 03/06/2016. This submission is therefore unacceptable.

29. Secondly, it was contended that since there was delay in pronouncing the Judgment and copy of the Judgment and Order was made available after seven months, on that ground alone the Judgment and Order was liable to be set aside. Reliance was placed on some judgments of the Apex Court.

30. It is true that the Apex Court in *Anil Rai & Ors vs. State of Bihar*¹ has observed that generally and more particularly in criminal cases

¹ 2002(3) Bom.C.R. 360

where the question of liberty of an individual is concerned, if the judgment cannot be pronounced within three months, the matter should be re-argued or should be decided by a new Bench. However, in our view, that cannot be the ground for setting aside the impugned order. In the present case, the matter was argued at length by both the parties and the judgment was pronounced on 21/03/2016 and it was uploaded on 03/06/2016. However, all the points have been considered by the learned Single Judge and it cannot be argued that the finding given by the learned Single Judge is not borne out by the record or not based on the pleadings made by the parties or on the question of law which was canvassed by both the parties. We are therefore unable to accept this submission of the learned Senior Counsel appearing on behalf of the Appellants.

31. Thirdly, it was submitted that the ARCIL could not have taken out the Chamber Summons in these proceedings and that specific liberty was granted to them to take out proceedings under the Securitization Act. It was also argued that the second Chamber Summons was barred by the principle of *res judicata* or constructive *res judicata*. This submission is also without any substance. For the purpose of deciding this question, it will be necessary to consider the prayers which were made by the Central Bank of India in the first Chamber Summons No.1268 of 2007. Prayers in the said Chambers Summons read as under:-

(a) that the order dated 04.04.2007 passed by this Hon'ble Court may be set aside;

(b) that this Hon'ble Court be pleased to grant the leave to the Applicants to proceed under SARFAESI Act, with the sale of the properties viz; (1) Land and Building situated at Plot No.10 & 11, admeasuring 2,980 sq. mtrs., Near MAFCO Market, APMC Yard, Sanpada, Turbe, Navi Mumbai; (2) Godwon Premises admeasuring 493 sq.ft. Carpet area in Basement No.9, Mital Chambers, Nariman Point, Mumbai- 400 021; and (3) Office Premises admeasuring 617 sq.ft. Carpet area in Flat No.89 on 8th Floor, Mittal Chambers, Nariman Point, Mumbai, under the SARFAESI Act and to recover the sale proceeds towards the outstanding dues, more particularly set out in the Mumbai Debts Recovery Tribunal in O.A. No.376/2003; O.A. No.35/2004; O.A. No.37/2004; O.A. No.15/2004; and O.A. No.10/2004;

(c) for ad-interim and interim reliefs as per prayer (b) hereinabove may be granted to the Applicants;

(d) for such other reliefs as the nature and circumstances of the case may require be granted in favour of the Applicants.”

32. The learned Single Judge while disposing of the said Chamber Summons had given a specific liberty to Central Bank of India to approach this Court and also file proceedings under the Securitization

Act. It would be relevant and necessary to reproduce the relevant portion of the said order, which reads as under:-

“3. By this Chamber Summons, the Applicants seek the setting aside of an order dated 4th April, 2007 and for an order granting leave to proceed under the Securitisation Act inter alia against the Court Receiver.

4. As far as the former relief is concerned, I am not inclined to consider it at this stage. Liberty to the Applicants to apply for the same subsequently.

5. The Applicants are at liberty to adopt proceedings in accordance with law against the Court Receiver including under the Securitisation Act.”

The Central Bank of India then took out the second Chamber Summons No.1990 of 2007 in which the following prayers were made:-

(a) that this Hon'ble Court be pleased to direct the Ld. Court Receiver, High Court, Bombay to hand over peaceful possession of the properties viz: (1) Land and Building situated at Plot No.10 & 11, admeasuring 2,980 sq. mtrs., Near MAFCO Market, APMC Yard, Sanpada, Turbe, Navi Mumbai; (2) Godwon Premises admeasuring 493 sq.ft. Carpet area in

Basement No.9, Mittal Chambers, Nariman Point, Mumbai – 400 021; and (3) Office Premises admeasuring 617 sq.ft. Carpet area in Flat No.89 on 8th Floor, Mittal Chambers, Nariman Point, Mumbai, in order to take all further steps under SARFAESI Act, including to sell the same and to recover the sale proceeds towards the outstanding dues, more particularly set out in the Mumbai Debts Recovery Tribunal in O.A. No.376/2003; O.A. No.35/2004; O.A. No.37/2004; O.A. No.15/2004 and O.A. No.10/2004 to the Applicants.

