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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO. 628 OF 2017
IN
COMMERCIAL SUIT NO.669 OF 2017

Karamtara Engineering Pvt. Ltd.	)	
705, Morya Landmark – II,	)	
New Link Road, Andheri (W),	)	
Mumbai – 400 053.	)	Applicant (original plaintiff)

IN THE MATTER BETWEEN :

Karamtara Engineering Private Limited	)	
705, Morya Landmark – II,	)	
New Link Road, Andheri (W),	)	
Mumbai – 400 053.	)	Plaintiff

....Versus....

1. Excel Metal Processors Pvt. Ltd.	)	
132/B, Mittal Towers,	)	
210 Nariman Point,	)	
Mumbai - 400 021.	)	
	)	
2. Shakti International Private Limited	)	
36, Arihant Industrial Estate,	)	
Sakinaka, Andheri (E),	)	
Yadav Nagar, Chandivali Powai,	)	
Mumbai - 400 072.	)	
	)	
3. Arisha Metal Precisions Pvt. Ltd.	)	
48-B, Mittal Towers,	)	
Nariman Point, Mumbai- 400 021.	)	...Defendants

Mr.Chetan Kapadia with Mr.Rahul Sarda, Mr.Rohaneel Mohite and
Ms.Kanchan Gupta i/b VBA Legal for the Applicant.

Mr.Gautam Ankhad with Mr.Rohan Cama, Mr.Omkar Chandurkar, Mr.Abhishek Adke, Mr.Nitin Jain and Mr.Lalit Munshi i/b Abhishek Adke for the Defendant No.2.

CORAM : R.D. DHANUKA, J.
RESERVED ON : 17TH APRIL, 2018
PRONOUNCED ON : 31ST AUGUST, 2018

JUDGMENT :-

1. The Notice of Motion No.628 of 2017 in Commercial Suit No.669 of 2017 is filed by the plaintiff *inter-alia* praying for an order and direction against the Court Receiver, High Court, Bombay and/or defendant no.1 to forthwith hand over to the applicant 24 HR steel coils weighing about 555.125 metric tons described in Exhibit "A" to the plaint and also seeks injunction against the Court Receiver, High Court, Bombay and/or from defendant no.1 from taking further steps in regard to the quantity of 24 HR steel coils which according to the applicant belongs to the applicant.

2. In the plaint, the applicant has applied for declaration that the said 24 HR steel coils which are in possession of the defendants or any one or more of them either through itself or themselves or through the Court Receiver belongs to the applicant and also seeks a mandatory order that the said 24 HR steel coils weighing 555.125 metric tons be handed over to the applicant in good usable conditions as lawful owner thereof.

3. By consent of parties, this notice of motion was heard

along with arbitration petitions. However, a separate order is passed in both the proceedings for sake of convenience. There is no issue of maintainability of suit raised by any of the defendants. Some of the relevant facts for the purpose of deciding this notice of motion are as under :

4. It is the case of the applicant that on 4th October, 2016, the applicant and the defendant no.1 entered into Job Work Agreement for converting HR coils supplied by the applicant to the defendant no.1 into slitting coils. The applicant had purchase those coils from JSW Steel Limited and had made payment to the said JSW Steel Limited for the said coils and became owner of the said coils. The said HR coils are bearing a test certificate and batch number which is unique to every HR coil. The HR coil weighs about 2000-2300 kgs and had the batch number embossed/engraved on the side of the HR coil similar to the number embossed on the chassis of a motor vehicle. The applicant had delivered 57 HR coils to the defendant no.1 for the purpose of job work. The defendant no.1 had duly returned slit coils pertaining to the 33 HR coils to the applicant after job work.

5. The defendant no.1 however refused to carry out the job work and deliver the slit coils in relation to the remaining 24 coils of the applicant on the ground that the same were the subject matter of

stay from this Court and from the learned arbitrator under the arbitration proceeding between the defendant no.1 and the defendant no.2. The defendant no.1 had cited the order dated 27th December, 2016 and the order dated 13th January, 2017 passed in arbitration proceedings under section 17 of the Arbitration and Conciliation Act, 1996 before the learned arbitrator *inter-se* between the defendant no.1 and the defendant no.2.

6. It is the case of the applicant that the applicant came to know about the order dated 27th December, 2016 later by which order, the learned arbitrator appointed the Court Receiver, High Court, Bombay as the Receiver with regard to HR coils weighing 5092.860 metric tons allegedly belonging to the defendant no.2. The applicant accordingly addressed letters dated 24th January, 2017 and 7th February, 2017 to the learned arbitrator seeking clarification that the undertaking given by the defendant no.1, if any, did not apply to the 24 HR coils of the applicant. The defendant no.1 filed a reply dated 10th February, 2017 admitting that the said 24 coils belong to the applicant. The learned arbitrator however did not pass any order for releasing the said 24 HR coils in favour of the applicant and also did not release defendant no.1 from the undertaking rendered by the defendant no.1 in respect of those 24 HR coils.

7. On 7th February, 2017, the defendant no.2 filed a Contempt

Petition (Lodging) No.9 of 2017 in the Court Receiver's Report No.476 of 2016 against the defendant no.1 alleging that the defendant no.1 had breached the order dated 2nd January, 2017 passed by this Court. In the said contempt petition, the defendant no.2 admitted that the coils lying at the said godown as on the date did not belong to the defendant no.2 and further alleged that the defendant no.1 had shifted / removed the coils which were marked by the parties pursuant to the joint inspection dated 29th December, 2016. The defendant no.2 also submitted that the third parties are now asserting their rights as the owners on some of the HR coils which are lying in the godown of the defendant no.1 where names were disclosed in the said contempt petition i.e. 13 petitioners and also disclosed the name of the applicant in the notice of motion claiming rights in 237 coils. It was contended by the defendant no.2 in the said contempt petition that the defendant no.1 had misled this Court by giving a false undertaking that HR coils were unencumbered.

8. On 9th February, 2017 and 13th February, 2017, this Court passed an order in the Contempt Petition (Lodging) No.9 of 2017 directing the Court Receiver's representative to visit the said godown forthwith and to make a report.

