

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
[COMMERCIAL DIVISION]

INTERIM APPLICATION NO.1370 OF 2020

IN

COMMERCIAL SUIT NO.319 OF 2020

Bharat Kishormal Shah] .. Applicant-Plaintiff

Versus

1. Yes Bank Ltd.	]
2. Sumer Corporation	]
3. Ramesh Sumermal Shah	]
4. Rahul Ramesh Shah	]
5. Deepak Ramesh Shah	]
6. Manakchand Hajarimal Loonkar	]
7. Mahendra Manakchand Loonkar	]
8. Sumer Buildcorp Private Limited	]
9. Sumer Builders	]
10. Kunal Goswami	] .. Defendants

ALONG WITH

INTERIM APPLICATION (LODGING) NO.5376 OF 2021

IN

COMMERCIAL SUIT (LODGING) NO.5374 OF 2021

1. Manakchand Hajarimal Loonkar	
2. Mahendra Manakchand Loonkar	] .. Applicants-Plaintiffs

Versus

1. Yes Bank Ltd.	]
2. Sumer Corporation	]
3. Ramesh Sumermal Shah	]
4. Rahul Ramesh Shah	]
5. Deepak Ramesh Shah	]
6. Bharat Kishormal Shah	]
7. Sumer Buildcorp Pvt. Ltd.	]
8. Sumer Builders	]
9. Kunal Goswami	] .. Defendants

Mr. Virag Tulzapurkar, Sr. Advocate, with Mr. Ashish Kamat, Mr. I.J. Nankani, Mr. H.S. Khokhawala and Mr. Rohan Sawant, i/by Nankani & Associates, for the Applicant-Plaintiff in IA/1370/2020.

Mr. Zal Andhyarujina, Sr. Advocate, with Mr. Indranil Deshmukh, Ms. Gathi Prakash, Mr. Kartik Prasad and Ms. Ishani Khanwilkar, i/by Cyril Amarchand Mangaldas, for Defendant No.1 in IA/1370/2020.

Mr. R.M. Kadam, Sr. Advocate, with Mr. Chetan Kapadia, with Ms. Kausar Banatwala and Mr. Chirag Sarawagi, i/by Mr. Tushar Goradia, for Defendant Nos.2 to 4 and 8 to 10 in both the IAs.

Mr. Chirag Mody, i/by Mr. Joaquim F. Fernandes, for Defendant Nos.6 and 7 in IA/1370/2020 and for the Applicants-Plaintiffs in IAL/5376/2021.

Mr. Ashish Kamat, with Mr. I.J. Nankani, Mr. H.S. Khokhawala and Mr. Rohan Sawant, i/by Nankani & Associates, for Defendant No.6 in IAL/5376/2021.

CORAM : A. K. MENON, J.
RESERVED ON : 28TH OCTOBER 2021.
PRONOUNCED ON: 22ND NOVEMBER 2021.

P.C. :

1. This order disposes both Interim Applications. The lead arguments have been canvassed in the first Suit No.319 of 2020 (*First Suit*). Defendants 6 and 7 in the first suit are plaintiffs in Suit (Lodging) No.5374 of 2021 (*Second Suit*). The second suit raises identical issues as the first and the IA in the Second Suit seeks reliefs similar to IA/1370/2020 in the First Suit. By consent, both the IAs are taken up for final disposal. Since reliefs sought in the Second Suit are on the same grounds as those in the First Suit, the facts and array of parties referred to below pertain to the First Suit.

2. The plaintiff, along with defendants 3 to 8, have been at all material

times partners of defendant no.2. Defendant no.9 is also a partnership firm. Plaintiff, defendant nos.4, 6, 7 and one Mrs. Pawan Ramesh Shah, wife of defendant no.3, were at all material times partners of defendant no.9. Defendant nos.2 and 9 are engaged in the real estate business. Pawan Shah it is stated was not in-charge of the affairs of defendant no.9, which firm has been represented by defendant nos.3 and 4. Pawan Shah is not presently a party to the suit. Defendant no.10 is a former director of defendant no.8-company and is said to have executed certain documents on behalf of that company.

3. In the Suit, the plaintiff seeks declaration that Letters of Authority dated 22nd June 2016 and 29th September 2017; Loan Agreements dated 6th October 2016 and 6th December 2018; Mortgage Deeds dated 28th September 2016 and 5th December 2018; Supplemental Mortgage Deed dated 2nd November 2016 and other documents listed in Exhibit-LL to the plaint, are all void and of no legal effect and are liable to be cancelled. A decree is also sought to deliver up for cancellation, originals of these documents. Further declaration is sought that the plaintiff is not liable for credit facilities granted by defendant no.1 to defendant no.2. Permanent and temporary injunctions are being sought against defendant no.1 and indemnities from defendant nos.3 to 5. In the IA, the plaintiff also seeks disclosure on oath by defendant nos.1 and 3 to 5 in relation to the transactions between those defendants and the business of defendant nos.2, 8 and 9 and also to deposit original documents in court and to furnish true copies thereof.

4. The defendant no.1-bank has denied all allegations including that of forgery, collusion and fraud. The bank contends that the loans were taken, disbursed in the usual course of business on standard terms. The bank has also contended that the loans were advanced on the strength of the implied authority of defendant no.2's partners viz. defendants 3 and 4. Defendants 3 and 4 have denied wrong doing. According to defendants 3 and 4, the plaintiff and defendants 6 and 7 were at all times aware of the loans being availed of. The defendants 3 and 4 have denied allegations of collusion, forgery and fraud. They contend that the impugned documents were sent to the plaintiff and were received back duly signed, which were then handed over to the bank.

5. Mr. Tulzapurkar appearing on behalf of the plaintiff submitted that the defendant no.1-bank has advanced monies to defendant no.2 essentially for the benefit of defendant nos.3 to 5 and at their instance, but is seeking to misuse the structure of a partnership in order to make the plaintiff also liable. This is sought to be done fraudulently by relying upon the impugned letters of authority dated 22nd June 2016 and 29th September 2017 (**LOAs**), in which signature of the plaintiff is forged. Relying upon such forged LOAs, the defendant no.1-bank colluding with defendant nos.3 to 5, had lent and advanced monies to defendant no.2. It is submitted that the business of defendant no.2 was conducted by the three groups viz. (i) Ramesh Group comprising of defendants 3 to 5 and their family members; (ii) Loonkars comprising of defendants 6 and 7 and their family members and; (iii) Bharat

Group comprising of the plaintiff and his family members. Defendant no.2 is said to be engaged in a Slum Rehabilitation Project at Chandivali, Mumbai. It also owns lands at Worli and Windmills in Gujarat. The defendant no.2-firm was reconstituted from time to time. The wife and son of the plaintiff, who were partners of defendant no.2, retired in 2015.

6. It is contended that disputes arose amongst the groups, as a result of which the parties mutually agreed to divide the businesses between the three groups. There were issues pertaining to discharge of liabilities, properties and assets falling to each group's share. Ramesh Group was said to be entitled to majority of the assets. Some of the assets came to the share of the applicant and some to defendants 6 and 7. This division of assets and liabilities was recorded in a Memorandum of Understanding dated 25th September 2014 and a Supplemental Memorandum of Understanding dated 8th December 2015. Each group then stopped participating in day-to-day business and affairs of business which did not fall into their share. Accordingly, the plaintiff's group (Bharat Group) and that of defendants 6 and 7 (Loonkars) stopped participating in the businesses and affairs of defendants 2, 8 and 9. Ramesh Group reportedly was in full control of defendants 2, 8 and 9. Certain part payments are said to have been made by the Ramesh Group to the Bharat Group. Majority shareholding in one Sumer Builders Private Limited was transferred to the Bharat Group.

7. In accordance with this MOU and Supplemental MOU (*collectively*

“MOUs”), the Ramesh Group is said to have assumed full control over majority of the businesses of the firms, companies and the properties in question, but are yet to discharge their obligations towards the plaintiff and defendant nos.6 and 7 in terms of the MOUs. Part payments are said to have been made and the MOUs are partly performed. This is evident from the fact that some shares have already been transferred. Mr. Tulzapurkar submitted that the suit assails the actions of the defendant no.1-bank. The Ramesh Group represented by defendant nos.3 to 5 were bound to ensure that they would not create any liability or sell assets of defendants 2, 8 and 9 or other entities in Sumer Group without obtaining prior written consent and approvals of the other partners. The Bharat Group was not involved in the day-to-day functioning of these entities and according to the plaintiff, he has not been informed of the financial affairs on a regular basis. Except that, after the financial year ending, the defendants 3 to 5 would furnish copies of the capital account of the plaintiff in the books of defendants 2 and 9 to enable the plaintiff to file tax returns. For this and other statutory requirements, the plaintiff was required to sign certain documents. The plaint sets out the fact that the plaintiff had been informed of the loan to be taken by defendant no.8 in 2014.

8. According to the plaintiff, in middle of June, 2019, the plaintiff received a default notice from one Capital India Finance Limited (**CIFL**) informing him that defendant no.9 had been sanctioned a term loan of Rs.9 crores from CIFL and the defendant no.9 had committed defaults in

complying with the terms and conditions of the facility agreements This the plaintiff states was a surprise because the default notice mentioned certain properties of defendant no.9, were mortgaged to CIFL to secure the loan. The plaintiff has disclaimed any knowledge of the same. According to the plaintiff, consent of the plaintiff was not taken at the time the loan was availed from CIFL and there was no way that the plaintiff could have learnt of the same by exercising due diligence. When the plaintiff contacted defendants 3 and 4, they admitted that a loan had been taken and a mortgage created, but assured the plaintiff that no liability would pass to him. The plaintiff believed in this representation / assurance and did not precipitate matters. The plaintiff then received a notice under Section 138 of the Negotiable Instruments Act, 1881 from the 1st defendant-bank. The notice was also addressed to defendants 2 to 8, 10 and one Ruchita Agarwal informing them of dishonor of two cheques of Rs.1.70 crores each, which were issued towards repayment / servicing of facilities sanctioned to and accepted by defendants 3 and 4 on behalf of the 2nd defendant. The total amount claimed was Rs.210 crores approximately. Once again the plaintiff contacted defendants 3 and 4 seeking an explanation, but they only tried to pacify him and offered to explain developments. The plaintiff then sought legal advice and was told that he should immediately respond to the notice under Section 138 of the NI Act.

9. On 21st June 2019, the plaintiff responded to the defendant no.1-bank informing them that he had not availed of any loan. He was unaware of any facility granted to defendant no.2. The plaintiff had neither authorized

defendant no.2 to act for him nor consented to other partners' acting for him and taking a loan. He pointed out that the Partnership Deed, as modified, provided that each partner would be liable for their respective debts and that no partner could take any loan for defendant no.2 without consent of other partners. He also informed the bank that he had no knowledge of the cheque which he had not signed. He was not an active partner of the 2nd defendant and had been out of management for several years. He highlighted the fact that the bank itself had recorded in the notice that defendants 3 and 4 had accepted facilities sanctioned by defendant no.1 and thereafter, on the bank's own showing, the facility was granted for defendants 3 and 4. The plaintiff therefore denied liability.

