

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

WRIT PETITION NO. 736 OF 2017

Phoenix ARC Private Limited	]
A Company incorporated and	]
registered under the Companies Act,	]
1956 and having its registered office	]
at 5 th Floor, Dani Corporate Park,	]
158, C.S.T. Road, Kalina, Santacruz	]
I, Mumbai – 400 098 acting in its	]
capacity as Phoenix Trust FY11-1.	].. Petitioner

Versus

1	Sunil Solvent Extraction Private Limited	]
	A Company incorporated under the	]
	Companies Act, 1956 having its	]
	registered office at 34, Ezra Street,	]
	Kolkata – 700 001.	]

Also at :

	Katangikala, Tah. & Dist. Gondia (M.S.), 441612.	
2	Ramlal Agarwal	]
	An adult Indian inhabitant having his	]
	address at Katangikala, Tah. & Dist. Gondia	]
	(M.S.), 441612.	]
3	Suresh Kumar Agrawal	]
	An adult Indian Inhabitant having his	]
	address at Katangikala, Tah. & Dist. Gondia	]
	(M.S.), 441612.	]
4	Arun Agrawal	]
	An adult Indian inhabitant having his	]
	address at Katangikala, Tah. & Dist. Gondia	]
	(M.S.), 441612.	]

- WITH

Phoenix ARC Private Limited]
A Company incorporated and]
registered under the Companies Act,]
1956 and having its registered office]
at 5th Floor, Dani Corporate Park,]
158, C.S.T. Road, Kalina, Santacruz]
I, Mumbai – 400 098 acting in its]
capacity as Phoenix Trust FY11-1.].. Petitioner

M/s. Suresh Trading Company]
A Partnership concern having its office at]
Katangikala, Tah. & Dist. Gondia]
(M.S.), 441612 acting through].. Respondent
Shri Suresh Agarwal

Mr. Charles De Souza, Advocate, a/w. Ms. Aneesa Cheema,
Ms. Mithila Damle for the Petitioner in both Petitions.
Mr. Atul Pande, Advocate i/by Ms. Yashashri Naik for
Respondents.

CORAM : K.K. TATED & N.J. JAMADAR, JJ.

DATE : JANUARY 4TH, 2019.

[Reserved for Judgment on : 02.11.2018]

[Judgment Pronounced on : 04.01.2019]

JUDGMENT : (Per N. J. JAMADAR, J.)

1 These Petitions, under Article 226 and 227 of the Constitution of India, are directed against the common order dated 19.10.2016 passed by the Debts Recovery Appellate Tribunal, Mumbai (hereinafter referred to as “DRAT” for short) in Appeal No. 128 of 2014 and Appeal No. 145 of 2014 whereby both the Appeals, preferred by the Petitioner herein against the order dated 11.02.2014 passed in OA No. 31 of 2010 and order dated 27.03.2014 passed in Securitization Application No. 119 of 2012, respectively, by the Debts Recovery Tribunal, Nagpur (hereinafter referred to as “DRT” for short), were dismissed.

2 As these writ petitions arise out of the common order passed by the DRAT and background facts are also

identical, we deem it appropriate to dispose of both these writ petitions by this common judgment and order.

3 For the sake of clarity and convenience, it would be apposite to enumerate the facts in OA No. 31 of 2010 and S.A. No. 119 of 2012, distinctly.

FACTS IN OA NO. 31 OF 2010

i) The Bank of India, the predecessor -in-title of M/s. Phoenix ARC Pvt. Ltd., (the Petitioner herein) had extended certain financial facilities to M/s. Sunil Solvent Extraction Limited Defendant No.1; a private limited company, which came to be subsequently converted into a public limited company. The Defendants Nos. 2 to 8 had stood guarantor to the said loan / financial facility extended to Defendant No. 1.

ii) The Defendants committed default in repayment. The Bank of India declared the loan and financial facilities extended to the Defendants, as non-performing assets. Thereupon action under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act'), was initiated.

iii) On 30.03.2011 the debts came to assigned in favour of the Petitioner-an asset reconstruction company. On 31.03.2011, the Petitioner claimed to have taken possession of the secured assets.