9. The applicant filed a Commercial Suit No.669 of 2017 *inter-alia* praying for declaration of ownership of those 24 HR coils, to

seek possession thereof in good usable condition along with compensation for the loss suffered by the applicant. The applicant also impleaded all the parties who were parties to the proceedings before the learned arbitrator as defendants to the suit filed by the applicant.

10. The applicant filed a Notice of Motion (Lodging) No.413 of 2017 in Contempt Petition (Lodging) No.9 of 2017 in Court Receiver Report No.476 of 2016 to point out to this Court that the said 24 coils in respect of which undertakings have been given by the defendant no.1 to the defendant no.2 in the proceedings between them *inter-se* belong to the applicant and no such undertaking could have been given by the defendant no.1 to the defendant no.2 in respect of those 24 coils. This Court allowed the applicant to withdraw the said notice of motion by an order dated 21st April, 2017 with liberty to take out appropriate proceedings. In the said notice of motion, the defendant no.2 filed an affidavit in reply contending that they had filed documents to prove the title of the said coils and that the said documents were produced before the learned arbitrator. The defendant no.2 filed affidavit dated 23rd March, 2017 in the Contempt Petition (Lodging) No.9 of 2017 and once again contended that the coils which were marked pursuant to the joint inventory on 27th January, 2017 had been removed.

11. On 3rd March, 2017, the representative of the Court Receiver along with the representatives of the applicant, the defendant no.1 and defendant no.2, along with the petitioners in the arbitration petitions visited the said godown for the purpose of identification of coils. The parties produced the respective title documents for the purpose of verifying the title to the coils at the warehouse. The Court Receiver after verifying the title documents and the coils lying at the godown came to a conclusion that the ownership of 237 out of 255 coils were owned by and belonged to the petitioners in those 13 petitions and the applicant herein. The Court Receiver submitted the report dated 6th March, 2017 identifying 255 HR coils. The details of coils identified and verified by the Court Receiver in respect of which all these 14 parties were mentioned in the said report. One of the parties i.e. D.M. Sons Metal Private Limited did not claim one coil. Two parties did not come forward i.e. Raviraj Iron Steel and Darukhana Steel Pvt. Ltd. for identification / verification of seven and three coils respectively.

12. By the orders dated 27th April, 2017 and 4th May, 2017, this Court clarified the order dated 21st April, 2017 and it was provided that the order dated 2nd January, 2017 passed in the Court Receiver's Report No.476 of 2016 would remain unaffected.

13. In the meanwhile by an order dated 17th November, 2017,

the learned arbitrator observed that the arrangement reflected by the order passed by this Court on 2nd January, 2017 in the Court Receiver's Report will continue as an interim arrangement till final disposal of the proceedings. The director of the defendant no.1 gave the same undertaking as was given before this Court on 2nd January, 2017 before the learned arbitrator.

14. Mr.Kapadia, learned counsel for the applicant in the notice of motion adopts the submissions made by Dr.Saraf, learned counsel for the petitioner in the arbitration petitions insofar as the identical facts are concerned and made additional submissions. It is submitted that the applicant had given the goods on job work basis to the defendant no.1. There was an agreement between the plaintiff and the defendant no.1 for doing the said job work by the defendant no.1 in respect of the goods of the applicant on the terms and conditions set out therein. The applicant claims the ownership of 24 HR coils.

15. Learned counsel for the applicant invited my attention to 24 invoices issued in favour of the applicant by JSW Steel Limited in respect of those 24 HR coils and would submit that the applicant is the owner of those coils. The said JSW Steel Limited had issued a Excise cum Tax Invoice and the Test Certificate in respect of each of those coils and also letter of Sale Confirmation of the said coils in favour of the applicant. Each of those coils has a unique batch code

embossed on it which corresponds with the batch code mentioned on the Excise cum Tax Invoice and the Test Certificate. The Excise cum Tax Invoices contain the details of the mode of transport from the factory of JSW Steel Limited to the factory of the applicant. It is submitted that after receipt of those coils, the applicant has sent the same to the defendant no.1 for job work. The applicant has also annexed delivery challans showing movement of goods from its factory to the factory/warehouse of the defendant no.1 with particulars of vehicle number of transporter, description of goods transported etc.

16. It is submitted by the learned counsel for the applicant that the defendant no.2, on the other hand, has alleged that the said coils belong to it on the basis of a purported trade finance transaction whereunder the defendant no.2 claimed to have purchased some HR coils from the defendant no.3 on behalf of the defendant no.1 and had allegedly retained the title thereon till payment is received from the defendant no.1 in respect thereof. He submits that the invoices relied on by the defendant no.2 show that the said coils allegedly purchased by the defendant no.3 did not contain any description of the goods. In certain invoices, description of goods is vaguely mentioned as "GPCC sheet/coil." The said invoices/delivery challans did not describe the goods purported to be the subject matter of

invoices relied on by the defendant no.2.

17. It is submitted that the defendant no.2 has failed to demonstrate that the said coils were the goods which were the subject matter of the invoices/delivery challans relied on by it. On the other hand, the applicant had produced the authenticate documents which corroborated the actual description of the said coils. It is submitted by the learned counsel that the defendant no.2 had admitted that its goods lying in the warehouse of the defendant no.1 have been replaced by the defendant no.1 or removed from the warehouse and had filed a contempt petition in this Court alleging such violation against the defendant no.1 on that ground. He submits that the Court Receiver had physically verified all the documents produced by both the parties pursuant to the order passed by this Court and tallied the description with the coils lying in the warehouse and submitted a report. Learned Court Receiver had identified the coils of the applicant lying in the said warehouse and mentioned about ownership of the applicant in the said report submitted before this Court.

18. Learned counsel for the applicant invited my attention to the statement of claim filed by the defendant no.2 seeking money claim against the other defendants and seeking declaration till the payment of Rs.25,61,39,857/- was paid by the defendant no.1 to the

defendant no.2, the learned arbitrator shall make an award declaring that the 217 HR coils + 6 HR coils comprising 5092.86 Mts in the warehouse of the other defendants at Taloja belong to the defendant no.2.