10. The plaintiff thereafter received a recall notice dated 21st June 2019 and attached therewith three annexures viz. Annexure-IA, Annexure-IB and Annexure-II. That notice revealed that receivables from sale of Transfer of Development Right (*TDR*) of defendant no.2 and properties belonging to defendants 8 and 9 had been mortgaged. Apart from the mortgage, it was also realized that defendants 3 and 4 had issued personal guarantees. The other partners had not. Defendants 3 and 4 had pledged 30% of shareholding in defendant no.8. This apart, defendant no.1 claims to have sent repeated reminders to defendant no.2-firm, but the plaintiff, as a partner, had not received any such notice. Thus, the plaintiff realized that substantial assets of defendants 2, 8 and 9 had been encumbered by defendants 3 to 5 and one Pawan Ramesh Shah, wife of Ramesh Shah (defendant no.3), without

obtaining consent of the plaintiff or defendants 6 and 7. The plaintiff therefore once again approached defendants 3 and 4 protesting these acts, but they were evasive and did not respond. The defendants 6 and 7 (*Loonkars*) also pointed out that they have received a similar notice and had no knowledge of the alleged loan or mortgage. Thus, the plaintiff and the Loonkars addressed a joint letter protesting these acts.

11. According to Mr. Tulzapurkar, the language of the demand notice clearly indicates that the bank was aware of the MOUs and that no liability could have been foisted on defendant no.2 without consent of all partners. He submitted that the former chairman of defendant no.1 was a close friend of associate of defendants 3 and 4 and this was a private arrangement between the bank and defendants 3 and 4, which was not to the knowledge of any of the other partners of defendant no.2 and hence not binding upon them. The manner in which the bank has conducted itself made it clear that defendants 3 and 4 alone would benefit from this act and for this reason, the bank had obtained personal guarantees only from defendants 3 and 4, to the exclusion of the other partners. The plaintiff then called upon the bank to provide copies of all the documents, which demand the bank resisted.

12. Further correspondence ensued and in the course of these developments, the plaintiff received a letter from CIFL dated 5th July 2019 forwarding what it called an irrevocable consent and authority letter dated 5th March 2019, purportedly signed by the plaintiff and the Loonkars. This came

as a shock to the plaintiff, who found that his signature had been forged. The signature appearing on this LOA was obviously different from his genuine signature. He had not signed this LOA and upon contacting the Loonkars, they too confirmed that they have not signed any such LOA. The plaintiff then realized that the bank was hand-in-glove with defendants 3 and 4, who were called upon to explain their conduct. Defendants 3 and 4 continued to assure the plaintiff that they would obtain clarification from CIFL that plaintiff was not liable.

13. While the defendant nos.3 and 4 continued to assure the plaintiff that they would deal with the issues in relation to CIFL and that they were actively pursuing the matter with CIFL, defendant no.1 issued a notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Secured Interest Act (SARFAESI Act) demanding a sum of Rs.213.15 crores from the plaintiff and defendants 2 to 10 and the said Pawan Ramesh Shah. The plaintiff called for a meeting with defendants 3 and 4 and to seek an explanation. At the meeting, the defendants 3 and 4 informed the plaintiff that they had taken a loan from the 1st defendant and mortgaged properties of defendants 2, 8 and 9. When asked pointedly whether the plaintiff's signature has been forged while taking the loan, the said defendants avoided the question but requested the plaintiff not to precipitate matters on the basis that they would ensure that the plaintiff was suitably discharged from liability and that defendants 3 to 5 alone would be liable. Meanwhile, on enquiries made with one Uday Chowhan, Notary, as to

the signatures appearing in the notarial register, the Notary informed the plaintiff that the signatures in the notarial register do not bear the name of defendant no.9 or CIFL or the plaintiff against the document named Irrevocable Consent and Authority.

14. Since no response was forthcoming from defendants 3 and 4, on 16th August, 2019, the plaintiff filed a criminal complaint against defendants 3, 4, CIFL and the said Notary and an Advocate and other unknown persons complaining of forging signatures of the plaintiff on the Irrevocable Consent and Letter of Authority dated 5th March 2019. The plaintiff, on advice, also responded to the SARFAESI notice on 14th February 2019 narrating the factual developments. Although the defendant no.1 was called upon to provide documents relied upon by the bank and to cease and desist from adopting any action, the plaintiff received no reply. One more request was made for furnishing copies of documents on 30th September 2019, to which the bank responded vide letter of 9th October 2019 denying receipt of the letter dated 30th September 2019. According to the plaintiff, although inspection was offered, due to shortage of time, he could not attend the office of the bank and hence he requested for an alternate date and time. The plaintiff claims he was surprised by the fact that defendants 3 and 4 were already aware of the fact that the plaintiff had requested inspection of documents and suggested that inspection is not necessary since the matter was being resolved. Finally, on 25th October, 2019, plaintiff attended the bank and inspection of various documents was given in relation to the two terms loans. There were 14

documents in respect of each of the term loans and in both cases, there were LOAs. This reportedly came as a shock to the plaintiff since he had not signed these LOAs. During inspection, the plaintiff is said to have noticed that there is a special condition in the offer letter dated 22nd June, 2016 issued by the bank, which required an authority letter. The offer letter of 22nd June, 2016 recorded the fact that defendants 3 to 5 and/or defendant no.8 will owe 100% of interest in defendant no.2 within eight months of the first disbursement and thus it became obvious that the bank was also aware of the MOUs and that repayment of this loan to defendant no.2 was the responsibility of defendants 3 to 5. The offer letter is said to reveal the active collusion and connivance between the bank, its officers and defendants 3 to 5. In an effort to scrutinize these documents which contained certain amount of details, the plaintiff sought copies but the request was declined. The plaintiff therefore endorsed an acknowledgment on the letter recording inspection to the effect that both the Letters of Authority dated 22nd June, 2016 and 29th September 2017 were not signed by him.

15. In the meanwhile, on or about 1st November, 2017, the plaintiff received a letter from CIFL informing him that the loan taken by defendant no.9 had been fully repaid. This he believes was a result of the criminal complaint filed against defendants 3, 4 and the officials of CIFL. It seems that the Deed of Mortgage dated 28th September 2016, Supplemental Deed dated 2nd November 2016, the Deed of Mortgage dated 5th December 2018 and the Fax-cum-Indemnity dated 18th July 2016 were not available for inspection in

original and only photocopies were shown. Vide a letter of 7th November 2019, the plaintiff put on record the fact that the signatures on the two letters of authority were not his, were forged and the fact that signatures on both these letters differ from each other. In an attempt to secure copies, the plaintiff is said to have taken search of the website of the Ministry of Corporate Affairs so as to source the copy of the letter from the Deed of Mortgage but the Deed of Mortgage itself did not contain a copy of the letters of authority.

16. According to Mr. Tulzapurkar, around this time, the plaintiff came to learn that defendants 3 to 5 and Mrs. Pawan Ramesh Shah had obtained similar loans in various entities owned by the Sumer Group without the consent or knowledge of the plaintiff or the Loonkars. These includes loans from SREI Equipment Finance Ltd., Kolkata, Edelweiss Assets Reconstruction Company Ltd. While the dues of the SREI have since been settled, Edelweiss had issued a SARFAESI notice to defendants 2 to 4. The plaintiff sought details and documents in respect of the loans but Edelweiss is yet to reply or respond to this request. Acting in furtherance of the MOUs, the plaintiff and defendants 3 and 4 had discussions with the intervention of a common Advocate and as a result, defendants 3 and 4 and their family members have transferred the majority shareholding in Sumer Builders Private Limited in favour of the plaintiff and his family members. The transfer was in pursuance of the MOUs between the parties but the aspect of the loan taken from Yes Bank was still outstanding. In this respect, the defendants 3 and 4 assured the

plaintiff that they would get a letter of discharge of the plaintiff from the bank. The LOA bears a forged signature of the plaintiff. The letter it was submitted clearly provides for the signature of Pawan Ramesh Shah, but has not been signed by her. The aforesaid defendants being in default and despite the SARFAESI notice having been issued, the bank once again disbursed a loan of Rs.2.03 crores to defendant no.9 in or around July, 2019. The plaintiff has informed the defendants that he had not signed any such document nor had he authorized anyone to sign such document on his behalf. The plaintiff had also not consented to the other partners availing of such a loan. Written consent of neither plaintiff nor Loonkars was obtained before availing of the loan. The plaintiff is given to understand that the defendants 3 and 4 have taken a further loan from one Integrated Spaces Limited, whose Advocates have since issued a notice claiming repayment of Rs.7.87 crores. This loan was once again taken by defendants 2 to 4 without the knowledge or consent of the plaintiff. Cheques were issued in repayment of these loans without the plaintiff's knowledge and these cheques have since been dishonoured. The Loonkars have since filed a commercial arbitration petition under Section 9 after invoking the arbitration clause under the Deed of Partnership. A copy of this was provided to the plaintiff from which the plaintiff found that Loonkars have annexed two letters of authority both dated 29th September 2017, which are said to have been executed by the plaintiff as well. The plaintiff was unaware of this till receipt of a copy of the arbitration petitions being Petition Nos.40 of 2020 and 44 of 2020. In response to the arbitration petitions,

Defendants 3 and 4 have filed replies contending that the disputes and differences stood resolved by execution of the MOUs and thus the arbitration clause did not survive.

17. In this background, the plaintiff filed a criminal complaint against Defendants 3 and 4 and employees of defendant no.1 in relation to the forged letters of authority dated 22nd June 2016 and 29th September 2017. The bank has in the meanwhile issued a letter in January, 2020 calling upon the plaintiff to show cause why he and defendants 2 to 8 ought not to be declared willful defaulters. The plaintiff challenges the show cause notice as being baseless and malafide. On 7th February 2020, the plaintiff was served with a copy of Original Application (Lodging) No.1321 of 2019 and Miscellaneous Application No.127 of 2020 along with Interim Application No.128 of 2020 filed by the defendant no.1 against the plaintiff, defendants 2 to 9 and IDBI Trusteeship Services Ltd. before the Debt Recovery Tribunal seeking recovery of the amounts under the two term loans by enforcement of securities. It was the plaintiff's case that none of the exhibits to the original application were served upon him, leading the plaintiff to request for copies of the annexures. In response to the interim application in the present suit, the defendant no.1 filed an affidavit-in-reply dated 23rd March 2021 annexing thereto documents in relation to the term loan from which the plaintiff has now learnt of more the acts of fraud and forgery committed by defendants 1 and 3 to 5. The two letters of authority dated 29th September 2017 have been annexed at Exhibits U and W to the affidavit-in-reply but these are different

from the letters of authority annexed to the deeds of mortgage. Similarly, the letter of authority of 22nd June 2016 executed on behalf of defendant no.2 and annexed as Exhibit-R to the reply is different from the letter of authority forming part of registered deed of Supplemental Mortgage dated 22nd November 2016. The defendant no.1-bank had allegedly obstructed the plaintiff when inspection was not provided. Photocopies, including of the letters of authority, were annexed to the affidavit-in-reply at exhibits R, U and W and the plaintiff was required to obtain copies from the Loonkars. The reluctance on the part of the defendant-bank to part with copies makes it all the more evident that the bank is in cahoots with defendants 3 and 4 and are shielding defendants 3 and 4 and such other persons, who may be involved in the acts of forgery.