iv) In the meanwhile, the predecessor in-title of the Petitioner had filed OA No. 31 of 2010, claiming an amount of Rs. 4,50,65,000/- with interest at the rate of 13.60 % per annum from the Defendants. The Petitioner assignee got itself substituted in the said O.A.. During the pendency of the said OA No. 31 of 2010, I.A. No. 321 of 2011 came to be filed for recording the settlement arrived at between the Petitioner and Defendant Nos. 1, 3, 5, 7 and 8, and passing order in terms thereof. Vide order dated 25.07.2011 in I.A. No 321 of 2011, the DRT recorded the terms of settlement and it was directed that the Defendant shall pay the sum i.e. 4,37,00,000/- to the Petitioner towards full and final settlement of the dues. The DRT further directed that, in the event of default, the said amount shall carry interest at the rate of 6% per annum.

v) The Petitioner, being dis-satisfied with the rate of interest, filed Review Application No. 10 of 2011 and claimed the interest at the rate of 30 % per annum on the

sum agreed to be paid i.e. Rs. 04,37,00,000/- towards full and final settlement.

vi) The learned Presiding Officer DRT specifically observed that, as regards the rate of interest, it was agreed by both the sides that whatever rate of interest would be determined by the Tribunal, shall be acceptable to both the parties. The Tribunal thus allowed OA No.31 of 2010 and thereby ordered the Defendant Nos. 1 to 8 to jointly and severally pay the sum of Rs. 4,37,00,000/- to the Petitioner, as ordered in terms of the settlement alongwith the further interest at the rate of 8% per annum.

vii) Being further aggrieved and dissatisfied with the award of interest at the rate of 8% per annum, the Petitioner preferred Appeal no. 128 of 2014 before the DRAT, Mumbai.

FACTS IN S.A. NO. 119 OF 2012 :

viii) As observed earlier, the loan accounts were assigned to the Petitioner by the Bank of India, the original Secured Creditor, vide Deed of Assignment dated 30.03.2011. The possession of the secured assets under section 13(4) of the SARFAESI Act was already

taken by the predecessor -in-title of the Petitioner on 13.04.2010. In the meanwhile, settlement was arrived at between the petitioner and respondent and it was agreed that the loan accounts shall stand settled upon payment of Rs.1.13 crores. However, despite payment of a sum of Rs.73, 00,000/- by the respondent, the settlement could not materialize on account of certain disputes. The Petitioner issued a notice on 08.11.2012 to sell the secured assets by way of public auction. Auction notice followed on 24.11.2012. The Respondent thus filed securitization application no. 119 of 2012, challenging the proposed sale of the secured assets by the Petitioner.

ix) The main grounds of challenge were that the secured asset consisted of agricultural land bearing Gat No. 276/2 and it could not have been sold under the provisions of the SARFAESI Act. Secondly, the Petitioner failed to observe the mandatory 30 days period of notice under the provisions of Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as “the said Rules 2002”). Thirdly, the Petitioner failed to comply mandatory provisions of Rule 8(2) of the Rules 2002 which warranted that the notice of taking possession of the secured assets shall be published in newspapers not later than 7 days from the date of taking possession.

x) After hearing the parties, and upon perusal of the material tendered by both the parties on record, the learned Presiding Officer DRT negated the first and second challenge, namely, that the secured asset was not amenable to sale being an agricultural land and that there was breach of Rule 8(6) of the Rules 2002. The DRT, however, came to the conclusion that the possession notice dated 31.03.2011 relied upon by the Petitioner could not be considered a “notice” contemplated by section 13(4) of the SARFAESI Act. Thus in the opinion of DRT, the notice was not published in the newspaper in conformity with the Rules 8 (2) of the Rules 2002. Even otherwise, if the notice dated 31.03.2011 is construed as a notice of taking possession, yet its publication in the newspaper on 11.04.2011, according to the DRT, was in breach of Rule 8(2) of the said Rules and thus the action initiated by the Petitioner was quashed and set aside and S.A. No. 119 of 2012 came to be allowed.

xi) Being aggrieved by and dis-satisfied with the said order, the Petitioner preferred Appeal No. 145 of 2014.