19. It is submitted by the learned counsel for the applicant that the said 24 HR coils are movable goods with a definite shelf life and such goods deteriorate with passage of time and thus this Court must pass orders in relation to the said coils so as to preserve its value and prevent any deterioration at the stage of notice of motion itself. He placed reliance on section 2(14) of the Sale of Goods Act, 1930 which defines "specific goods" and would submit that all such 24 HR coils were purchased by the applicant from JSW Steel Limited and subsequently bailed by the applicant to the defendant no.1 for the purpose of job work under the Job Work Agreement. The said coils can be separated from the other goods and hence, the property therein remains with the applicant as per section 156 of the Indian Contract Act, 1872.

20. Learned counsel for the applicant placed reliance on section 25(1) of the Sale of Goods Act, 1930 and would submit that under the said provision, a seller may, by the terms of the contract, reserve the right of disposal of the goods until certain conditions are fulfilled. The defendant no.2 in this case, has reserved the right of

disposal of those goods till payment of price thereof by the defendant no.1. He submits that the right of disposal can be reserved only in respect of those goods which are subject matter of sale and not in respect of any other goods. The defendant no.2 thus cannot claim any rights in respect of the coils of the applicant merely because those coils are allegedly kept as security under the said contract between the defendant no.1 and the defendant no.2.

21. It is submitted that under section 46 of the Sale of Goods Act, 1930, an unpaid seller can exercise rights only in respect of the goods which have been sold by it to the buyer i.e. the defendant no.1 and not in respect of the goods of the third party i.e. the goods of the applicant which have been bailed by such third party to the buyer. He submits that in any event, the alleged sale of the goods by the defendant no.2 to the defendant no.1 was without any authority and consent of the applicant and thus would not binding upon the applicant.

22. It is submitted by the learned counsel that the arbitral proceedings were admittedly between the defendant no.1 and the defendant no.2. The learned arbitrator however has passed an order against the applicant who was the third party. Though the claim was brought to the notice of the learned arbitrator, he did not vacate such order against the applicant. He submits that in any event, the

applicant is not a party to the said proceedings before the learned arbitrator. The impugned order passed by the learned arbitrator in respect of the goods of the applicant is thus not binding upon the applicant.

23. It is submitted by the learned counsel that since the defendant no.2 has admitted that the goods lying in the warehouse of the defendant no.1 are either allegedly replaced by the defendant no.1 an/or removed from the warehouse and those goods are not the goods which according to the defendant no.2 is sold in favour of the defendant no.1 and in view of the fact that the Court Receiver appointed has identified the goods as the goods of the applicant, this Court has an ample power to grant mandatory injunction against the defendant no.1 or to direct the Court Receiver to hand over the said coils to the applicant. In support of this submission, the learned counsel for the applicant placed reliance on the following judgments :-

- i). In Re: **Mahalxmi Cotton Mills Ltd. (in liquidation), 66 C.W.N. 747;**
- ii). **Sukanya Holdings (P) Ltd. vs. Jayesh H. Pandya & Anr., (2003) 5 SCC 531 ;**
- iii). **Dhulabhai & Ors. vs. The State of Madhya Pradesh & Anr., Air 1969 SC 78;**
- iv). **MdGhufran vs. Varun Finance Corporation Ltd. & Anr.,**

AIR 2016 CAL 197;

v). **Mulji Umershi Shah and etc. vs. Paradisia Builders Pvt. Ltd. & Ors., AIR 1998 Bom 87.**

24. It is submitted that the defendant no.3 is the sister concern of the defendant no.1. The transaction was between the applicant and the defendant no.1. He submits that the transaction between the defendant no.1, defendant no.2 and the defendant no.3 appears to be on the basis that the defendant no.3 would sell the goods to the defendant no.2 and the defendant no.2 would sell the goods to the defendant no.1 with a view to give legitimacy to the alleged loan transaction between them.

25. My attention is also invited to some of the paragraphs from the affidavit in reply filed by the defendant no.1 and the defendant no.3 to the notice of motion. In the affidavit of the defendant no.1 and the defendant no.3, it is stated that the defendant no.3 would sell the goods to the defendant no.2. My attention is also invited to the affidavit in reply filed by the defendant no.2 and more particularly paragraphs 4 to 6. It is submitted that since the superior rights of the applicant have been established beyond reasonable doubt, the defendant no.1 may be directed to hand over those HR coils to the applicant. The applicant has already paid more than Rs.3.00 crores one year back to the sellers and are seriously affected because of the

interim measures granted by the learned arbitrator against the applicant who is a third party.

26. Learned counsel for the defendant nos. 1 and 3 made following submissions:-

a). The learned arbitrator has already disposed of an application under section 17 filed by the defendant no.2. The learned arbitrator has permitted the defendant no.2 to file a fresh statement of claims and application under section 17 of the Arbitration Act for interim measures and has directed the defendant no.1 to file its reply in the said application. The learned arbitrator has by its oral order has set aside the entire arbitration proceedings. There is thus no bar or obstruction from any judicial order by this Court or by the learned arbitrator against the defendant nos. 1 and 3 to enable them to return the HR Coils belonging to the petitioners to them.

b). The defendant no.1 had borrowed money from the defendant no.2 i.e. unsecured loan at the rate of interest approximately 24% to 30% per annum with penal additional interest for delayed payment in the range of 2% to 2.5% per month. The defendant no.1 obtained term loan and working capital from bank against security of the plant and machinery. The sister concern of the defendant no.1 M/s.Arisha Metal Precisions Pvt. Ltd. had the processing facility to carry out job work processing of third party coils.