18. The Letter of Authority dated 22nd June 2016 is also stated to be backdated and fabricated since the registered office of the defendant no.9 on the letter-head is shown as 203, Peninsula Corporate Park, Tower-1, A Wing, Ganpatrao Kadam Marg, Lower Parel, Mumbai – 400 013, when, in fact, the registered office was changed only on 1st April 2017. As on 22nd June 2016, the registered office of defendant no.9 was at 201, Commerce House, 114, Nagindas Master Road, Mumbai – 400 001, which address is also reflected in the Supplemental Mortgage Deed dated 2nd November 2016.

19. Apropos the extract of the resolutions said to have been passed in board meetings on 22nd June, 2016 and 29th September 2017 viz. the dates on which

the letters of authority are said to have been executed, the plaintiff has contended that the bank has not produced the notice or agenda for the meetings. These were suspicious since the resolutions are said to have been passed on the same day as the date of the facility letter. The resolutions are thus assailed as got up, fabricated and illegal. The plaintiff has thus termed the documents as null and void and impugns the LOAs and other contemporaneous documents.

20. Mr. Tulzapurkar therefore submitted that the acts of the defendant no.1, along with defendants 3 to 5, being collusive with ulterior motives and fraudulent especially in the light of the fact that the defendant-bank had constructive notice of the fact that defendants 3 to 5 did not have the necessary authority to bind the plaintiff and / or seek or offer securities to secure the term loans. The loans appear to have been advanced with a full knowledge that the plaintiff was not bound by the documents and the liability of defendant no.2 to let defendant no.1 through defendants 3 to 5, was deliberately concealed from the plaintiff at the time of execution of the loan document. It is alleged that defendants 1 and 3 to 5 have acted in collusion to defeat the rights of the plaintiff and cause wrongful loss to him. Mr. Tulzapurkar submitted that under the Deed of Reconstitution of Partnership dated 27th March 2015, there is an express stipulation that no partner shall take any loan or incur debts for the firm without the written consent and approval of the other partners, except in the ordinary course of business. That seeking and obtaining loans of Rs.300 crores out of which Rs.210 crores had

been disbursed is not in the ordinary course of business. Moreover, the MOU and the Supplemental MOU of which the bank had knowledge contemplated that defendants 3 and 4 would take on the liability to the exclusion of others but by virtue of the letter of authority, liability was sought to be foisted on the plaintiff as well and the conduct of defendants 1, 3 and 4 is therefore obviously fraudulent and contrary to the terms of the Reconstituted Partnership.

21. It is further submitted that not having complied with clause 15 of the Reconstituted Partnership Deed, the loans obtained are personal obligations of defendants 3 and 4, as, in fact, contemplated by clause 13 of the deed which provides that partners shall be liable for their respective debts and liabilities and neither the partnership firm or other partners will be liable. Thus, it is contended that the loans obtained without authority of the plaintiff are the personal liability of defendant nos.3 and 4 and not that of the partnership firm. According to Mr. Tulzapurkar, the defendant nos.3 and 4 have taken advantage of the fact that the plaintiff had not been active and in control of defendant no.2. Defendants 8 and 9 had been entrusted to defendants 3 and 4 in accordance with the MOU and Supplemental MOU between the parties. Defendants 3 and 4 were not entitled to pay it any liabilities in respect of defendants 2, 8 and 9 without the express consent of the plaintiff but have acted in breach of trust and have forged the signatures from the Letters of Authority dated 22nd June 2016 and 29th September 2017 and misused the same with the knowledge that they were forged.

22. It is further contended that the 1st defendant bank's management and personnel were aware of the MOUs and were required to ensure that the plaintiff and the Loonkars inter alia were not liable under the credit facilities if any availed of after the execution of the MOUs. This is sought to be implied by the bank having obtained personal guarantees only from defendants 3 and 4 to the exclusion of others. But for such exclusion from liability, there was no occasion for the bank to advance monies without the consent of the plaintiff since the defendants 3 and 4 did not have the implied authority to obtain loans of this nature, which were not in the usual course of business. It is contended that neither the bank nor the defendants 3 and 4 have responded to the various letters that have been addressed, highlighting the fact that the plaintiff had not signed the letters of authority and not agreed to avail of the loan and was not liable thereunder. The property in which the plaintiff has an interest also could not have been mortgaged without the plaintiff's consent since the mortgages were sought to be created for loans taken without authority. Even after the bank was informed of the apparent forgery and despite issuance of a SARFAESI notice by the bank, it sanctioned and disbursed a further loan of Rs.2.03 crores to defendant no.9. Thus, the complicity of bank's officers and in particular the erstwhile chairman of the bank and his close relations with defendants 3 and 4 were probably responsible for the bank having advanced large sums of money and attempting to foist liability on the plaintiff and the Loonkars. The allegation is that the former chairman of the bank and the defendants 3 and 4 were extremely close, had personal

relations and defendant no.3 had even attended private functions held by the former chairman. It is contended that the defendants 3 and 4 have fraudulently and illegally mortgaged TDR and Receivables belonging to 2nd defendant-firm without the consent and knowledge of the Loonkars or the plaintiffs and as such, the loans so obtained are not the liability of the plaintiff. The fraudulent mortgage of Tower-3 known as Sumer Trinity Vertical Project belonging to defendant no.9 was also without the approval or knowledge or consent of the plaintiffs or the Loonkars. The mortgage created over the undivided share in the property at Wellington Catholic Colony, Bandra Village, which belongs to defendant no.8 is also alleged to be fraudulent and defendants 3 and 4 have not taken approval of the shareholders of defendant no.8.

23. It is the plaintiff's case that the term of the loan application and its sanction and operational parameters are all evidence of the bank acting with full knowledge of the MOUs, its operation, terms and the fact that the plaintiff and Loonkars are not to be made liable. In practice, however this has hardly been achieved. The facility letters and their conditions are remained unexplained and the bank has continued to rely upon forged and fraudulent documentation without disclosing the source and procedure followed and due diligence, if any, conducted, obtained by defendant no.2-Sumer Corporation. The documents were not available for inspection with the bank, nor with the Registrar of Firms. The plaintiff has reiterated that this court has jurisdiction to grant reliefs and mere filing of the Original Application will not deprive

this court of the jurisdiction. The suit is not barred by law of limitation either. It is contended that reference to the commercial arbitration petition and invocation of arbitration by defendant no.9-Sumer Builders is of no consequence. The reliance placed by the defendant-bank on the End Use Certificates has been criticized and being post-sanction, they did not explain the fraud committed. The bank and its officers are said to be involved in perpetration of the fraud and sanction of the loan. Those in the know of things have been kept available to suppress the true facts. While defendants 3 to 5 are admitting to settle disputes with the bank, the bank has sought withdrawal of the proceedings by the partners of defendant no.2-Sumer Corporation, who has not included the plaintiff or the Loonkars in such settlement talks. Thus, according to the deponent, the transaction is between the bank and defendants 3 to 5, who alone are liable to repay the loans.

24. It is contended that the Deed of Reconstitution of Partnership of defendant no.9 also contained restrictive clauses identical to the Deed of Reconstitution of Partnership dated 27th March 2015 of defendant no.2 to the extent it related to creation of security and thus the loans could not have been taken except with the express approval of the partners. Although the plaintiff's signature on letter of authority dated 29th September 2017 has been forged, it does not evidently contain the signature of Pawan Ramesh Shah although a provision was made for obtaining her signature.

25. Mr. Tulzapurkar has taken me through the disputed documents and

compared the signatures on the letters of authority and the admitted signatures of the plaintiff in his attempt to demonstrate that this is a clear case of forgery and therefore actionable. He submits that notwithstanding the jurisdiction vested in the Debt Recovery Tribunals, the jurisdiction of the Civil Court is not ousted. According to him, the plaintiff has pleaded and produced documents to substantiate a clear case of fraud which would render the documents void ab initio and would entitle the plaintiff to the declaratory reliefs and the consequent cancellation of the documents and in the meantime, the injunction that is sought for. In other words, Mr. Tulzapurkar has disputed the character of the plaintiff as a debtor of defendant no.1-bank in relation to the two term loans that we are now concerned with. He submitted that the defendant no.1-bank has at best filed an evasive denial and that should be construed as an admission. Inviting my attention to the affidavit dated 23rd March 2021 filed by one Hitesh Darji, he points out that the affidavit was filed about a year after the bank was served. That the deponent has no personal knowledge whatsoever and has clearly stated that the deposition is on the basis of information and records and legal advice. He submits that the facility letters were issued by persons in senior management. None of these persons have filed affidavits especially considering that there is a serious charge of collusion between the bank officials and defendant nos.3 and 4.

26. Fraud and forgery having been pleaded, the bank was bound to meet these charges, but had failed to do so. The affidavits do not disclose that the

defendant had made any investigation into the allegations levelled against them, especially after notices were issued and show cause notices were issued by the bank invoking the SARFAESI Act. In fact, there is no denial that forgery has been committed. Alluding to the plaintiff's contention that the defendants 3 to 5 had good relations with the former chairman, it was pointed out that this statement has not been denied. Furthermore, with specific reference to the MOUs, there is only a blanket denial but the fact remains that the facility letters issued in relation to Term Loan I and II are contrary to the MOUs.

27. Mr. Tulzapurkar has invited my attention to the documents annexed to the affidavit-in-rejoinder, in particular Exhibits A to F, in an attempt to demonstrate how the signature of the plaintiff has been forged and how these letters of authority are got-up documents and not reliable and therefore cannot be the basis to foist liability on the plaintiff. Reliance is placed on a copy of the letter dated 21st September 2020 issued by defendant no.2-Sumer Corporation to the bank informing them of family arrangement and settlement in the Sumer group and impending change of partnership structure whereby defendant no.8-Sumer Buildcorp Pvt. Ltd., Mr. Ramesh Shah, Mr. Rahuul Shah and Mr. Deepak Shah shall own 100% in defendant no.2-Sumer Corporation.

28. Ramesh Group has also not deposed to the validity of the board resolution. The letter dated 22nd June, 2016 annexed as Exhibit-T to the reply of the bank contains an address, which was not valid as on date of the letter.

Ramesh Group has not dealt with this aspect in the additional reply. It is further contended that the bank has not vouched for the validity of the resolution. The plaintiff has reiterated that there is forgery as between defendants 3 to 5–Ramesh Group in collusion with defendant no.1–bank. The bank has also chosen not to invoke the cross default provision and has disbursed a further sum to defendant no.9–Sumer Builders. This conduct is violative of RBI Guidelines. Even the Mortgage Deed dated 5th December 2018 is incomplete. Part of the document was disclosed initially in order to suppress the authority letter annexed to the mortgage deed, which is different from the one annexed to the reply. These are all aspects which Mr. Tulzapurkar pressed into service to seek relief in the IA.