IMPUGNED COMMON ORDER BY DRAT :

xii) The DRAT declined to interfere with the order passed by the DRT in OA No. 31 of 2010, awarding

interest at the rate of 8% per annum on the premise that there was no stipulation, regarding the rate, at which the interest was to be paid in the event of default, in the consent terms, on the basis of which the order came to be passed on 25.07.2011. The DRAT was also of the view that the future interest was awarded by the DRAT in exercise of its discretionary power. The DRAT thus found that the discretion was not exercised arbitrarily nor there was any perversity in enhancing the rate of interest from 6% to 8%. Thus, the Petitioner's claim for enhanced interest on the basis of the alleged agreement to pay interest at the rate of 30% per annum in the event of default, was negated.

xiii) As regards quashing of the action initiated by the Petitioner for sale of the secured assets, the learned DRAT was of the view that Rule 8 (2) of the Rules, 2002 explicitly provides that the notice of possession shall be published in two newspaper not later than 7 days of taking over the possession. Thus, there was breach of the mandatory provisions of Rule 8(2) of the said Rules 2002. Resultantly, the DRAT did not find any fault with the order passed by the DRT in SA No. 119 of 2012.

4 We have heard Mr. Charles D'Souza, learned counsel for the Petitioner and Mr. Atul Pande, learned counsel for the Respondent, at considerable length.

5 The arguments were concluded on 02.11.2018. However, liberty was granted to both the parties to file written submissions by 16.11.2018. The Petitioner has tendered written submissions in both the matters. The Respondents have also tendered the Written Notes of Arguments in both the matters. We have perused the Notes of Arguments tendered on behalf of the Petitioner and the Respondents.

6 To begin with, few un-controverted facts : The Bank of India was the original secured creditor. On account of default in repayment, the debts were declared non-performing assets by the Bank of India on 31.12.2009. The Bank of India initiated action for enforcement of the security interest under the SARFAESI Act. A notice under section 13(2) of the Act was issued on 19.01.2010. The borrowers failed to discharge their liability within the period specified in sub-section (2) of section 13. The Bank of India took possession of the secured assets, under section 13(4) of the SARFAESI Act on 30.04.2010. The Petitioner entered into the shoes of the Bank of India, as the debts came to be assigned in favour of the Petitioner on 30.03.2011. The Petitioner claimed to have taken possession of the secured assets on 31.03.2011. An

effort was made to settle the loan accounts by entering into the settlement agreement on 06.04.2011. The Petitioner published purported notice of possession in the newspaper on 11.04.2011. The Petitioner issued sale notice on 08.11.2012. Auction notice was issued on 24.11.2012. In the meanwhile, in IA No.321 of 2011 in O.A. No. 31 of 2010, an order came to be passed on 25.07.2011, based on the consent terms executed by and between the parties.

7 The learned counsel for the Petitioner strenuously urged that the DRT as well as DRAT committed manifest error in quashing and setting aside the action initiated by the Petitioner for enforcement of security interest on the premise that there was breach of the mandatory provisions contained in Rule 8(2) of the Rules 2002. The learned counsel for the Petitioner advanced two-pronged submission. One, there was no breach on the part of the Petitioner and its predecessor-in-title in compliance with any of the provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules 2002. Secondly, the DRT and DRAT had fallen into error in construing Rule 8(2) of the said Rules, as mandatory. It was submitted that the phraseology of Rule 8(2) and non-prescription of any consequence of non-observance of the condition of publication of the possession notice in the newspapers within 7 days, lead to the only conclusion that

seven days time for publication of the possession notice in the newspapers is directory.

8 The learned counsel for the Petitioner urged with a degree of vehemence that mere use of word 'shall' in Rule 8(2) of the Security Interest (Enforcement) Rules, is not of determinative and decisive significance. The learned Presiding Officer, DRT and the learned Chairperson, DRAT, according to the learned counsel for the Petitioner, adopted a superficial approach in non-suiting the Petitioner by holding that Rule 8(2) of the Rules 2002, was mandatory without adverting to the object and purpose of the provisions of the SARFAESI Act and the Security Interest (Enforcement) Rules 2002.

9 At this juncture, it may be advantageous to reproduce the relevant sub-rules of Rule 8 of the Rules, 2002. They read as under :

“8. Sale of immovable secured assets –

(1) where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) [The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven day from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised offer.”