Western India Metal Processors Ltd., another sister concern is in the business of trading of metal and chemicals and has also stored HR Steel Coils at the same premises in Taloja.

c). The defendant no.2 had borrowed funds from their bankers as working capital loan and since the said bank did not permit the money to be lent for further lending purposes the defendant no.2 structured a transaction of loan from defendant no.2 to the defendant no.1. The commercial purchase transaction was structured with defendant no.3 and was sold further to defendant no.1. Such transactions of purported sale and purchase were merely transactions to enable defendant no.2 to raise finance with its bankers and lend the same to the defendant no.1. The defendant no.2 would raise funds at an interest rate of approximately 12% to 13% per annum and lend at approximately 24% to 30% to the defendant no.1 or any party.

d). The transaction of sale and purchase between the defendant no.1 and the defendant no.2 remained only on paper and there was never any physical movement of the goods either by Western India Metal Processors Limited to the defendant no.2 or by the defendant no.2 to the defendant no.1. The ownership of the goods lying at Taloja plant were never a matter of contention as the defendant no.2 only required equivalent amount of quantity of the goods to be shown to their bankers at the time of stock audit and bank

visits. There was never any monitoring of inventory by the defendant no.2 or its surveyors in normal course while the loan was being furnished with interest.

e). The constituents of a genuine sale transaction, *inter-alia*, include minimum a purchaser order and excise cum tax invoice, a product quality certificate, a weigh bridge receipt etc. which are absent in the sale and purchase transaction between the defendant no.1 and the defendant no.2. The exact quality, specification and size of the goods sold and purchased under a genuine transaction are expressly setout in the invoice raised by the supplier. However, in this case there are simple and summary commercial tax invoices raised by Western India Metal Processors Limited on the defendant no.2 and then by the defendant no.2 on defendant no.1 which merely state the product, but not its specification, origin etc.

f). No personal guarantee is normally insisted in case of a business or a regular business transactions wherein in this case for such purported sale and purchase transaction, personal guarantee of the defendant no.1 was insisted which would indicate that there was a money lending transaction between the defendant nos.1 and 2 and not a sale and purchase transaction. No surveyor was ever appointed by the defendant no.2 to monitor stock and the quality and quantity of the said HR Goods.

g). The defendant no.1 vide their e-mail dated 22nd December, 2016 had already informed the defendant no.1 that the defendant no.1 did not have any stock of any nature whatsoever belonging to the defendant no.2 at their premises. The defendant no.2 did not purchase any goods from the sister concern of the defendant no.1 and they do not hold any inventory which belongs to the defendant no.2. The statement was given to the defendant no.2 for their bankers audits by the defendant no.2.

h). In e-mail dated 19th November, 2016, there is specific mention that it was being provided specifically for their bank audit purposes and there was mention of only 192 coils in the sheet relied upon by the defendant no.2. The defendant no.2 prepared a handwritten report claiming 217 coils which is not more than what they purportedly claim to have bought and marked more than 217 coils and is in sharp contrast to the inventory relied upon by the defendant no.2 in their prayer before the learned arbitrator which was 192 coils.

i). A fraudulent case of the defendant no.2 is that there was a trade finance between the defendant no.1 and the defendant no.2 as against the earlier stand of genuine sale and purchase transaction. The stand now taken before this Court by the defendant no.2 is contradictory to the earliest stand.

j). Since the defendant no.2 is unable to prove its claim and

its ownership over the coils, the defendant no.2 has now come out with a case that all the coils have been systematically removed by the defendant no.1 from the warehouse.

k). A reliance placed on the invoice by the defendant no.2 which mentions HR Coils without any indication of size, thickness, grade etc. Reliance is placed by the defendant no.2 on the invoice of the Western India Metal Processors Limited. None of those invoices state about the quality and the grade there are no agreements or sale or purchase invoices tender in support of their claim before the learned arbitrator or even in these proceedings.

l). The case of the defendant no.2 is that it had purchased the coils in January, February and April, 2016 which is *ex-facie* false in view of the fact that several of the HR Coils identified and marked by the defendant no.2 claiming ownership on them were indeed manufactured post August 2016.

m). The defendant no.2 had deployed their own security in the premises of the defendant no.1 and the defendant no.2 inspects defendant no.1 premises on daily basis. His allegation of whole sale removal/replacement of HR Coils is not supported by its own daily reports and complaint from their security. The Court Receiver's report dated 10th February, 2017 confirmed availability of 233 defendant no.2 marked coils marked by the defendant no.2 in the premises of the

defendant no.1.

n). The defendant no.1 is not in a position to return the said coils which were handed over to the defendant no.1 by the petitioner in the arbitration petitions as well as the applicant in the notice of motion for job work in view of the impugned order passed by the learned arbitrator and this Court. If any order is passed by this Court in these proceedings vacating/modifying of the impugned order passed by the learned arbitrator or if the defendant no.1 is directed to return any part of the coils to the petitioner or the applicant, the defendant no.1 is ready and willing to comply with the said order.

27. Insofar as submissions made by Mr.Kapadia, learned counsel for the applicant in the notice of motion is concerned, it is submitted by the learned counsel for the defendant no.2 as under :-

a). The transaction between the defendant no.1 and the defendant no.2 is not the money lending transaction. The defendant no.1 had ordered for the job work which transaction was on principal to principal basis. The defendant no.1 had called upon the defendant no.2 to supply the goods. The defendant no.2 in turn purchased the same from the defendant no.3 and supplied the same to the defendant no.1. The quality and quantity is fixed by the defendant no.1. The source of purchase is also identified by the defendant no.1. Defendant no.2 is secured by a indemnity furnished by the defendant

no.1 and also from the margin money that had received from the defendant no.1. If any claim arises from any losses, title, etc. then such liability is on the defendant no.1.

b). From 2015 onwards several agreements had been entered into between the defendant no.1 and defendant no.2 to purchase HR Coils from suppliers nominated by the defendant no.1. All these agreements were owned by the parties. Reliance is placed on the documents such as alleged purchase order of defendant no.1, sales invoice of defendant no.3, sale confirmation of defendant no.3, bank statement, bank receipts, tax invoices as well as tax returns, various cheques given as security etc. The transaction were genuine, *bonafide* and were reflected as sales/purchase transaction in the books of defendant no.2 and was not simplicitor of money lending transaction. The defendant no.1 has filed affidavit in this proceeding supporting the case of the plaintiff.