(b) for interim order in terms of prayer (a) hereinabove may be granted to the Applicants;

(c) for such other reliefs as the nature and circumstances of the case may require be granted in favour of the Applicants.”

An affidavit in support of the Chamber Summons was filed by the Central Bank of India and thereafter when the debt was assigned to ARCIL, they filed an additional affidavit making specific allegations of fraud, fabrication and ante-dating the Arbitration Award. Upon conjoint reading of the reliefs claimed by the ARCIL in the first Chamber Summons and in the Second Chamber Summons and the specific liberty granted by the learned Single Judge, we are of the view that contention of the Appellants that the second Chamber Summons was barred by principle of *res judicata* or constructive *resjudicata* is

without any substance. The said submission is therefore not accepted.

33. The next point which was submitted by Dr. Sathe for the Appellant was that the Chamber Summons taken out by ARCIL in collateral proceedings viz in the execution proceedings which were filed by the Appellants i.e. the claimants and respondents in so-called arbitration proceedings could not be challenged by the Bank by filing Chamber Summons and appropriate proceedings therefore ought to have been taken for the purpose of setting aside the Award and/or setting aside the consent order which was passed by the learned Single Judge in execution proceedings taken out by the claimants and the respondents in the arbitration proceedings.

34. In order to decide this issue, it will be necessary to consider the chronology of events and the manner in which the Award has surfaced in these proceedings.

(i) Central Bank of India granted credit facilities to the Appellants in September 1997 and equitable mortgages were created in respect of the properties in question between 1997 and 1998 and these equitable mortgages were extended till 08/10/2001.

(ii) All these Accounts were declared as NPAs in the year 2003 by the Central Bank of India and notice under section 13(2) of the SARFAESI Act was issued on 07/03/2003.

(iii) After a lapse of 60 days, measures under Section 13(4) of the SARFAESI Act were taken on 14/05/2003.

(iv) Soon after the measures were taken by the Central Bank of India in 2003, borrowers viz. (1) M/s Prabhudas Hirji & Co., (2) Prabhu Hira International Ltd., (3) M/s Satyajit Traders, (4) Prabhu Hira & Cold Storage Ltd and (5) Prabhu Hira Travels Ltd. filed Writ Petition, challenging the constitutional validity of the SARFAESI Act and also the measures taken by the Bank.

(v) This Court by Judgment and Order dated 17/06/2003 directed the Bank to

handover possession to the Appellants herein, after they had taken physical possession under Section 13(4) of the said Act. However, they were permitted to retain the symbolic possession of the said office premises and the Appellants were restrained from creating any third party rights.

(vi) Subsequently, the Apex Court upheld the constitutional validity of the said case in the case of Mardia Chemicals (supra) on 08/04/2004 and the said Writ Petition No.1368 of 2003 was disposed of on 28/04/2004 and liberty was granted to the Central Bank of India to approach DRT. Before the said order was passed, Central Bank of India had already filed five Original Applications in the DRT against the said five borrowers.

(vii) At this stage, for the first time, the Appellants filed an Execution Application No.90 of 2006 before the Civil Court,

Hyderabad, seeking execution of the
purported Award dated 04/04/1997.

35. It is not in dispute that this Award surfaced for the first time almost after eight years. In all the proceedings which were taken out either by the Central Bank of India or by the Appellants, no reference whatsoever was made about existence of the Award. It was alleged that the said Award was passed by the Arbitrator who was appointed by consent of both the parties at Hyderabad.