10 Learned counsel for the Petitioner submitted that a conjoint reading of the aforesaid provisions would indicate that following steps are mandatory :-

- (i) Issue and delivery of possession notice to the borrower,
- (ii) Affixing the possession notice on the outer door or other conspicuous place of the secured assets.
- (iii) Publication of the possession notice in two leading newspaper.

However, according to the learned counsel for the Petitioner , the prescription of time i.e. “not later than seven days from the date of taking possession” is not a mandatory requirement but its substantial compliance would be in order.

11 The aforesaid inference that the stipulation with regard to the time is directory, was sought to be justified on two grounds - (i) no penal or other consequence is prescribed for non-observance of the condition of publication within the

stipulated time, (ii) holding the condition, as regards the publication within the stipulated time, mandatory will lead to general inconvenience. Thus such an interpretation needs to be avoided.

12 In order to bolster up the aforesaid submission, the learned counsel for the Petitioner placed a strong reliance upon the judgment of this court in the case of ***Clarity Gold Pvt. Ltd. Vs. State Bank of India & Ors.***¹ wherein the nature of the provision, which stipulated time of one week for communication of non-acceptance of the representation or objections of the borrower, to the borrower, as envisaged by subsection (3-A) of section 13 of the SARFAESI Act, arose for consideration. This court, after considering the nature and import of stipulation of one week's time in subsection (3-A) of section 13 (as it stood then), came to the conclusion that the prescription of time of one week, for communication of reasons for non-acceptance of representation, was directory in nature. Para nos. 12 and 13 of the aforesaid judgment read as under :

“12. The requirement that the secured creditor must communicate reasons to the borrower for the rejection of the objection is undoubtedly mandatory because the whole object and purpose of sub-section (3A) is to enable

¹ 2011 (2) Mh.L.J. 778

the borrower to have some recourse upon a notice being issued under Section 13(2). However, the failure of the secured creditor to deal with the representation within a period of one week does not render the disposal of the representation invalid. The secured creditor must of course deal with the representation on an expeditious basis particularly since under Section 13 a borrower, after receipt of a notice under sub-section (2) is restrained from transferring the secured assets without the prior written consent of the secured creditor.

13. We are in respectful agreement with the judgment of the Gujarat High Court which holds that every prescription of a period within which an act has to be done does not constitute a prescription of a period of limitation, a failure of compliance with which would render the action invalid. The object of sub-section (3A) is to provide an expeditious method for the disposal of objections in order to ensure that the action of the secured creditor is not held up for an unduly long period of time. The period of one week that is prescribed in sub-section (3A) is clearly directory. That apart, the Petitioners have not established that any prejudice was caused to them by the delay on the part of the Bank in responding to the representation submitted to the notice under Section 13(2). That submission must therefore fail.”

13 Learned counsel for the Petitioner urged that the aforesaid analogy applies with equal force to the construction of Rule 8(2) of the Rules, 2002. Publication of the possession notice is indisputably mandatory. However, the period of seven days from the date of taking possession prescribed for publication, is directory.

14 Reliance was also placed on the judgment of the Supreme Court in the case of ***Topline Shoes Ltd. vs. Corporation Bank***,² wherein it was enunciated that section 13 of the Consumer Protection Act, 1986, which provide 45 days time for filing reply by the opponent was directory in nature and the time limit was not peremptory.

15 The learned counsel for the Petitioner also placed a strong reliance upon another judgment of this court, dated 21.02.2018, in the case of ***Global Aviation Services Pvt. Ltd., Vs. Airport Authority of India***³ in; wherein after reference to a number of judgments, it was enunciated that the provision of section 34 (5) 34(6) of the Arbitration & Conciliation (Amendment) Act, 2015, which provide for issuance of prior notice and disposal of the application under section 34, within a period of one year, respectively, were not mandatory but directory. The learned single Judge of this court observed,

2 (2002) 6 SCC 33

3 Commercial Arbitration Petition No.434 of 2017

inter-alia, that since no consequence was provided for the non-compliance with the aforesaid provisions i.e. prior notice and disposal within one year, the said requirements were directory in nature.