c). As and when payments are made by the defendant no.1 to defendant no.2, delivery of goods is given to the defendant no.1. Therefore, this is a matter of trade finance and there is nothing unusual about such transaction. There are several others in the industry such as State Trading Corporation, MMTC, PEC, Edelweiss who are in the same business such as that of defendant no.2. The transactions that have not been paid by the defendant no.1 and for

which the delivery of goods has not been taken are now subject matter of the arbitration proceeding before the learned arbitrator. The ownership of the HR Coils lies with the defendant no.2 until the payment for the same is made by the defendant no.1.

d). The suit filed by the plaintiff is a declaratory suit for title and in the alternative for damages. The plaintiff has also prayed for mandatory injunction and final relief for damages in the plaint. Reliance is placed on sections 5, 6, 7, 34 and 35 of the Specific Relief Act, 1963. The plaintiff is required to prove its ownership after leading evidence at trial and only if it succeeds at trial, can the final relief of decree for mandatory injunction can be granted in favour of the plaintiff. In the alternate, the plaintiff has already claimed the damages for wrongful deprivation of goods and for losses etc. which would have to be proceeded under section 73 of the Contract Act.

e). Attention of the Court is invited to the reliefs claimed in the notice of motion. It is submitted that in the notice of motion, the applicant has prayed for mandatory injunction at the interim stage which is not permissible. If the reliefs as prayed in the notice of motion are granted, it would result in decreeing the suit in terms of prayer clauses (a) and (b) of the plaint without any trial or evidence and more particularly cross examination of the defendant nos. 1 and 3 against whom orders have been repeatedly passed by this Court which are

not impugned by the defendant nos. 1 and 3.

f). The defendant no.2 has title over 217 HR Coils. There is no question of the plaintiff claiming superior title to that goods of the defendant no.2. In any event, the plaintiff will have to prove the alleged superior title of the plaintiff by leading evidence. No exceptional case is made out by the applicant to handover the goods in question or for grant of a mandatory injunction at the interim stage. Reliance is placed on the judgment of Supreme Court in case of **Metro Marines vs. Boney Watch Co. Ltd., (2004) 7 SCC 478** (paragraph 9) and also judgment of Supreme Court in case of **Dorab Cawasji Warden vs. Coomy Warden, (1990) 2 SCC 117** (paragraph 16).

g). The judgments relied upon by Mr.Kapadia, learned counsel for the applicant are distinguished on various grounds which are dealt with while dealing with the judgments in the later part of this order.

h). The balance of convenience is in favour of the defendant no.2. At the instance of the defendant no.2, various orders have been passed by this Court against the defendant no.1 including in its contempt jurisdiction vide order dated 27th April, 2017, 21st June, 2017 and 23rd June, 2017 which orders have not been impugned by any of the defendants till date. The defendant no.1 has repeatedly given undertaking to this Court and the learned arbitrator to preserve the

goods of the defendant no.2. There is no question of any collusion between the defendant no.2 with the defendant no.1 or defendant no.3. The case of the applicant that there is collusion between the defendants is totally false.

i). On 27th December, 2016, the learned arbitrator has already granted injunction after examination of contemporaneous record. The said injunction has been continued by this Court from time to time. On 2nd January, 2017, this Court has granted an injunction with respect to 217 identified HR Coils which order is continued by the learned arbitrator. In view of the statement made by the defendant no.1, the said interim order is continued and the application filed by the defendant no.2 under section 17 is disposed of. The said order continued to be valid, subsisting and binding. Those orders cannot be modified and/or vacated by this Court in this notice of motion filed by the applicant.

28. It is submitted by the learned counsel that there are several disputed questions of fact arisen in this matter which can be proved only at the stage of trial and after recording of evidence. This Court thus cannot pass any order of mandatory injunction against the defendant no.1 to hand over delivery of those 24 HR coils of the applicant.

29. It is submitted by the learned counsel that the transaction

between the defendant nos.1, defendant no.2 and the defendant no.3 were genuine and *bonafide* transaction and reflected as sale/purchase transaction in the books of the defendant no.2 and were not simplicitor money lending transaction. The defendant no.1 and the defendant no.3 having rendered undertaking before the learned arbitrator and before this Court are estopped from contending that the goods belong to the applicant. Learned counsel placed reliance on the judgment of **Lalit Kumar s/o Purushottamdas Mohta vs. Official Liquidator, High Court of Judicature at Bombay, (2004) 2 Mh.L.J. 457** and in particular paragraphs 22 to 24 in support of the submission that whenever the order is invited by parties from the Court or if the same is passed at the behest of the parties, such order would be in the nature of consent order and would be binding on the parties. Thus without consent of the defendant no.2, the defendant no.1 cannot be allowed to remove any such undertaking rendered before the learned arbitrator and before this Court.

30. It is submitted by the learned counsel that the transaction between the defendant no.1, the defendant no.2 and the defendant no.3 was a manner of trade finance which is nothing unusual transaction. He also placed reliance on the chart during the course of the hearing in support of the submission that the defendant no.2 had rightly claimed ownership in respect of those goods. It is

submitted by the learned counsel that the appeals under section 37 of the Arbitration and Conciliation Act, 1996 which are filed by the petitioners in arbitration petitions and the civil suit filed by the applicant herein are mutually destructive. If one is upheld, the other has to be dismissed as not maintainable.

31. It is submitted by the learned counsel that the applicant has not only filed the suit *inter-alia* praying for declaratory reliefs but also claimed damages. If the applicant succeeds in the suit, the applicant may be compensated in terms of money. Reliance is placed by the learned counsel on the judgment of the Hon'ble Supreme Court in the cases of **Metro Marines vs. Boney Watch Co. Ltd., (2004) 7 SCC 478** (paragraph 9) and **Dorab Cawasji Warden vs. Coomy Warden, (1990) 2 SCC 117** (paragraph 16). He submits that there is no collusion between the defendant no.1 and the defendant no.2 as canvassed by the applicant. Learned counsel distinguished the judgments relied upon by the learned counsel for the applicant and would submit that the balance of convenience is in favour of the defendant no.2 and not in favour of the applicant. There is no contract between the applicant and the defendant no.2 and thus the applicant cannot seek to dilute the security given by the defendant no.1 in favour of the defendant no.2 and cannot claim any right over such security.