36. As rightly pointed out by Mr. Dhond, the learned Senior Counsel for Respondent/ARCIL that there are several intriguing facts which have emerged on the closer scrutiny of the Award. From the said Award, it appears that both the parties approached the Arbitrator viz Mr. Ashok Agarwal, who is not a Judge of this Court with similar name. In the Award, he has stated that both the parties approached him and told him that he was appointed by consent of both the parties. He has recorded that parties had purchased two sets of stamp papers and the Award, therefore, was passed by consent. Surprisingly, period of 8 years was granted in favour of the Respondents, the Appellants herein, to repay the amount claimed by the claimants in the said proceedings. In our view, there is no manner of doubt that this was done in order to explain the delay in filing the execution proceedings after a lapse of eight years. The stamp papers also disclose that they were purchased in Mumbai in the name of one of the parties in the

arbitration proceedings. Several other factors disclose that terms and conditions in the Award were dubious to say the least.

37. Things further become murkier which can be seen from the events which have transpired thereafter. The so-called claimants and appellants then filed execution proceedings in this Court for appointment of Court Receiver and for taking consent terms on record. The learned Single Judge by relying on the parties passed an order in terms of the Consent Terms. Perusal of the Consent Terms discloses that the said Consent Terms were obviously designed in such a way that the Appellants herein would continue to remain in possession indefinitely by virtue of being appointed as agents of the Court Receiver. It is inconceivable that the claimants who have filed claim of Rs 50 lakhs would agree to appoint the borrowers as agents of the Court Receiver for indefinite period of time. It is further inconceivable that in such Consent Terms there is a reference to the effect that the execution proceedings are also disposed of. It is obvious that intention of the parties was to ensure that the properties vest with the Court Receiver and remained *custodia legis*, so that in the event an order is passed under Securitization Act, the Bank would be precluded from taking possession. We fully agree with the submissions made by Mr. Dhond, the learned Senior Counsel appearing on behalf of the Respondent/ARCIL. The submissions of Dr. Sathe and Mr. Jahagirdhar, the learned Senior Counsels appearing on behalf of the Appellants cannot be accepted. We have gone through the affidavit-

in-reply filed by the Respondent/ARCIL and specific averments have been made alleging the fraud played by the Appellants on the Court and questioning the Award which was obtained by the Appellants and the manner in which it was obtained and also the manner in which the Consent Terms were filed in this Court. We have no manner of doubt that the Appellants have not only tried to take the learned Judge for a ride but have played fraud on this Court, apart from playing fraud on the Respondent/ARCIL.

38. We have perused the impugned order passed by the learned Single Judge and we find that, in fact, the learned Single Judge was considerably lenient in dealing with the allegations which were made by the Respondent/ARCIL against the Appellants herein.

39. We concur therefore with the view taken by the learned Single Judge. We have considered all the submissions made by the learned Senior Counsels appearing on behalf of the Appellants and the Respondent/ARCIL and have heard them at considerable length and the grievance, if any, of the Appellants that the learned Single Judge's Order should be set aside on the ground of delay in disposing of the Chamber Summons does not even otherwise survive.

40. Lastly, it has to be noted that the Respondent/ARCIL has specifically denied the allegation that they have assigned the debts to a private Concern. Sufficient material has been brought on record to

indicate that this allegation which is now being made is without any substance and, in any, case can be considered by the DRT in the said proceedings where similar contention has been raised by the Appellants.

41. Dr. Sathe, the learned Senior Counsel for the Appellant submitted that without proper adjudication of the debts, possession should not be handed over to the Bank. This submission is required to be stated to be rejected. It is a well settled position in law that proceedings under the SARFAESI Act are non-adjudicatory in nature and this is settled by a long line of decisions of the Apex Court and this Court. The Apex Court in *Mardia Chemicals* (supra) has considered various provisions of the Act and thereafter upheld the constitutional validity of the said Act. Division Bench of this Court in *M/s Trade Well, a Proprietorship Firm, Mumbai & Anr. vs. Indian Bank & Anr*¹ has also in terms held that the proceedings under the said Act are non-adjudicatory in nature. The Apex Court in *Transcore vs. Union of India & Anr.*² has also at great length discussed this issue and made observations on the scope and nature of the proceedings which are initiated and the measures which are to be taken by the Bank under Section 13(4) of the said Act. The Apex Court as well as this Court have noted that though initially RDDB Act was passed in 1993, it was noticed that debts due to Financial Institutions and Banks could not be recovered and therefore the SARFAESI Act was passed in 2001

1 2007 Cri.L.J.2544

2 AIR 2007 SC 712

which came into force in 2002 and therefore Banks were permitted to take measures under Section 13(4). The said contention is therefore without any substance.