29. Defendant no.1–bank has filed two affidavits–in–reply; the first being a limited affidavit–in–reply dated 23rd March 2021 and the second dated 28th July 2021. Both these affidavits have filed by one Hitesh Darji, authorized signatory of defendant no.1. In the reply, the defendant no.1 has relied upon the Deed of Reconstitution of Partnership dated 27th March 2015. It is the case of the deponent that the 2nd defendant, through its partners (unnamed) approached the bank to avail of a loan of Rs.150 crores for construction and development of an SRA project at Chandivali. This included refinancing of unsecured loans deployed in the project and the 2nd defendant is believed to have obtained this loan in the ordinary course of business. A second loan of Rs.150 crores was also availed of for the very same project which included reimbursement of unsecured loans and mobilization advances. Once again

the bank claims it was given to understand that the loan was being taken in the ordinary course of business.

30. Thus, two loans of Rs.150 crores were sanctioned under Facility Letter No.I and Facility Letter No.II. Under the Facility Letter No.I, the defendant no.8, defendants 3, 4 and 5 were obliged to hold 51% of share capital of defendant no.2. No change in management was permissible without approval of the bank. Material change of ownership structure would be an event of default. Facility Letter No.I provided that defendants 8, 3, 4 and 5 were to own 100% of the partnership and the beneficial interest in defendant no.2 within eight months of the first disbursement and any subsequent change will be only after the prior approval of the bank. As part of the conditions precedent, the bank has contended that it required defendant no.2-firm to submit true copies of organizational documents, certified true copies of letter of authority of defendant no.2 accepting the loan and authorizing particular persons of defendant no.2 to deal with the bank as also execute necessary documents. The documents to be provided included the Deed of Reconstitution of Partnership. It is contended that the MOUs were never provided to the bank, which remained unaware of the existence of the MOUs. Facility Letter No.II also provided that there will be no change in management as required under Facility Letter No.I. Term Loan II also required as a condition precedent a letter of authority from the partners of defendant no.2 authorizing particular persons to deal the bank in connection with the loan facility.

31. Mr. Mody on behalf of the Loonkars, namely, defendants 6 and 7, has supported the plaintiff. He has adopted all the submissions of Mr. Tulzapurkar on behalf of the plaintiff and refutes the defence. He has reiterated his case in the plaint filed in Commercial Suit (Lodging) No.5374 of 2021. There being no material difference in the facts as compared to the First Suit, he submitted to orders of the court. Mr. Mody therefore sought relief in terms of Interim Application (Lodging) No.5376 of 2021.

THE DEFENCE :

32. In the additional affidavit of Mr. Hitesh Darji, filed on behalf of defendant no.1-bank, the deponent, while stating that he is the officer handling recovery of loans, deals with the amended plaint, disputes, all that is to the contrary to what he has deposed to, all of which prima facie appears to be without personal knowledge of the facts of the present case. In paragraph 6, he states as follows :-

“6. I verily believe that defendant no.1 has followed the systems and process, as set out in paragraph 5 above, while granting and disbursing Term Loan I and II to defendant no.2.”

33. The deponent denied involvement of the bank in any forgery or fabrication. He denied any involvement of the bank in the alleged forgery of the letters of authority, denied knowledge or having taken part in any back-dating of documents or fabrication of minutes of board meetings. He has denied that the bank granted further loan of Rs.2.03 crores to defendant no.9-

Sumer Builders despite defaults committed by the 2nd defendant and explains it by contending that defendants 2 and 9 are separate entities executing different projects. The default under one of the agreements would not cancel the term loan granted to the other entity. Cancellation of a term loan on account of cross-default provision is said to be the prerogative of the bank and the bank is not bound to exercise its cross-default rights. The bank in its commercial wisdom need not jeopardize projects unaffected by the defaults. Thus, the amended plaint does not demonstrate any fraud on the part of defendant no.1-bank, nor does it reveal any negligence or violation of banking norms. Controversies relating to inspection of documents have also been commented upon since the plaintiff has alleged that inspection has been refused and the bank has contended otherwise.

34. Certain documents are annexed to the additional affidavit-in-reply of defendant no.1-bank and these include copies of ;

<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Document</i>	<i>Annexed to the Affidavit in-reply of Defendant No. 1</i>
1	The account opening form of defendant no.2-Sumer Corporation, which is undated, appears to be received by the bank on 3 rd September 2010 at its Worli Branch.	Undated Bears Bank's rubber-stamp dated 3/9/2010	Exhibit-B
2	Partnership Declaration issued by Sumer Corporation.	18 th August 2010	Exhibit-C
3	Letter of Authority in respect of TL-II, said to be signed by the partners of Sumer Corporation	29 th September 2017	Exhibit-D

4	Second version of Letter of Authority in respect of TL-II, said to be signed by the partners of Sumer Corporation.	29 th September 2017	Exhibit-E
5	Letter of Authority in respect of TL-I, said to be signed by the partners of defendant no.2-Sumer Corporation.	22 nd June 2016	Exhibit-F
6	Certified true copy of the Resolution of Sumer Buildcorp Pvt. Ltd.-defendant no.8.	22 nd June 2016	Exhibit-G

35. On behalf of the 1st defendant-bank, Mr. Andhyarujina has taken me through the relevant dates and events. He points out that the plaintiff is a partner of defendants 2 and 9 Sumer Corporation and Sumer Builders and shareholders of defendant no.8-Sumer Buildcorp Pvt. Ltd. and the bank had issued facility letters dated 22nd June 2016, read with an Addendum dated 16th October 2017, in favour of Sumer Corporation and also a facility letter dated 29th September 2017. Undoubtedly, plaintiff and defendants 3 to 8 were partners of defendant no.2. Defendant no.3 was the signatory of defendant no.8 pursuant to resolutions of the board of directors; defendant no.4 was a director of defendant no.8 as well; the Loonkars were also partners of defendants 2 and 9 and shareholders of defendant no.8. Defendant no.8 had two directors, namely, defendants 3 and 4; whereas defendant no.9 has the directors viz. the plaintiff, defendants 4, 6, 7 and one Pawan Ramesh Shah, wife of Ramesh Shah as its partners. Pertinently, defendant no.3 is not a partner of Sumer Builders, but was representing his wife Pawan R. Shah. Defendant no.10 was an authorized signatory of defendant no.8-company. It is submitted that TL-I was for a sum of Rs.150 crores. It was granted against

security provided vide Mortgage Deed dated 28th September 2016 and Supplemental Mortgage Deed dated 2nd November 2016 (*collectively “Mortgage-I”*). The mortgage included the charge over certain share in the development rights held by defendant no.8, defendant no.2 in respect of a project at Chandivali as also project owned by defendant no.9. The TL-II for identical amount of Rs.150 crores was also granted vide facility letter dated 29th September 2017 in respect of two projects, which were already part of security offered under Mortgage-I. This TL-II was secured, as aforesaid, by a Mortgage Deed dated 5th December 2018 (*hereinafter described as “Mortgage-II”*). Defendant no.2-Sumer Corporation having defaulted in repayment of term loans, the bank took action initially by issuing a notice under Section 138 of the Negotiable Instruments Act, 1881 upon dishonour of two cheques of Rs.1.7 crores each and by subsequently issuing recall notice dated 21st June 2019, followed by a notice under Section 13(2) of the SARFAESI Act on 18th July 2019. In all, recalling a sum of Rs.213,15,68,587/- from the plaintiff and defendants 2 to 10 as also the aforesaid Pawan Ramesh Shah.

36. Incidentally, Pawan Ramesh Shah is not a party in the present suit. The bank proposed to declare the said plaintiff and defendants as willful defaulters and to declare them as non-cooperative borrowers. A separate notice dated 7th January 2020 has been issued to the plaintiff, defendants 2 to 8, 10 and one Ruchita Agarwal to show cause against being declared as non-cooperative borrowers. Mr. Andhyarujina has relied upon the relevant clauses

of the Partnership Deed dated 27th March 2015 and in particular clause 3, which describes the businesses of the firm including the power to borrow and accept loans. Clause 15 contemplates availing of loans in the ordinary course of the business and clause 17 provides for arbitration in the event of disputes between the partners. He submits that any partner could have incurred a debt on behalf of the firm in the ordinary course of the business and nothing prevents any partner from doing so especially in view of the provisions of Clause 15. He submits that no consent is required from other partners. The term loans were granted, which is a fact that cannot be denied.

37. LOAs, according to Mr. Andhyarujina, were called for and were received. He has denied the allegations of forgery or fabrication. He submits that the bank has not forged the signature of the plaintiff or that of the Loonkars. The LOAs were issued as a part of conditions for availing of the term loans, but the plaintiff's case that LOAs are false and fabricated has no merit since the LOAs and the Board Resolutions of defendant no.8-Sumer Buildcorp Pvt. Ltd. and Facility Letter No.1 are consistent. The documents were executed on the same day and the allegations of forgery are baseless. Likewise, in the case of TL-II also, the LOAs were executed, as required by the bank; resolutions have also been passed by defendant no.8 and he submits that the allegations of forgery, fraud and fabrication against the bank have not been established. Counsel relied upon the fact that the defendant no.2-Sumer Corporation has executed several of these documents, to which I have made reference and denied allegations that inspection of the documents has not

given or that defendant no.1-bank was non-cooperative. Mr. Andhyarujina has submitted that the bank had received certain part payments and refuted allegations of complicity of the bank's management or employees in any fraud, fabrication or forgery. It is contended that merely because a fresh loan was granted in July, 2019 to defendant no.9-Sumer Builders, after issuance of a SARFAESI notice by defendant no.1 on 18th July 2019, the bank cannot be faulted since defendant no.9 was a different entity. He submitted that the defendants 6 and 7-Loonkars had also filed a suit, in which similar contentions were taken, and in the arbitration proceedings, defendants 3, 4, 6 and 7 had arrived at consent terms referring the disputes to arbitration, while agreeing that the present suit and Commercial Suit (Lodging) No.5374 of 2021 would proceed on their own merits. As on date, it is submitted that copies of all the documents have been provided, inspection has been given and there is no grievance that survives on this count. During the hearing, Mr. Andhyarujina assured the court that all original documents are available for the court's perusal.

38. There is some amount of correspondence between the parties and the Advocates in this behalf, which indicates the fact that the bank was not entirely forthcoming in its offer of inspection. The bank had at one point denied that the plaintiff was entitled to inspection. The reason for this approach is unexplained. However, at the time of hearing the matter, inspection had been given and all documents were said to have been kept ready in court.