32. Insofar as the submission of the learned counsel for the defendant nos. 1 are concerned, learned counsel for the defendant no.2 submits as under :-

a). The defendant no.1 cannot be allowed to resile from the undertaking and the statements made before the learned arbitrator and before this Court and cannot be allowed to handover the goods to the plaintiff in the notice of motion. Mr.Mohd.Iqbal Khan holds 69,15,000 shares constituting 23.05% shareholding of the defendant no.1 and Mr.Imran Khan holds 1,35,000 shares constituting 0.45% shareholding of defendant no.1. Mr.Mohd.Iqbal Khan holds 32,69,907 shares constituting 18.24% shareholding of defendant no.3, while Mr.Imran Khan holds 30,87,857 shares constituting 17.22% shareholding of the defendant no.3.

b). The defendant no.2 has expressly pleaded at page 18 of the written statement in the suit that the goods have been converted and expressly pleaded that they have produced all the facts that the subject 217 HR Coils plus 6 additional HR Coils belong to the defendant no.2. The goods were bailed by the plaintiff to the defendant no.1. The defendant no.1 has acted in the manner which would suggest that the goods are of defendant no.2 and therefore converted the said goods by claiming ownership.

c). Assuming without admitting that the HR Coils are of the

plaintiff, the said coils are given under a contract of bailment and as such have been converted under the Order dated 2nd January, 2017 passed by this Court, there is no privity of contract between the applicant and the defendant no.2 and thus the applicant cannot now seek to dilute the security. The applicant cannot claim right over the rights of the defendant no.2.

d). My attention is invited to the prayers in the statement of claim filed by the defendant no.2 in support of the submission that the defendant no.2 has prayed for money decree as well as for a declaration that the goods i.e. 217 HR Coils belongs to the defendant no.2 herein and in the alternate it is prayed that in the event, defendant no.1 is unable to pay the amount claimed by the defendant no.2, the arbitral tribunal be pleased to pass an order directing the defendant no.1 to handover 217 HR Coils with liberty to sale the same by private auction and appropriate the said sale proceeds towards the amount due and payable to the defendant no.2.

e). The defendant no.1 and the defendant no.3 are colluding with the applicant. The defendant no.1 has now made various statements before this Court in support of the applicant in breach of the undertaking rendered before this Court. The defendant no.1 thus cannot be allowed to change its stand contrary to the stand taken in the arbitration proceedings and in this proceedings.

33. Mr.Kapadia, learned counsel for the applicant in rejoinder submits that there is no issue of maintainability of these proceedings raised by the defendant no.2. Reliance is placed on section 27 of the Sale of Goods Act, 1930 in support of the submission that the applicant has already produced requisite title documents and has made out a strong *prima-facie* case of the title in respect of the coils in question. The defendant no.2 however has not produced any such document to prove their title or to prove any interest therein. The defendant nos.2 and 3 have at the most acquired goods from the defendant no.1 who had no authority to sale those goods to the defendant no.2. The defendant no.1 was given those coils by the applicant for the job work. The coils of the applicant/plaintiff are identified by the Court receiver pursuant to the order passed by this Court.

34. It is the case of the defendant no.2 itself in various affidavits that those coils have been replaced by the defendant no.1 and are not the same coils in respect of which the defendant no.2 had claimed ownership. The defendant no.2 may have other financial transactions with the defendant no.1 but the title in ownership in respect of the goods in question irrevocably vest in the plaintiff.

35. It is submitted that the order passed by the learned arbitrator in the application filed by the defendant no.2 under section

17 of the Arbitration Act is in personam and is against the defendant no.1. The applicant was admittedly not a party to the arbitration proceedings. The said order passed by the learned arbitrator is thus not binding upon the applicant. The rights of the applicant are superior to the alleged rights of the defendants. Though the defendant no.1 cannot sale, transfer those coils in view of his undertaking given to this Court, but can handover those coils to the successful parties in this notice of motion. All the parties to the arbitration proceedings are impleaded as parties to this suit.

36. It is submitted that this Court thus can pass an appropriate order as prayed in the notice of motion. Though the defendant no.1 has given undertaking to this Court, this Court has ample power to pass an order to return those HR Coils to the applicant, the ownership in respect which is sufficiently proved by the applicant and more particularly in this situation where the defendant no.2 has itself alleged that the goods in respect of which the defendant no.2 was claiming the ownership have been allegedly removed by the defendant no.1 and/or replaced. This Court has thus ample powers to grant mandatory injunction in favour of the applicant. Learned counsel reiterated the submissions based on the judgment already relied upon earlier and would submit that the defendant no.2 could not distinguish those judgments relied upon by the applicant.

REASONS AND CONCLUSIONS :

37. It is not in dispute that pursuant to the visit of the representative of the Court Receiver as directed by this Court, all the parties were allowed to produce their respective documents before the Court Receiver. The Court Receiver has submitted a report before this Court which also *prima-facie* indicates that most of the quantities of those coils belonged to the petitioners in the arbitration petitions and the applicant herein. The defendant no.2 has also admitted in the affidavit in reply as well as during the course of arguments before this Court that at least those coils lying with the Court Receiver / defendant no.1 as on date did not belong to the defendant no.2 and has alleged that either the coils on which the defendant no.2 had claimed certain alleged rights are either replaced by the defendant no.1 or have been removed from the warehouse of the defendant no.1.

38. The defendant nos.1 and 3 never admitted the claim of the defendant no.2 that those coils which were in the custody of the defendant no.1 ever belonged to the defendant no.2. The defendant no.2 did not purchase any goods from the sister concern of the defendant no.1 and they did not hold any inventory which belongs to the defendant no.2. The defendant no.2 itself has admitted in the arbitral proceedings and also before this Court that there was a trade

finance between the defendant nos.1 and 2. In my view, the defendant no.1 thus could not be prevented from complying with its obligation to deliver those coils which were handed over to the defendant no.1 by the applicant.