42. The last question which remained to be considered is: whether the Court Receiver could be directed to handover possession to the Bank?

43. In our view, under the SARFAESI Act, procedure for taking possession has been laid down under Sections 13(2) and 13(4) of the said Act which read as under:-

“13. Enforcement of security interest.-(1) Notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities

to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4);

Provided that -

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities;and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.

(3).....

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease,

assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;

(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to

pay the secured debt.”

Before issuing notice under Section 13(2) of the SARFAESI Act, Bank has to declare the Account as Non Performing Account (NPA). The Apex Court in *Transcore* (supra) has held that normally Banks are reluctant to declare the Account as NPA and gives ample scope and latitude to the borrowers to repay that amount because if such an action is taken, it can entail adverse consequences against the Bank from Reserve Bank of India. However, it has to be noted that the Bank has already initiated proceedings under the SARFAESI Act and after the notice under Section 13(2) is issued, if the Bank wishes to take possession, order has to be obtained from the Chief Metropolitan Magistrate/District Magistrate, seeking permission to take possession of the property. It is not in dispute that proceedings under Section 14 have not been taken. We are therefore of the view that in the event an order is passed by the Chief Metropolitan Magistrate permitting the Bank to take possession, the Court Receiver shall handover possession of the mortgaged properties to the Respondent/ARCIL. All remedies which are available to the Appellants in those proceedings are kept open.

44. Both these Appeals are therefore dismissed. The impugned order passed by the learned Single Judge is confirmed with a rider that the Court Receiver shall handover possession of the mortgaged properties only after the order is passed by the Chief Metropolitan

Magistrate. The Chief Metropolitan Magistrate shall not be influenced by the fact that Consent Terms have been filed by the Appellants in this Court and should independently consider the application of the Respondent/ARCIL and only after he is satisfied that the measures under Section 13(4) are properly taken, pass the appropriate orders.

45. We must make mention here of the practices which are obviously adopted by the borrowers and debtors to defeat the claim of the lenders / Banks / Financial Institutions / Claimants. This is a second case in which we find that, apparently, back dated bogus Award has been relied upon by the Appellants for the purpose of protracting the proceedings under the SARFAESI Act and preventing the Bank from taking possession. In a similar case, the learned Single Judge of this Court (S.J. Kathawala, J.) went to the extent of ordering investigation by the Police in Santosh Bagaria (supra). As a result of the said order, criminal complaint was registered by the Police against the perpetrators of fraud and investigation is being conducted by the Police to find out the modus operandi of relying on fabricated, sham and bogus arbitration awards for the purpose of defeating the claim of the Claimants / Financial Institutions. In the said proceedings, however, the learned Single Judge has recorded the statement of the sole Arbitrator Mr. Sohail Kazi, who candidly confessed before the Court that he had not passed the Award on which reliance was placed by the parties in the said matter. The statements of other parties have also been recorded and they are part of the order of the learned Single

Judge and therefore further order was passed directing investigation to be made by the Police.

46. In the present case, we did not have benefit of recording the statement of the Arbitrator since he is staying at Hyderabad. Secondly, if notices would have been issued, it would have consumed further considerable time and the purpose of the Appellants would have been succeeded in defeating the intention of the Respondent/ARCIL in proceeding under the SARFAESI Act. We, however, grant liberty to the Respondent/ARCIL to take out appropriate proceedings before the appropriate forum, if they are so advised. With these observations both these Appeals are disposed of. Since the Appeals are disposed of, Notice of Motion (L) No 1285 of 2016 taken out by the Appellant in Appeal (L) No. 162 of 2016 does not survive and it is accordingly disposed of.

47. At this stage, the learned Counsel appearing on behalf of the Appellants seeks the order of continuation of the interim relief. Taking into consideration the facts and circumstances of the case, we are not inclined to extend the interim order. Interim relief granted by this Court is vacated.

(MRS. SWAPNA S. JOSHI, J.)

(V.M. KANADE, J.)