39. Mr. Andhyarujina has also relied upon a compilation of documents submitted for KYC compliance, which includes the Partnership Declaration of 18th August 2010 signed inter alia by the plaintiff, copies of the plaintiff's PAN Card and Passport, copy of the account opening form of defendant no.2, which is also signed by the plaintiff in August, 2010. According to Mr. Andhyarujina, on comparison of the signatures appearing on the account opening form and KYC documents with the documents impugned in the present suit, there is no difference. He is however unable to explain the discrepancies in the bank's documentation, more particularly different versions of the LOAs, to which I have made detailed reference above. Except to state that the bank has not forged signatures, there is no explanation forthcoming. The bank will, no doubt, have to explain all of this, however the question is whether that should await decision of the trial of the suit or whether this is an aspect for the DRT to consider in the pending proceedings. Mr. Andhyarujina therefore submitted that no case is made out against the bank.

40. On behalf of defendant nos.3 and 4, a limited affidavit-in-reply dated 25th June 2021 has been filed by defendant no.4, in which he seeks to set out the operational groups being Bharat Group, the Loonkars and defendants 2, 3, 8, 9 and 10 are described as Ramesh Group. The plaintiff and defendants 3, 4, 6 and 7 belong to the Sumer family and the suit is the result of disputes inter se within the Sumer family. References are made to the Loonkars' arbitration

petition and an interim application and the orders passed and consent terms made therein, which had been signed by the plaintiff as well. All disputes have been referred to the arbitration and hence the suit should not proceed. According to the deponent, the Bharat Group and the Loonkars were all along aware of the loans availed of by defendants 2 and 9 and proper procedures had been followed while availing of the loans. The loan taken from Capital India Finance Ltd. had already been repaid and defendants 3 and 4 had not forged or fabricated signatures of plaintiff or the Loonkars. The Bharat Group had filed criminal complaints against Ramesh Group and arbitration proceedings are also pending and hence they do not wish to precipitate matters by filing further detailed affidavits. The deponent has contended that Ramesh Group does not have in its possession original documents executed with the defendant no.1-bank, which are available with the defendant no.1-bank. Therefore, no relief can be granted in the present suit.

41. In a further additional affidavit-in-reply filed by Mr. Rahuul Shah-defendant no.4, the deponent has dealt with changed circumstances between 25th June 2021 and 27th July 2021. According to him, the plaint contains vague and unsubstantiated allegations of forgery and fabrication. He has opposed the application on the basis that the statements in the plaint are denied unless specifically admitted and that all loans have been availed of by the defendant no.2-firm with the knowledge of the plaintiff. All documentation has been signed by the plaintiff. The history of the Sumer Group has been set out as to how differences of opinion arose between the

three groups and it was to divide the assets and properties, for which the MOU dated 25th September 2014 was executed. The MOUs are said to record a complete settlement between the family members and the Deed of Partnership cannot be read de hors the family settlement or MOUs. The MOUs altered the family businesses. After the execution of the MOUs, the relations between three groups were cordial and then certain steps were taken by the parties, as set out in paragraph 16 of the additional affidavit-in-reply of defendant no.4.

42. Mr. Kadam highlighted the fact that these were all business transactions keeping in mind the obligations of the parties under the MOUs. The groups' offices were initially at Commerce House and later the Ramesh Group shifted to the Peninsula Corporate Park and the Loonkars have occupied one office at Commerce House. The plaintiff occupied office no.205 at Commerce House. The loan documents were required to be executed by the Loonkars and the plaintiff and therefore the loan documents were sent to their offices for signature and were received back duly signed. I may observe here that no particulars given as to who signed, who received and who has brought it back.

43. According to the deponent, the plaintiff has not alleged that defendants 3 and 4 in particular had signed or forged the signature of the plaintiff. It is not his case that the Ramesh Group approached the plaintiff for signing the documents and he refused, which resulted in the signature having been

forged. The Family Settlement still holds and there were break-down in the family members' relations and hence the settlement is still not fully fructified. According to the deponent, there was no reason to forge the signatures of the plaintiff and he denies the allegations of forgery, which he submits is an afterthought, after having taken advantages arising out of the loans. The relationships between the parties are always said to be amicable and the plaintiff is well aware of the nature of the real estate business and the need for the borrowings. The deponent states that he had requested the plaintiff to sign the loan documents as required by the banks, which the plaintiff did. The deponent has contended that the plaintiff was assisting the Ramesh Group by signing statutory and another documents and it is the qualification of the obligations/assistance by the plaintiff. The contention of the plaintiff that he was signing the documents only for the sake of compliances and that such signatures were restricted to the documents required for compliances is an afterthought. The loans were raised by the Ramesh Group in the name of the two firms viz. defendants 2 and 9 with the knowledge and consent of the plaintiff and this explains why the plaintiff derived benefits from the firms and was also given copies of his Capital Accounts in defendants 2 and 9. Plaintiff was also provided with copies of the ledgers and all financial statements. The plaintiff allegedly had full access to all financial statements and accounts and accounting system of the two firms. The share of profit of the plaintiff in defendants 2 and 9 was arrived at after taking into consideration the interest charged by the banks on the loans availed. The

plaintiff's own income tax returns reflect the figures of profits earned by him. All documents have been provided to the plaintiff from time to time and had also been annexed by the Loonkars. All documents provided to the Loonkars were also provided to the Bharat Group.

44. The documentation executed post MOUs is retained in escrow. Meanwhile, arbitration proceedings have also been commenced and the Ramesh Group and the Loonkars have almost arrived at mutual settlement of their disputes inter se. Talks of settlement between Ramesh Group and the plaintiff have been discontinued on account of the suit and the interim application. Arbitration is now proceeding and pleadings are expected to be completed. In the meantime, the allegations in the plaint have been denied.

45. Mr. Kadam has sought to impress upon the court the steps taken by the parties in the course of taking over / transfer of their assets, as provided in the Family Settlement / MOUs. The Bharat Group has raised objections in connection to certain properties in Mazgaon. These letters resulted in allegations of forgery and fabrication. Complaints having filed in Dadar Police Station, the allegations of forgery and fabrication also in relation to the loan transactions between Capital India Finance Pvt. Ltd. and defendant no.9. As a result of all these disputes, the Bharat Group and the Loonkars had stopped participating in day-to-day business affairs of the firms and companies, which were allocated to the Ramesh Group.

46. It is denied that the Ramesh Group had taken full control of majority of

the firms. The deponent has denied being evasive in his responses or having avoided meeting the plaintiff. All allegations and insinuations have been denied and the loans taken by the group concerned have all been taken by consent and knowledge of the plaintiff. Thus, the affidavit goes on to deny all allegations made by the plaintiff and reiterates that all loans have been taken with the consent and knowledge of the plaintiff. A case in the earlier affidavit is thus reiterated.

47. Counsel relied upon financial statements of Sumer Corporation-defendant no.2 for the period 2016-17 to 2019-20. He has taken me through the schedules and the notes on financial statements, which indicates that the share of each partner, including that of the plaintiff, amongst others has been specifically shown. The share in profit has been shown separately for each of the financial years. Copies of these financial statements, Mr. Kadam has contended, have already been furnished to the plaintiff from time to time and the plaintiff is fully aware of the finances of the firms and the businesses of the firms. Quite apart from the fact that the Family Settlement / MOUs contemplates bifurcation and division of assets and the fact that the plaintiff is not supposed to be liable for any of the obligations of the firms post separation, the plaintiff continues to be a partner and that is a fact that cannot be overlooked and in his capacity as such, along with the other members of the Loonkars and the Ramesh Group, the rights and liabilities of the partners apply equally to the plaintiff and therefore the plaintiff is deemed to be aware of the activities of the firms.

48. The additional affidavit-in-reply of defendant no.4 encloses therewith a copy of the MOU dated 25th September 2014 and seeks to rely upon the contents thereof. In the meantime, it is pointed out that Term Loan Facility No.II had been fully repaid and reliance is placed on the letter dated 17th July 2015 issued by the Yes Bank. The loans taken by Sumer Builders Pvt. Ltd. from Indiabulls Housing Finance Ltd. have also been repaid, so also the loans taken from IndoStar Capital Finance Ltd. have been repaid. Reliance is placed on the Income Tax Returns for the Assessment Years 2015-16, 2016-17, 2017-18 and 2018-19 filed by the plaintiff demonstrate that he had knowledge of the earnings from the very firms that are subject matter of the present dispute. In this manner, the additional affidavit seeks to support the defence and seeks to demonstrate the improbability of the plaintiff's case. Reliance is also placed on a communication from the Advocate for the contesting defendants addressed to the plaintiff's Advocate informing them that without prejudice talks cannot proceed further. Thus, the affidavit makes it evident that the Ramesh Group is taking steps to settle some loans without participation of the plaintiff / Loonkars.

49. Relying upon a judgment of the Division Bench of this court in *State Bank of India Vs. Jigishaben B. Sanghavi and Ors.*¹, Mr. Kadam submitted that this court has no jurisdiction to entertain and try the present suit and no injunction as sought should be granted especially since the bank has now

1 2011(2) Mh.L.J. 342

taken action under SARFAESI Act and the bar under Section 34 of the SARFAESI Act will clearly be attracted, as clearly laid down in the said judgment. The only exception is the one carved out in *Mardia Chemicals Ltd. and Ors. Vs. Union of India and Ors.*², along with connected matters, in which the Supreme Court has held that the civil suit is maintainable in cases involving fraud or where the claim is so absurd or untenable that it did not require any probe. Further, this court also observed that mere use of the word “systematic fraud” would not be sufficient to bring the case within the scope of the exception in *Mardia Chemicals* since the plaint must be read as a whole. The SARFAESI Act provides for a remedy for actions under that Act.

50. Mr. Kadam also invited my attention to paragraph 20 of the judgment in *Jigishaben Sanghavi (supra)*, in which the contention of the third-party applicant was that there was no mortgage. The mortgage, if any, was illegal and these were all matters that DRT was empowered to determine and hence jurisdiction of the civil court is barred. Mr. Kadam also sought to support this argument by relying upon a decision of Queen’s Bench Division of the England and Wales High Court in *Toner Vs. Telford Homes Ltd. and Ors.*³, in which proof of fraud has been adverted to and the fact that cogent evidence is required to justify a finding of fraud or other discreditable conduct. The more serious the allegation, the more cogent the evidence required. In this judgment, the court also referred to an observation in the case of *Jafari-Fini*

2 (2004) 4 SCC 311

3 [2021] EWHC 516 (QB)

*Vs. Skillglass Ltd.*⁴, in paragraph 73, in which Lord Justice Carnwath had observed that unless the court was dealing with known fraudsters, “the court should start from a strong presumption that the innocent explanation is more likely to be correct”.

51. In the present case, Mr. Kadam urged the court to accept the rather straightforward explanation that the plaintiff being partner was also liable to the extent of his interest in the firm. However, he submitted that there is no intention to deny the existence of the MOUs or the effects thereof, but that is a matter that is now engaging the attention of the arbitral tribunal constituted pursuant to invocation of arbitration under the MOUs. My attention is also invited to Commercial Arbitration Petition No.40 of 2020 filed by the Loonkars consisting of two partners – defendants 6 and 7 herein and submitted that the Loonkars had also sought relief of appointment of Court Receiver of certain projects of the firms pending arbitration. This group had also taken up contention qua the documentation relied upon by the bank. Mr. Kadam therefore refuted the allegations in the plaint and submitted that no case is made out on the basis of the averments of fraud by the defendants 3 and 4. He submitted that defendants 3 and 4 were not involved in any fraud or fabrication of documents and that no reliance can be placed on these aspects urged by the plaintiff.