16 We have given our anxious consideration to the aforesaid submission on behalf of the Petitioner. It is pertinent to note that an endeavor is made on behalf of the Petitioner to demonstrate that the question turns upon the construction of Rule 8(2) of Rules 2002 only i.e. whether its compliance is mandatory or directory. Indeed the learned Chairperson of the DRAT observed that the use of the word 'shall' in Rule 8(2) of the said Rules, leads to a plain meaning and construction of the said provision as mandatory. However, upon a close scrutiny of the facts and material on record and the observations of the learned Presiding Officer, DRT, we find that the DRT negated the claim of the Petitioner on the count of non-compliance with the Rule 8(2) of the said Rules, within the stipulated period of seven days, in the alternative. The principal ground was that the possession notice was not given to the borrower and it was not published in the newspaper. The DRT expressly observed that the purported notice dated 31.03.2011 was not a possession notice within the meaning of section 13(4) of the SARFAESI Act.

17 The pivotal question which thus crops up for consideration is whether the notice dated 31.03.2011 issued, and subsequently published, by the Petitioner, satisfies the statutory requirement under section 13(4) of the SARFAESI Act and Rule 8 of the Rules 2002. It is pertinent to note that the learned Presiding Officer, DRT, recorded that initially the possession notice dated 31.03.2011 was not placed on the record of the Tribunal and it came to be filed on 26.03.2014 alongwith pursis. It would be contextually relevant to note that the said possession notice dated 31.03.2011 was even not tendered alongwith the petition and the petitioner placed its copy before this court. It must be noted that the Respondent did not dispute the correctness of the said copy.

18 After perusal of the said possession notice dated 31.03.2011, the learned Presiding Officer, DRT observed that the said notice did not partake the character of possession notice, as contemplated by section 13 (4) of the SARFAESI Act. Following observations in para 6 of the judgment and order dated 27.03.2014 in S.A.No.119 of 2012, would make the view of the Presiding Officer, DRT, explicitly clear :

“.... From perusal of photocopy of said notice, nowhere it is written that it is issued to the applicant / appellant, nowhere it is mentioned that it is notice under section 13(4) and from the entire perusal of the

said notice it cannot be considered as notice issued under section 13(4) of SARFAESI Act by M/s. Phoenix ARC Pvt. Ltd. To the applicant/ appellant. As such, said notice cannot be considered as a notice of possession.”

19 In the backdrop of the aforesaid reasoning, we have carefully perused the purported possession notice dated 31.03.2011. It is indisputable that the predecessor -in-title of the Petitioner had issued the possession notice under section 13(4) of the Act and also taken possession of the secured assets on 13.04.2010. The said possession notice was in the Form prescribed in Appendix IV appended to the Security Interest (Enforcement) Rules 2002. It is nobody's case that the said possession notice dated 13.04.2010 was published either by the predecessor-in-title of the Petitioner or the Petitioner.

20 In contrast to this, the purported possession notice dated 31.03.2011, relied upon by the Petitioner, indicates that the possession was taken by the authorised officer of the Petitioner from the authorised officer of the Bank of India. It records the fact that the possession of the secured assets was already taken by the predecessor in title of the petitioner on 13.04.2010. The avowed object of the said notice appears to proclaim that the Petitioner stood surrogated in the place of

Bank of India. The said notice dated 31.03.2011 nowhere indicates that it was addressed to the borrower. The said notice dated 31.03.2011 does not satisfy the requirement of Rule 8 nor it appears to be in substantial compliance with the form prescribed in Appendix IV appended to Rules 2002.

21 To sum up, in contradistinction to the notice dated 31.03.2011, the possession notice issued by the Bank of India on 30.04.2010, appears to be in conformity with the provisions of the SARFAESI Act and the Rules 2002. Whereas the notice dated 31.03.2011 is in the nature of the declaration of the Petitioner as the assignee of debts in question. We are, therefore, inclined to hold that the learned Presiding Officer, DRT was within his rights to record the finding that the said notice dated 31.03.2011, cannot be considered be a notice under section 13(4) of the SARFAESI Act.