39. A perusal of the report submitted by the Court Receiver indicates that after perusing the documents produced by both the parties and after taking inspection of the coils lying in the warehouse of the defendant no.1, the Court Receiver has identified the coils of various parties including those 24 coils of the applicant. On the other hand, the defendant no.2 has totally failed to produce any material on record to identify the HR coils with purported invoices relied upon by the defendant no.2 and on the contrary, contended before the learned arbitrator as well as before this Court that the defendant no.1 had either removed those HR coils and/or replaced. This Court has to do substantial justice in the matter and has to consider the material produced by both the parties on the issue as to whether the mandatory injunction can be granted by this Court in favour of the applicant by directing the Court Receiver to hand over the delivery of those 24 coils to the applicant or to issue the similar directions to the defendant no.1. It is the case of the defendant no.2 that the concerned coils have been replaced and/or removed, and thus on this ground also mandatory injunction can be granted by

this Court. In my view, if the defendant no.2 succeeds in the arbitral proceedings, the defendant no.2 can be compensated in terms of money by the defendant no.1 or by the defendant no.3.

40. In my view, since the applicant has *prima-facie* demonstrated before this Court their ownership right, title and interest in those coils, the defendant no.1 and the defendant no.3 having admitted before the learned arbitrator and also before this Court that those coils belonged to the applicant in this notice of motion and in view of the fact that the defendant no.2 has also admitted that those coils have been allegedly removed / replaced by the defendant no.1 which were alleged to have been purchased by the defendant no.2, the applicant has made out a case for grant of reliefs. The applicant would be at liberty to call upon the defendant no.1 and the defendant no.3 to hand over the custody of those coils to the applicant.

41. The applicant in this notice of motion has prayed for an order and direction against the learned Court Receiver and/or the defendant no.1 to forthwith hand over to the applicant 24 HR steel coils weighing about 555.125 M.T. described in Exhibit "A" to the plaint and also seeks an injunction against the learned Court Receiver and/or the defendant no.1 from taking any further steps in regard to 24 HR steel coils. The applicant in the plaint has prayed for a declaration that the applicant is the lawful owner of 24 HR steel coils in good

useful condition and further seeks the directions against the learned Court Receiver or any other person to hand over possession of 24 HR steel coils weighing 555.125 M.T. in good useful condition and for other reliefs.

42. The applicant has produced large number of documents in support of its claim of ownership in respect of those 24 HR steel coils. These 24 HR steel coils also are found in the custody of the learned Court Receiver and/or the defendant no.1 and at the time of taking inventory of those coils by the learned Court Receiver. In support of these 24 HR steel coils also, the defendant no.2 has raised a similar dispute which is raised in respect of the coils claimed by the petitioners except dispute about maintainability of suit.

43. In my view, the applicant has already produced requisite title documents and has made out a strong *prima-facie* case of title in respect of those 24 HR steel coils in question under section 27 of the Sale of Goods Act, 1930. The defendant no.2 has not produced any documents to prove their alleged title or to prove any interest therein.

44. In my *prima-facie* view, there is no substance in the submission made by the learned counsel for the defendant no.2 that the defendant no.1 had called upon the defendant no.2 to supply the goods or that the defendant no.2 in turn purchased the same from the defendant no.3 and supplied the same to the defendant no.1. In my

view, the defendant no.2 could not produce any identity or source of purchase of those coils. None of the documents produced by the defendant no.2 would indicate or would support the case of the defendant no.2 even *prima-facie* that the coils in question were purchased by the defendant no.2 from the defendant no.3 and were sold to the defendant no.1. It is the case of the defendant no.2 before this Court that it was the matter of trade finance between the defendant no.2 and the defendant no.1.

45. Insofar as the submission of the defendant no.2 that the plaintiff is required to prove its ownership and only after leading evidence at the trial and only if the plaintiff succeeds at the trial can be granted an order of mandatory injunction is concerned, the Court has ample powers to grant mandatory injunction in appropriate cases even at the notice of motion stage. The defendant no.2 has not filed any counter claim in the suit filed by the applicant. Before the learned arbitrator, the defendant no.2 has also claimed damages against the defendant no.1 and the defendant no.3.

46. Insofar as the judgment of the Supreme Court in case of **Metro Marines vs. Boney Watch Co. Ltd. (2004) 7 SCC 478** (para 9) and **Dorab Cawasji Warden vs. Coomy Warden (1990) 2 SCC 117** (para 16) relied upon by the learned counsel for the defendant no.2 is concerned, in my view, the facts before the Hon'ble Supreme

Court in these two judgments were totally different and thus the same are distinguishable in the facts of this case. Since the defendant no.2 has admitted before this Court that the goods in the custody of the defendant no.1 are not the goods which were allegedly purchased by the defendant no.2 from the defendant no.3 and sold to the defendant no.1, the claim of the defendant no.2, if any, against the defendant no.1 and the defendant no.3 would be in the nature of money claim or for damages. No lien can be claimed by the defendant no.2 in respect of such goods. The Court has to see whether balance of convenience is in favour of the applicant or the defendant or whether *prima-facie* case is made out by the applicant or not before granting interim relief in favour of the applicant.

47. It is the case of the defendant no.2 itself that the defendant no.1 has alleged to have converted the said goods and the same are not now in the same form. The said submission is without any pleadings. Insofar as the issue of locus raised by the defendant no.2 of the applicant with the defendant no.2 is concerned, since the applicant is claiming right, title and interest in respect of the said goods which are allegedly owned by the defendant no.2, for the purpose of seeking possession of those goods in the custody of the defendant no.1, the locus between the plaintiff and the defendant no.2 is irrelevant. In my *prima-facie* view, there is no substance in the

submission made by the learned counsel for the defendant no.2 that the defendant no.1 and the defendant no.3 are colluding with the applicant in the notice of motion.

48. I am inclined to accept the submission of the plaintiff that there was a contract of bailment between the applicant and the defendant no.1 and thus the applicant is entitled to seek custody of the goods given to the defendant no.1 for a particular purpose i.e. job work. In my view, the rights of the applicant are superior to the alleged rights of the defendant nos.1 to 3.