4 [2007] EWCA Civ 261

CONCLUSIONS :

52. It is in this background that I am required to consider (i) the jurisdiction of this court to grant relief given the statutory provisions and the general bar that operates against the civil court entertaining claims pertaining to subject matters, which are expressly provided for under two Statutes, namely, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*RDDBI Act*) and Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*SARFAESI Act*), and this I propose to do after considering the law on the subject; firstly, on the aspect of “jurisdiction”, then on the aspect of “fraud” and “implied authority of partners”.

53. The plaintiff’s case in the present suit is two fold; first, that by virtue of the family settlement / MOUs, the defendants forming part of the Ramesh Group, which includes Sumer Corporation and Sumer Buildcorp, were not entitled to borrow funds from the bank without the express consent of the plaintiff. The Loonkars’ case is similar. By virtue of the proposed division of assets and businesses, it is contended that the plaintiff would be relieved of all liabilities in relation to the businesses falling part of the Ramesh Group and hence no liability can be foisted upon the plaintiff, as now proposed by the bank by filing the Original Application and by invoking provisions of the SARFAESI Act. The second line of opposition to the bank’s efforts to make the plaintiff and/or his interest in the businesses liable is sought to be resisted by contending that his consent has not been obtained for seeking TL-I or TL-II.

This attempt he supports by urging that the letters of authority form the basis of the plaintiff being impleaded in the DRT proceedings and the notice being issued under the SARFAESI Act. An attempt is thus made to establish the weaknesses of the bank's case and that of the contesting defendants by demonstrating that the signatures of the plaintiff have been forged on these LOAs. These LOAs form the backbone of the bank's case against the plaintiff and the Loonkars. Quite apart from the fact that the plaintiff continues to be a partner in the firms in question, specific knowledge of the borrowings under TL-I and TL-II are sought to be attributed to the plaintiff by virtue of his having executed the LOAs. It is the plaintiff's case that these LOAs were never signed by him. His signatures have been forged, that the LOAs are fabricated and therefore a fraud has been perpetrated by such forgery. According to the plaintiff, this is not a contractual fraud. The fraud is in the forgery. The plaintiff does not venture to allege that any one person has forged his signature. The attempt is to show that the plaintiff has not signed these LOAs and he is unaware of who has purportedly signed in his name. He has denied his signatures on the LOAs and has sought to demonstrate that he has been consistently opposing reliance upon these LOAs.

54. My attention has been invited to the provisions of the MOU dated 25th September 2014 and the Supplemental MOU dated 8th December 2015. The first MOU is between the Loonkars as parties of the first part, the Ramesh Group as parties of the second part and the Bharat Group consisting of the plaintiff and his son as parties of the third part. The effect of the MOU is to

relieve the plaintiff's group of liability of the partnership firm and to obtain a clean discharge from liability to creditors in terms of the settlement. It also provides for execution of retirement deeds in respect of Sumer Builders and for retention of the retirement deed and other documents in escrow. The contesting defendants are meanwhile permitted to raise finances to the extent of about hundred crores on the understanding that neither the Loonkars or the Bharat Group shall be personally liable for the loans raised by the firm Sumer Builders. The firm is thus allowed to borrow to that extent. The settlement also contemplates that the contesting defendants shall not avail of any other secured / unsecured loans beyond the aforesaid sum of one hundred crores. It is this aspect that is said to have been breached by the contesting defendants by availing of TL-I and TL-II.

55. Having executed the MOUs, it is contended that the contesting defendants were duty bound to ensure that these terms are observed and it is in this behalf that the arbitration proceedings have been commenced by the plaintiff before a Sole Arbitrator in terms of the MOUs. In view of the covenants on behalf of the contesting defendants not to raise any further secured or unsecured loans, the plaintiff have alleged breach of the obligation to perform the terms of the MOU and as a result of which breach the bank has now initiated proceedings including against the plaintiff. The plaintiff is therefore prima facie justifiably aggrieved at the conduct of the contesting defendants. All counsel before me have cited law primarily on the aspect of jurisdiction and to some extent on the liability of the plaintiff as a partner of

the firm. I shall shortly deal with those aspects and as applicable to the facts of the present case prior to coming to a decision on relief if any that is required to be granted. Presently it is appropriate that one considers the factual aspects.

56. The plaintiff has relied upon a compilation of documents dated 8th September 2021 which is said to contain forged LOAs. These are divided into two sections; one in relation to TL-I and the second in relation to TL-II. As can be seen from the compilation, there is a LOA dated 22nd June, 2016 in relation to Sumer Corporation. There is also a similar LOA of the same date in relation to Sumer Builders. According to the plaintiff, the version of the LOA dated 22nd June 2016 in relation to Sumer Corporation appearing at Exhibit-F to the additional affidavit-in-reply dated 28th July 2021 of the bank is a different / cured version of the earlier document of the same date. A comparison of these two LOAs reveals that it is in respect of a term loan of Rs.150 crores sanctioned by the bank under facility letter bearing no.YBL/MUM/FL/0243/2016-2017. This reference number is common in both letters of authority. Thus it is clear that this LOA pertains to TL-I under facility letter bearing distinctive no.0243. Prima facie, the two LOAs appear to be identical, but there are differences. For one, while the contents appear the same, the “cured” version of the LOA contains a rubber-stamp of Sumer Buildcorp Pvt. Ltd. against the signature of one “Kunal”. Thus, doubts are sought to be cast on the reason why there are two different versions and this alludes to fabrication of the letter. Quite apart from the fact that the plaintiff’s case is that he has not signed the LOAs, both versions of LOAs are denied by

him in terms of content and in terms of his signature appearing thereon. My attention is also invited to a different LOA of the same date, which is said to be annexed to the Supplemental Deed of Mortgage dated 2nd November 2016. This version of the LOA bears the same date but it is handwritten and on top of the page. The signatories to this LOA are Ramesh Shah, Manakchand Loonkar, Rahuul Shah, all for Sumer Corporation. Ramesh Shah is seen to have executed this LOA on behalf of Sumer Buildcorp Pvt. Ltd. as authorized signatory; whereas the plaintiff and Mahendra Loonkar and Deepak Shah have executed it individually. First two versions of the LOA authorized Ramesh Shah and Rahuul Shah to execute agreements, deeds, securities and indentures “singly”. This third version forming part of the Deed of Mortgage authorizes Ramesh Shah and Rahuul Shah to execute these documents “severally”. Thus, not only is the letter different in terms of content and the order of signatories, there is a blank against the date which has entered in hand in the earlier versions of this LOA.

57. In relation to TL-I, there is also a LOA dated 22nd June 2016 on behalf of Sumer Builders–defendant no.9 and there are two versions of this LOA. The first version while making reference to the same facility letter authorizes the signatory to execute various documents “severally”. The signatory is only one. Thus there is no question of authorizing two or more persons severally. This LOA is signed for Sumer Builders by five persons; by Ramesh Shah, Manakchand Loonkar, Pawan Ramesh Shah, Mahendra Loonkar and

purportedly by the plaintiff himself. While the place of execution is mentioned as Mumbai, the date is blank.

58. I will now deal with TL-II. My attention has been drawn to three versions of this LOA dated 29th September 2017 pertaining to TL-II. The first of these is Exhibit-W at page 204 of the plaint. The second at Exhibit-D to an affidavit-in-rejoinder dated 26th April 2021 on behalf of the plaintiff and the third as Exhibit II-2 at page 291 of the plaint and as annexed to the Deed of Mortgage dated 5th December 2018. The number of the facility letter in this LOA is seen to be YBL/MUM/CF/FL/0224/2017-18 and it also refers to *“all addendums thereto”*. Thus, in the second version, apart from the rubber-stamp, the letters are identical. The third version of the LOA purportedly dated 29th September 2017 is part of the Original Application filed in the DRT. It is said to be Exhibit-G to the OA and in this LOA, the description of the facility letter is different as stated above. Secondly, there is a rubber-stamp of Sumer Buildcorp that appears against the name Sumer Buildcorp Pvt. Ltd. and the signature of one Kunal, which rubber stamp is not seen in the Version-1 of this LOA. Moreover, the letter also is a different print-out.

59. The description of signatories on behalf of Sumer Corporation are also differently located. Pertinently, this letter purports to jointly authorize the signatories mentioned in the first table of the LOA, but it contains only one name and that is of Rahuul Ramesh Shah. There is no second signatory. There is also no mention of authorization singly or severally, as in the case of TL-I.

More importantly, however, the signatures of Deepak Ramesh Shah and Ramesh Sumerlal Shah appear in different locations in this version of the LOA. Thus clearly, these are different versions. The next version said to be the cured version of the earlier document appears at page 882 of the additional affidavit-in-reply dated 28th July 2021 on behalf of the bank. Having reached this conclusion, the question is whether any relief can and should be granted.

60. The plaintiff has relied upon *Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors.*⁵, along with connected matters, to support his case on jurisdiction. It is contended that the court had observed that to a very limited extent, jurisdiction of the civil court can be invoked and Mr. Tulzapurkar has sought to fit his case within the limited scope of interference by a civil court. In paragraph 51, the Supreme Court observed thus :-

“51. However, to a very limited extent, jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable, which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the case of English mortgages.”

“22. The remedies of a mortgagor against the mortgagee, who is acting in violation of the rights, duties and obligations are two fold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for

5 (2004) 4 SCC 311

restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought.”

61. The scope of interference contemplated by *Mardia Chemicals* is therefore clear. It contemplates a civil court exercising jurisdiction in matters in respect of which no action may be taken under the SARFAESI Act a subsequent to the invocation of jurisdiction. No doubt, *Mardia* has also held that financial institutions and lenders are required to act fairly and in good faith and that there has to be fair dealing between the parties. They cannot be relieved from an obligation of fair dealing and effectively what is contemplated by the court is that borrowers cannot be left without a remedy if they have been wrong or subjected to unfair treatment and in violation of the terms and conditions of a contract. The borrowers are entitled to plead deficiencies on the part of the bank and the financial institutions. Paragraph 80 of the *Mardia Chemicals* deals with the procedural aspects of action to be taken under the SARFAESI Act after a notice under Section 13(2) has been issued. It deals with steps post-notice that a lender takes.