22 The situation which thus emerges is that the possession of the secured asset was taken on 13/04/2010 itself and notice to evidence the said taking over of possession was issued to borrowers on 13/04/2010. Therefore, the non-publication of the notice dated 13.04.2010 dismantles the substratum of the petitioner's case, as there is total non-compliance with the statutory requirement. An attempt made on behalf of the Petitioner to wriggle out of the situation, by publishing the notice dated 31.03.2011 in the newspapers on

11.04.2011, is of no avail. It must be noted that the learned Presiding Officer, DRT, did not negative the claim of the Petitioner only on the premise that there was delay of 4 days in publishing the notice dated 31.03.2011. In fact, the substantive reason was that the notice dated 31.03.2011, did not acquit itself as a statutory notice, contemplated by section 13(4) of the SARFAESI Act.

23 At this juncture, a profitable reference can be made to the judgment of the Supreme Court in the case of **Mathew Varghese vs. M. Amritha Kumar & Ors.**⁴, wherein the question of validity of sale of secured assets without 30 days' clear notice to borrower fell for consideration. The Supreme Court after adverting to the provisions of section 13 of the SARFAESI Act and Rule 8 of the Rules 2002, observed that while on the one hand secured creditor may be entitled to enforce the secured asset created in its favour on its own without resorting to any court proceedings or approaching the Tribunal, such enforcement should be in conformity with the other provisions of the SARFAESI Act. The Court further observed that, unless and until a clear 30 day's notice is given to the borrower, no sale or transfer can be resorted to by secured creditor.

4 (2014) 5 Supreme Court Cases 610

24 The observations of the Supreme Court in para 31 indicate the nature of the provisions, especially rule 8 and 9 of the Rules, 2002, which read as under :

“31. Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said rules prescribe as to the procedure to be followed by a secured creditor while resorting to a sale after the issuance of the proceedings under Section 13(1) to (4) of the SARFAESI Act. Under Rule 9(1), it is prescribed that no sale of an immovable property under the rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to Sub-rule (6) of Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable secured assets. Reading Sub-rule (6) of Rule 8 and Sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days time gap for effecting any sale of immovable secured Asset is a statutory mandate. It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days individual notice to the borrower and also a public notice by way of publication in

the newspapers. In other words, while the publication in newspaper should provide for 30 days clear notice, since Rule 9(1) also states that such notice of sale is to be in accordance with proviso to Sub-rule (6) of Rule 8, 30 days clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well. Therefore, the use of the expression 'or' in Rule 9(1) should be read as 'and' as that alone would be in consonance with Section 13(8) of the SARFAESI Act.”

25 In the backdrop of the aforesaid exposition of law, we are persuaded to hold that though the secured creditor has been statutorily empowered to enforce the security interest without intervention of the Court or the Tribunal, yet the statutory provisions prescribing the manner in which the security interest is to be enforced, are required to be scrupulously observed. If the provisions of Section 13(4) of the SARFAESI ACT are read in juxtaposition with Rules 2002, especially sub-Rule (1) to (4) and (6) of Rule 8 and sub-Rule (1) of Rule 9, it becomes explicitly clear that the secured asset, upon its turning into a non performing asset, cannot be dealt within a high-handed manner and disposed of in a casual manner, without adhering to the procedure prescribed by the Act and Rule 2002.

26 For the forgoing reasons, we are impelled to hold that the in the facts and circumstances of the case, the

abstract question as to whether the provisions of Rule 8(2) of the Rules, 2002, qua the time limit for publication of notice are mandatory or directory, does not warrant determination. It is evident that the possession notice dated 13.04.2010 was not published in the newspaper, as is envisaged by Rule 8(2). Thus, there is total non-compliance of Rule 8(2) of the Rules 2002. The publication of the notice dated 31.03.2011, thus, does not salvage the position.

27 As regards the challenge to the impugned order with reference to the award of interest at the rate of 8% per annum, the learned counsel for the Petitioner would urge that the learned Chairperson, DRAT, committed a gross error in adverting to the irrelevant and inappropriate clause of the consent terms, executed by and between the parties. It was submitted that the basis of the consent terms was the letter of acceptance, executed by the borrower on 06.04.2011. The following stipulation therein clearly provides that in the event of default in payment of any installment, in accordance with the consent terms, the borrower would be liable to pay penal interest at the rate of 30% per annum (compounded monthly)

“8. The Addressees undertake, confirm and agree that on or before 31st July 2011, SSEL shall pay a minimum amount on Rs.40,00,000/- (Rupees Forty Lacs only) out of the agreed settlement amount. The Addressees further agree

that failure of paying the said amount on or before 31st July would be treated as an 'Event of Default' and the outstanding balance of the Settlement Amount shall become due and payable forthwith.