49. Insofar as the submission of the learned counsel for the defendant no.2 that section 37 appeals and the civil suit are mutually destructive is concerned, it is not in dispute that the applicant in this matter has not invoked section 37 of the Arbitration and Conciliation Act, 1996. A perusal of prayers in the suit filed by the applicant/plaintiff indicates that the applicant had prayed for declaration that the applicant is the lawful owner of the 24 HR steel coils in good usable condition and seeks appointment of a Court Receiver or any other person to hand over the possession of the 24 HR steel coils to the applicant.

50. The applicant has also prayed for permission to inspect the said 24 HR steel coils to ascertain its condition and/or appoint an independent agency to examine condition of the coil and ascertain

the damages, if any, to the same and/or the same is in usable condition. In the notice of motion, the applicant had prayed for an order and direction to the Court Receiver and/or the defendant no.1 to forthwith hand over to the applicant those 24 HR steel coils and also seeks an injunction against the Court Receiver or the defendant no.1 for taking any further steps in respect of those 24 HR steel coils. The applicant has not applied for setting aside the order passed by the learned arbitrator either in the suit or in the notice of motion. The parties to the arbitration proceedings are impleaded as parties to the suit. I am thus not inclined to accept the submission of the learned counsel for the defendant no.2 that in this case, the reliefs claimed in the suit or the notice of motion are destructive to the appeals under section 37 of the Arbitration and Conciliation Act, 1996.

51. This Court in the case of **Mulji Umershi Shah and etc. vs. Paradisia Builders Pvt. Ltd. & Ors.** (*supra*) has considered the powers of the Court under Order XL Rule 1 of the Code of Civil Procedure, 1908 and has held that in suitable cases, the Court was not powerless to pass appropriate order for appointment of receiver without any application by any of the parties while rejecting the application for temporary injunction. It is held that such power can be exercised by the Court to prevent ends of justice from being defeated and where such order may be imminently required to be passed also

so that possession may be made over to that party who is *prima-facie* entitled to possession but is deprived by unlawful conduct or illegal act of the other party.

52. This Court has held that a party may not have any right to the property and still comes in possession of the property unlawfully and illegally which may be of recent origin and on that basis may seek to protect his possession by filing suit for injunction and by making an application for temporary injunction. The Court may find that such person has no title, right or interest in the property and is not in lawful possession. To avoid grave situation where the parties may take law in their own hands even while temporary injunction has been refused, in the absence of any application, the Court may make an order of appointment of receiver to prevent larger mischief. In my view, the principles of law laid down by this Court in the said judgment in the case of **Mulji Umershi Shah and etc. vs. Paradisia Builders Pvt. Ltd. & Ors.** (*supra*) would squarely apply to the facts of this case.

53. Though the defendant no.2 has failed to establish even any semblance of right in the said 24 HR steel coils and on the other hand, the applicant has satisfactorily proved their entitlement in respect of those 24 HR steel coils which are now lying in the warehouse of the defendant no.1, the applicant has made out a case for appointment of a Court Receiver with a direction to hand over

those 24 HR steel coils to the applicant upon the applicant tendering an undertaking before this Court within one week from the date of this order to the effect that if the applicant does not succeed in the suit, the applicant would return the amount equivalent to the value of those 24 HR steel coils as on the date of the Court Receiver handing over the possession of such coils with such rate of interest as the Court may direct to any of the defendant hereto.

54. In so far as the judgment of the **Lalit Kumar s/o Purushottamdas Mohta** (*supra*) relied upon by the learned counsel for the defendant no.2 is concerned, it is held by the Division Bench that whenever order is invited by the parties from the Court or if the same is passed at the behest of the parties, such order because of conduct of the parties, is in the nature of consent order and is therefore binding on the parties. Admittedly the applicant herein was not a party to such alleged consent order passed by the learned arbitrator or by this Court and thus the said undertaking rendered by the defendant no.1 or the statement made by the defendant no.1 before the learned arbitrator or before this Court in respect of those 24 HR steel coils would not be binding on the applicant. The judgment of the Division Bench of this Court in the case of **Lalit Kumar s/o Purushottamdas Mohta** (*supra*) thus would not assist the case of the defendant no.2 and is clearly distinguishable in the

facts of this case.

55. In my view the applicant has thus made out a *prima-facie* case for grant of interim reliefs. The balance of convenience is in favour of the applicant and not the defendants. The judgment relied by Mr.Kapadia, learned counsel for the applicant referred to aforesaid would assist the case of the applicant. In my *prima-facie* view, the applicant has made out a strong case for grant of mandatory injunction against the defendant nos.1 and 3 to hand over 24 HR steel coils to the applicant however on the applicant furnishing an undertaking to this Court that in the event of the defendants succeeding in the suit, the applicant would return the amount equivalent to the value of goods on the date of release of such goods to the defendant no.2 with such rate of interest as this Court may deem fit.

56. I therefore pass the following order :-

i). Court Receiver, High Court, Bombay is appointed in respect of 24 HR steel coils earmarked by the Court Receiver, High Court, Bombay in the report submitted before this Court and more particularly described in Exhibit 'A' to the plaint with a direction to hand over possession thereof to the applicant within two weeks from the date of communication of this order subject to the applicant filing an undertaking before this Court within one week from the date of

this order to the effect that the applicant would return the amount equivalent to the valuation of 24 HR steel coils which are directed to be returned to the applicant by the Court Receiver as on the date of delivery of such 24 HR steel coils with such rate of interest as the Court may direct at the stage of passing a decree to any of the defendants, as may be directed by this Court.

ii). Till the Court Receiver takes possession of 24 HR steel coils described in Exhibit 'A' to the plaint, the defendants are restrained from creating any third party rights in respect of the suit property.

iii). Notice of motion is made absolute in aforesaid terms.

iv). There shall be no order as to costs.

v). Parties as well as the Court Receiver to act on the authenticated copy of this order.

(R.D. DHANUKA, J.)

Mr.Ankhad, learned counsel for the defendant no.2 seeks stay of operation of the order passed by this Court today. The order passed by this Court today shall not be executed for a period of six weeks from today.

(R.D. DHANUKA, J.)