62. After dealing with the effect of measures under Section 13(4) and the consequence of such measures having been adopted, the Supreme Court held that it will be open to maintain a civil suit in a civil court *“within the narrow scope and on the limited grounds on which they are permissible in matters relating to an English mortgage enforceable without intervention of the court”*. The emphasis here is on the maintainability of an action in a civil

court on the matters pertaining to enforcement of an English mortgage, which a lender may enforce without the intervention of court. The court also held in paragraph 81 that the borrowers in the facts of that case would get reasonably a fair deal and opportunity to get the matter adjudicated before the DRT. The court was conscious of the fact that some of the provisions of the SARFAESI Act may be harsh on some borrowers, but the court found that the action of the banks could not be categorized as unconstitutional. Thus, while upholding the validity of the Act, except for sub-Section (2) of Section 17, which was declared as ultra vires Article 14, in *Mardia Chemicals*, the court has left a small opening in the window to permit an applicant-borrower to make an attempt at obtaining relief from a civil court.

63. *Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation*⁶, along with connected matters, had occasion to consider whether the DRT was to be treated as a civil court and observed that if it were to be a civil court, a debtor or even a third-party must have an independent right of approaching the DRT without waiting for a bank or a financial institution to lodge a claim. It also contemplates the fact that a counter-claim would be dependent upon the bank or institution continuing with its claim, but in no uncertain terms holds that declaratory relief cannot be sought by a debtor before the DRT. Although a claim for damages may be maintainable, that would be more in the nature of a counter-claim and that the focus of proceedings before the tribunal is on the recovery of a debt(s) due to banks

6 (2009) 8 SCC 646

and financial institutions. Thus, this is one other aspect that needs to be considered in the present case as to whether the DRT is competent to deal with the allegations in the plaint in the right spirit and grant reliefs. In paragraph 85 of *Nahar Industrial Enterprises Ltd. (Supra)*, the Supreme Court observed thus :-

“85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it, no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable, but the same have been provided by way of extending the right of counterclaim.”

64. The court also went on to consider the difference between civil courts and courts trying disputes of a civil nature. It observed that only because a court or a tribunal is entitled to determine an issue involving a civil nature, that itself would not lead to a conclusion that it is a civil court and that legal fiction requires to be put into play before it could have all the attributes of a civil court. That a tribunal could have been treated as civil court if it could pass decrees, but in case of a DRT, it issues recovery certificates and it does not have all the attributes of a civil court. In effect, providing for a trial following the procedure laid down in the Code of Civil Procedure and in compliance with the rules of evidence under the Evidence Act, the court was disinclined to adopt the doctrine of purposive construction to confer additional

jurisdiction on a DRT. The issue in that case being the proposed transfer of a case from a civil court to a tribunal. In the case at hand, *Nahar Industrial Enterprises Ltd. (Supra)* can come to the assistance of the plaintiff to the extent that the plaintiff cannot approach the DRT independent of the bank's O.A. since the reliefs sought in the suit are a result of the O.A.

65. In *State Bank of India Vs. Sagar s/o. Pramod Deshmukh and Ors.*⁷, a Single Judge of this court, while considering rejection of a plaint under Order VII Rule 11(d) of the CPC, came to the conclusion that burden of proving that jurisdiction of a court is excluded in a particular case, is on a party that raising such a contention. While considering the test to determine ouster of jurisdiction of a civil court, the court observed that the extent of jurisdiction of DRT under Section 17 of the Act would determine the extent of exclusion of jurisdiction of the civil court to decide a dispute and that the normal jurisdiction of a civil court cannot be invoked to defeat the rights of a secured creditor under Section 13. To prevent jurisdiction being exercised by the DRT under Section 17 in view of the bar of jurisdiction created under Section 34 of the Act. The plaintiff in that case had filed a suit for declaration, partition, separate possession and an injunction and in a case where the plaintiff had filed a suit seeking reliefs in two parts; first for a declaration that the action proposed to be taken by a bank to take possession of suit property and sell the same was arbitrary and illegally and void ab initio and a second for a declaration that such action of the bank was not in pursuance of the

⁷ 2011(3) Mh.L.J. 71

provisions of a SARFAESI Act. In that context, the court held that the jurisdiction of a civil court to entertain and try a special civil suit for a declaration, that creation of a mortgage in respect of the suit property was fraudulent, is not barred by Section 34 of the Act.

66. In *Sagar Deshmukh (Supra)*, the suit claimed partition and separate possession along with the declarations as aforesaid and also sought a permanent injunction. The court held that once a civil court has jurisdiction to entertain and try a suit claiming some of the reliefs and the bar under Section 34 of the Act does not apply, then the power of the civil court to grant a permanent injunction on its own merits on the touchstone of the provisions of Section 38 of the Specific Relief Act cannot be ousted and if a civil court has jurisdiction to grant permanent injunction, then the power of granting a temporary injunction under Order 39 read with Section 151 of the Code also cannot be barred by Section 34.

67. *Sagar Deshmukh* also considered *Mardia Chemicals (Supra)* and in paragraph 33, the court summed up the position observing that the jurisdiction of the civil court to entertain and try a suit or proceedings in respect of property which is subject matter of security interest is barred only to the extent the Debt Recovery Tribunal or the Appellate Tribunal is empowered to determine under that Act. Those aspects which do not fall within the jurisdiction of the DRT or Appellate Tribunal under Sections 17 and 18 and are not ousted or barred under Section 34 of the Act would still be

available for the civil court to act upon and exercise jurisdiction and the real test to ascertain whether jurisdiction of the civil court under Section 9 is ousted or not would be to ascertain whether the DRT under Section 17 is empowered to hold an enquiry on a particular question and to grant relief in respect thereof. Considering this aspect in the instant case, the question is whether the declaration sought in the suit can be granted by the DRT. Alternatively, I may construe the relief sought in the present suit as a prayer to discharge the plaintiff from liability to the extent it concerns TL-I and TL-II and/or the demand based on the facility letters. This relief could be granted de hors the declaration and that in my view would be the real test in the facts of the present case. Moreover, to the extent the plaintiff seeks relief against the partner of the defendant no.2 and the other group entities, the ratio in *Sagar Deshmukh (Supra)* offers some help. More recently, a Division Bench of this court has in the case of *Bank of Baroda Vs. Gopal Shriram Panda and Anr.*⁸ considered a reference on the following question :-

“Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitization Act ?”

8 2021 SCC OnLine Bom 466

68. This question came to be framed after noticing the difference of opinion in the judgment of *State Bank of India Vs. Jigishaben Sanghavi and Ors.*⁹ and *State Bank of India Vs. Sagar s/o. Pramod Deshmukh and Ors.*¹⁰, to which I have just made reference. In *Jigishaben Sanghavi*, the court was faced with a situation where immovable property – a residential flat was mortgaged with a bank as security by the Karta of the HUF and on default by the borrower, an application was filed before the DRT for recovery. It was allowed and in recovery proceedings, the flat came to be attached. Subsequently, notice under Section 13(4) of the SARFAESI Act was issued. That came to be questioned in a writ petition, which was dismissed by the Gujarat High Court. Appeal also came to be dismissed. Thereafter a suit came to be instituted by the respondent claiming that they have right and interest in the property and claiming that an action on the part of the bank was illegal and there was no valid mortgage or security interest in favour of the bank to the extent it concerns the plaintiff. An application was filed for rejection of the plaint under Order VII Rule 11(d). That application was rejected in view of the bar under Section 34. An appeal came to be filed, which held that the bar under Section 34 applied and once the matter was of a nature that could be decided by the DRT or the Appellate Tribunal, civil court could not entertain a suit. The facts of the matter revealed that the plaintiff's grievance was in respect of validity of the mortgage, which was executed by the Karta and the action of the bank under SARFAESI, it was held that the suit was barred by

9 2011(2) Mh.L.J. 342

10 2011(3) Mh.L.J. 71

Section 34 of the SARFAESI Act. It was also held that a borrower or a third-party cannot be permitted to defeat or render nugatory provisions of the Act by stray references to the allegations of fraud or systematic fraud.

69. As against this, in *Sagar Deshmukh*, the suit was for a declaration, partition and separate possession and a permanent injunction has been sought, as already dealt with above. Review of the summary of the decision, the Division Bench deciding the reference found that it was necessary to determine nature, scope and ambit of the jurisdiction of the DRT under Section 17 of the RDDB Act read with provisions of Sections 13 and 17 of the SARFAESI Act. The nature of the claims and proceedings it is entitled to decide in juxtaposition to the jurisdiction of a civil court under Section 9. After considering the law on the subject and as dealt with in various judgments, the court answered the question in paragraph 27 thus :-

“Answer :

The answer, looking to the nature of the question, in our view, is in parts :-

- (A) Jurisdiction of the Debts Recovery Tribunal to decide all matters relating to Sections 13 and 17 of the SARFAESI Act, is exclusive.*
- (B) In all cases, where the title to the property, in respect of which a ‘security interest’, has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters, to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the DRT.*
- (C) The jurisdiction of the Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Sections 13 and 17 of the SARFAESI Act, in relation to*

enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.

- (D) Where civil rights of persons other than the borrower(s) or guarantor(s) are involved, the Civil Court would have jurisdiction, that too, when it is prima facie apparent from the face of record that the relief claimed, is incapable of being decided by the DRT, under Section 17 of the DRT Act, 1993 read with Sections 13 and 17 of the SARFAESI Act.*
- (E) Even in cases where the enforcement of a security interest involves issues as indicated in Mardia Chemicals (supra) of fraud as established within the parameters laid down in A. Ayyasamy (supra); a claim of discharge by a guarantor under Sections 133 and 135 of the Contract Act [Mardia Chemicals (supra)]; a claim of discharge by a guarantor under Sections 139, 142 and 143 of the Contract Act; Marshalling under Section 56 of the Transfer of Property Act [J.P. Builders (supra)]; the Civil Court shall have jurisdiction.*
- (F) Examples, as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.*
- (G) The principles laid down in para 33(i) to (ix)^{11*sic} of Sagar Pramod Deshmukh (supra) are in accordance with what we have discussed and held above.*

70. In effect, the plaintiff has placed reliance on sub-para (c) of paragraph 27 in which the court held that Section 34 does not prohibit a civil court from exercising jurisdiction to decide matters of a civil nature, which could not be tried by the DRT under Sections 13 and 17 of the SARFAESI Act. Thus, the plaintiff relies upon this aspect which has specifically considered the applicability of the SARFAESI Act and the power of the DRT to decide certain questions under that Act. The Division Bench approved of the principles laid down in paragraphs 33(i) to 33(xi) of *Sagar Deshmukh* . Thus, what we have

11 **sic 33(i) to 33(xi)*

here is a reiteration of the principle that there is no bar against a civil court exercising jurisdiction in matters pertaining to the claims filed by banks and financial institutions under the SARFAESI Act or for that matter under the RDDB Act in absolute terms. The ascertainment of jurisdiction would depend upon the powers of the DRT, the Appellate Tribunal under those specific special statutes and where the DRT or the Appellate Tribunal is not competent to exercise jurisdiction under provisions of those Acts, Section 9 of the Code of Civil Procedure will enable a civil court to decide such excluded aspects. Thus, the warrant to exercise jurisdiction in a civil suit would be to the extent of the exclusions from jurisdiction of the DRT or the Appellate Tribunal. Put differently, those aspects which the DRT or the Appellate Tribunal cannot decide under the RDDB Act and the SARFAESI Act may form subject matter of a civil suit and a civil court is not prohibited from considering such claims, which were declaratory or howsoever else similarly described. This is in order to identify a fulcrum at which point the civil court could exercise jurisdiction, one would have to examine the subject matter not merely in terms of its immediate description. One would also have to consider the effect of an improper description or misdescription and ascertain what the real controversy is between the parties. If after this exercise, it is found that the reliefs sought cannot be granted by the DRT or the Appellate Tribunal, such an aspect could form part of a claim by way of a civil suit. Needless to mention, the dispute will have to be of a civil nature and one will have to ascertain the essence of the dispute rather than its form. In the facts of the

present case, I find that the relief being sought by the plaintiff is to prevent the bank from making any claim against him personally on the basis of the LOAs and on the interest that the plaintiff holds in the properties of the firm, which are subject matter of the two mortgages that were created to secure the term loans.