9. *In the event Phoenix agrees to extend the limit for payment of any particular monthly installment on the written request of the Addressees, the Addressees shall pay penal interest at the rate of 30% per annum (compounded monthly) for the period of such delay till the actual date of payment on such amount. Such extension shall not exceed period of 30 days in any case. The Addressees confirm and undertake that grant of this extension by Phoenix shall not under any circumstances be deemed to be a waiver of Phoenix's right mentioned herein.”*

28 It is imperative to note that I.A. No. 321 of 2011 in O.A.No. 31 of 2010, jointly filed by the Petitioner and the Defendant Nos. 1,3,5,7 and 8, does not contain the aforesaid stipulation of payment of penal interest at the rate of 30% per annum (compounded monthly). In opposition to this, the following stipulations find mention therein, at clauses (g), (h) and (k), which read thus :

“g. *The consenting Defendants, jointly and severally, undertake, confirm and agree that on or before 31st July*

2011, the Consenting Defendants, jointly and severally, shall pay a minimum amount of Rs.40,00,000/- (Rupees Forty Lakhs only) to the Applicant out of the agreed Settlement Amount. The Consenting Defendants, jointly and severally, further agree that failure of paying the said amount on or before 31st July 2011 would be treated as an 'Event of Default', whereby the entire Settlement Amount along with further interest as per the terms of settlement shall become due and payable forthwith by the Consenting Defendants to the Applicant.

h. The Consenting Defendants, jointly and severally, have further agreed that in the event of any default on the part of the Consenting Defendants in compliance of the terms and conditions of the compromise, whether fully or partially, the decision of the Applicant shall be final and binding upon the Consenting Defendants and the Applicant shall have a right to immediately cancel the settlement and recover the entire Settlement Amount, together with future interest, costs and other amounts, without any relief and concession and accordingly the Applicant shall be entitled to get the Recovery Certificate issued without any further delay. The Consenting Defendants, jointly and severally, further agree that the Applicant shall be entitled to take such other remedial measures against the Consenting Defendants as it may deem fit and best to preserve and protect its rights and interests in

order to recover the settlement amount at the cost and risk of the Consenting Defendants."

k. In the Event of Default in payment of any one installment out of the agreed payment schedule, the Applicant shall be entitled to a recovery certificate, forthwith, from this Hon'ble Tribunal , in terms of the Settlement Amount, payment of which is hereby agreed to by the Consenting Defendants, after adjusting the amounts already received by the Applicant.

29 It is true that the learned Chairperson, DRAT, extracted the aforesaid clause (k) only. On the basis of the aforesaid clause, the learned Chairperson, DRAT, came to the conclusion that there was no stipulation of rate of interest in the event of default in payment, as per the terms of the settlement. Though, the aforesaid clause (g) and (h) have a bearing upon the consequences which would ensue in the event of default in payment, (in addition to the clause (k), extracted above), yet it is abundantly clear that there was no specific stipulation regarding the rate at which the interest was to be paid in the event of default in any of the aforesaid clauses. In clause (g), it was simply mentioned that the entire amount along with the future interest, as per terms of the settlement, shall become due and payable.

30 The above extracted clause (9) of letter of acceptance dated 06.04.2011, providing for penal interest at the rate of 30% per annum, was, however, not a part of the consent terms executed before the Presiding Officer, DRT, and on the basis of which the DRT passed the order on 25.07.2011. Thus, the submission on behalf of the Petitioner that there was contractual rate of interest agreed to be paid in the event of default under the terms of settlement is not borne out by the record.

31 Even otherwise, the justifiability of the claim of interest at 30% per annum is required to be appreciated. There are two impediments which the petitioner needs to surmount. Firstly, the learned Presiding Officer, DRT, observed, more than once, that the parties had consented that the rate of interest which may be determined by the Tribunal would be acceptable to both of them. Even in the operative part of the impugned order in OA No. 31 of 2010, the learned Presiding Officer, DRT, made it abundantly clear that the rate of interest was determined in view of the consent given by both the parties. Clause (c) of the operative part of the order reads as under :

“(C) The rate of interest is granted by this Tribunal in view of consent given by both the sides that whatever rate of interest is fixed by this Tribunal, that shall be acceptable to both the sides.”

32 In this backdrop, the Petitioner would now be precluded from challenging the grant of interest at the rate of 8% per annum, based on the consent and concession made by the Petitioner as well. The learned counsel for the Petitioner made a feeble attempt to wriggle out of the situation by submitting that no such express concession was made. We are afraid to accede to this submission.

33 A useful reference in this context can be made to the judgment of the Supreme Court in the case of ***State of Maharashtra vs. Ramdas Shrinivas Nayak & Anr.***⁵, wherein it was enunciated 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. The relevant observations of the Supreme Court, in para 4 of the aforesaid judgment, are instructive in nature. They read as under :

“4. 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

5 (1982) 2 Supreme Court Cases 463

*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. Chanderwati** A.I.R. 1917 P.C. 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."*

34 In view of the aforesaid legal position, at this stage, we are not inclined to accede to the submission made on behalf of the Petitioner. We hold that the determination of rate of interest on the basis of the consent of the parties cannot be now reopened.

35 Even otherwise, it is pertinent to note that the stipulation of payment of interest on account of default in compliance with the order, based on the consent terms, is in the nature of future interest. The grant of future interest, under section 34 of the Code of Civil Procedure, is discretionary in nature. The controversy is no longer res-

integra. Reference to the constitution bench judgment of the Supreme Court in the case of the ***Central Bank of India vs. Ravindra and Ors.***⁶ would be apposite and suffice.

36 In the aforesaid case, the Supreme Court answered the reference in following terms:

“58. Subject to the above we answer the reference in following terms :

(1) Subject to a binding stipulation contained in a voluntary contract between the parties and/or an established practice or usage interest on loans and advances may be charged on periodical rests and also capitalised on remaining unpaid. The principal sum actually advanced coupled with the interest on periodical rests so capitalised is capable of being adjudged as principal sum on the date of the suit.

(2) The principal sum so adjudged is 'such principal sum' within the meaning of Section 34 of the Code of Civil Procedure, 1908 on which interest pendente lite and future interest i.e. post-decree interest, at such rate and for such period which the Court may deem fit, may be awarded by the Court.

(3) Corpn. Bank vs. D.S. Gowda and Bank of Baorda vs. Jagannath Pigment & Chem., hve been correctly decided.”

6 (2002) 1 Supreme Court Cases 367,

37 As regards the award of interest, pendente lite and post-decree, the Supreme Court expounded the following proposition : -

“55

(8) Award of interest pendente lite and post-decree is discretionary with the Court as it is essentially governed by Section 34 of the CPC de hors the contract between the parties. In a given case if the Court finds that in the principal sum adjudged on the date of the suit the component of interest is disproportionate with the component of the principal sum actually advanced the Court may exercise its discretion in awarding interest pendente lite and post-decree interest at a lower rate or may even decline awarding such interest. The discretion shall be exercised fairly, judiciously and for reasons and not in an arbitrary or fanciful manner.”

38 The learned Chairperson, DRAT observed that the learned PO, DRT, exercised the discretion to award interest at the rate of 8% per annum correctly and not arbitrarily. We are inclined to agree with the learned Chairperson, DRAT. In the totality of the facts and circumstances, we are of the view that the award of interest at the rate of 8% per annum is just and proper. Thus the

challenge to the impugned order on this count also falls through.

39 Resultantly, on a careful analysis of the legal position, in the backdrop of the facts, we are impelled to hold that no interference is warranted by this court in exercise of writ jurisdiction. The Petitions, therefore, deserve to be dismissed. Hence, the following order :

: ORDER :

- i. Both Writ petitions stand dismissed.
- ii. In the facts and circumstances, there shall be no order as to costs.

(N.J. JAMADAR, J.)

(K. K. TATED, J.)

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