71. The Original Application may not seek to hold the plaintiff personally liable, but the consequent issuance of notice under Section 13(2) of the SARFAESI Act and the proposal to declare him a willful defaulter will probably be bordering on personal liability as well. The question to be considered is whether the reliefs sought in the interim application can be granted at this stage by this court and are in the facts of the case required to be granted. On the aspect of jurisdiction, I have no doubt that the declaration sought do not prima facie appear to be ones that DRT can grant. To that extent, I do not find that the jurisdiction of this court will be barred on principles that have been laid down in the aforesaid judgments. However, the question is whether the facts of the case would justify exercise of jurisdiction. The plaintiff's case is premised on alleged forgery and therefore, fraud sourced from collusion between the plaintiff's partners and the bank and its officials.

72. On behalf of the bank, Mr. Andhyarujina has placed reliance on *Mardia Chemicals, Bank of Baroda (Supra)* and also the decisions in *Padma*

*Ashok Bhatt Vs. Orbit Corporation Ltd. and Ors.*¹², *T. Arivandandam Vs. T.V. Satyapal and Anr.*¹³ and the case of *Rentworks India Pvt. Ltd. Vs. Small Industries Development Bank of India*¹⁴. Mr. Andhyarujina has laid stress upon the fact that the DRT not being a court subordinate to the High Court in the exercise of its ordinary original civil jurisdiction, the High Court cannot injunct the bank from prosecuting a proceedings in DRT. Reliance was placed on Section 41(b) of the Specific Relief Act and to the effect that injunction cannot be granted to restrain person from prosecuting a proceeding in a court that is not subordinate to the one from which injunction has sought. Reference was also made to the decision of the Supreme Court in *Cotton Corporation of India Ltd. Vs. United Industrial Bank Ltd.*¹⁵, in which the court had held that no injunction could be granted restraining prosecution of a proceeding which was otherwise not permissible under Section 41(b) of the Specific Relief Act and the argument that the court had inherent power to issue such an injunction came to be rejected. On facts however what the plaintiff seeks in the present case is that the partners / contesting defendants be restrained from raising further loans with liabilities being foisted on the plaintiff upon the LOAs and the creation of the mortgage and a notice under SARFAESI Act. The DRT, in my view, cannot grant some of the reliefs claimed in the plaint and IA. Such reliefs may only be granted by a civil court. Having come to the above conclusion on the aspect of jurisdiction and before

12 2017(6) Mh.L.J. 102

13 (1977) 4 SCC 467

14 2014 SCC OnLine Bom 258

15 (1983) 4 SCC 625

considering whether any relief is liable to be granted in the facts of the present case, it would be appropriate that one considers the aspects of fraud and the implied authority of partners.

73. The bank's version, as set out in the affidavit dated 23rd March 2021, is that for Term Loan-I (*TL-I*) and Term Loan-II (*TL-II*), mortgages were created in respect of projects at Catholic Colony, Bandra and Tower-3 of Sumer Trinity Vertical Project. Certain documents in respect of these two Terms Loans were executed between 29th June 2016 and 6th December 2018, which are reproduced below in a tabulated form for ease of reference.

TERM LOAN – I			
<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Execution</i>	<i>Annexed to the IA</i>
1	Demand Promissory Note executed by defendant no.2 in favour of defendant no.1-bank.	29 th June 2016	Exhibit-H
2	Letter of Continuity for the aforesaid DPN.	29 th June 2016	Exhibit-I
3	Deed of Undertaking of Shortfall executed by defendants 3, 4 and 8.	12 th July 2016	Exhibit-J
4	Deed of Mortgage in respect of Catholic Colony Project executed by defendants 2 and 8 in favour of the 1 st defendant-bank.	28 th September 2016	Exhibit-F
5	Deed of Guarantee executed by defendants 3, 4 and 8	6 th October 2016	Exhibit-K
6	Deed of Pledge of shares of defendant no.8 and Sumer Radius Realty Pvt. Ltd. held by defendants 3 and 4 in favour of defendant no.1-bank.	6 th October 2016	Exhibit-L

TERM LOAN – I			
<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Execution</i>	<i>Annexed to the IA</i>
7	Supplemental Mortgage Deed in respect of Tower-3 of Sumer Trinity Vertical Project executed by defendants 2 and 9 in favour of the 1 st defendant-bank.	2 nd November 2016	Exhibit-G

TERM LOAN – II			
<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Execution</i>	<i>Annexed to the IA</i>
1	Demand Promissory Note executed by defendant no.2 in favour of defendant no.1-bank.	30 th October 2017	Exhibit-N
2	Letter of Continuity for the aforesaid DPN.	30 th October 2017	Exhibit-O
3	Deed of Mortgage in respect of Catholic Colony Project and Tower-3 of Sumer Trinity Vertical Project executed by defendants 2, 8 and 9 in favour of the 1 st defendant-bank.	5 th December 2018	Exhibit-M
4	Deed of Guarantee executed by defendants 3, 4 and 8	6 th December 2018	Exhibit-P
5	Deed of Pledge of shares of defendant no.8 and Sumer Radius Realty Pvt. Ltd. held by defendants 3 and 4 in favour of defendant no.1-bank.	6 th December 2018	Exhibit-Q

74. It is contended that the 1st defendant-bank received certain documents on the basis of which term loan facilities were granted. Those documents are described below :-

TERM LOAN – I			
<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Execution</i>	<i>Annexed to the IA</i>
1	Resolution passed by the Board of Directors of defendant no.8 approving creation of mortgage in Catholic Colony Project and authorizing to execute documents on behalf of defendant no.8.	22 nd June 2016	Exhibit-S
2	Letter of Authority issued by defendant no.2 for availing TL-I and authorizing to execute documents on behalf of defendant no.2.	22 nd June 2016	Exhibit-R
3	Letter of Authority issued by defendant no.9 approving creation of mortgage in Tower-3 and authorizing to execute documents on behalf of defendant no.9.	22 nd June 2016	Exhibit-T

TERM LOAN – II			
<i>Sr. No.</i>	<i>Description of Document</i>	<i>Date of Execution</i>	<i>Annexed to the IA</i>
1	Resolution passed by the Board of Directors of defendant no.8 approving creation of mortgage in Catholic Colony Project and authorizing to execute documents on behalf of defendant no.8.	29 th September 2017	Exhibit-V
2	Letter of Authority issued by defendant no.2 for availing TL-II and authorizing to execute documents on behalf of defendant no.2.	29 th September 2017	Exhibit-U
3	Letter of Authority issued by defendant no.9 approving creation of mortgage in Tower-3 and authorizing to execute documents on behalf of defendant no.9.	22 nd June 2016	Exhibit-W

75. The 1st defendant-bank (*the bank*) has relied upon certain facts

admitted by the plaintiff such as (a) defendant no.2 availed of both the term loans from the 1st defendant-bank; (b) Rs.199 crores had been disbursed to defendant no.2; (c) defendant no.2 had failed to repay the amount with interest and; (d) the bank had filed an Original Application, Miscellaneous Application and Interim Application in Debt Recovery Tribunal-II, Mumbai against defendant no.2. On 13th July 2019, the bank issued notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*SARFAESI Act*).

76. According to the deponent, the suit is not maintainable since it is intended to stall the DRT and SARFAESI proceedings. The plaintiff is trying to avoid submitting to jurisdiction of the DRT. It is also contended that the suit is barred by the law of limitation. Since the mortgages were created in December 2016 and January 2017 and had been publicly notified on the website of the Ministry of Corporate Affairs, the plaintiff had constructive notice of the same. Moreover, the suit is filed seven months after notice under the SARFAESI Act and 3½ years after the defendant no.2 availed of the loan.

77. The plaintiff is also “feigning ignorance” of the Balance Sheet filed with the Registrar of Companies and noting of charges or encumbrances by the Sub-Registrar of Assurances, which are a matter of record from 2016. Furthermore, an independent Audit Report dated 27th October 2017 in respect of defendant no.2 has been on record and to the knowledge of the plaintiff, since the plaintiff is deemed to have constructive notice of the same.

It is also contended that the suit is barred by virtue of the arbitration agreement between the partners, as embodied in the Deed of Reconstitution of Partnership dated 29th March 2015. Defendant nos.6 and 7 – Loonkars have already filed Commercial Arbitration Petition No.44 of 2020 under Section 9 of the Arbitration and Conciliation Act, 1996, wherein the grievance pertains to the loans raised in breach of the partnership agreement and claiming that the signatures of the Loonkars have been forged. The deponent has denied any collusion of the bank or its officers. The allegations of conspiracy, forgery or fraud have been denied on the basis that these are all vague allegations. According to the deponent, the bank had advanced TL-I and TL-II after conducting due diligence and obtaining all documents and approvals.

78. Defendant no.2 was specifically authorized under the Partnership Deed to borrow facilities in the ordinary course of business. Board Resolutions and letters of authority were obtained from defendants 2, 8 and 9 and hence the bank was not to be blamed. The bank had also obtained End Use Certificates from the Chartered Accountants of defendant no.2, who have certified that the amounts disbursed were utilized for the purposes set out in the facility letters. The bank claims to have advanced credit facilities on an arm's length basis as a bonafide third party lender. The alleged friendship between defendant no.3 and the former managing director and the chief executive officer of the bank is not sufficient to establish conspiracy, forgery or fraud. Similar allegations are also made in cases of other lenders such as SREI Equipment Finance Ltd., Edelweiss Asset Reconstruction Ltd. and Integrated

Spaces Ltd. The plaintiff alone will have to prove these allegations and no such proof is forthcoming. Copies of several documents have been attached to the affidavit, which include facility letters, photographs of certain projects, loan agreements pertaining to the facilities, demand promissory notes, which apparently have been signed by only one partner of the defendant no.2-Sumer Corporation. The document described as "*Deed of Undertaking of Shortfall*" is seen to be signed by defendant nos.3 and 4 on behalf of defendant no.2-Sumer Corporation and by one Kunal Goswami-defendant no.10 on behalf of Sumer Buildcorp Pvt. Ltd.-defendant no.8. Deed of Guarantee is also signed by defendant nos.3 and 4 on behalf of defendant no.2-Sumer Corporation and defendant no.10 on behalf of Sumer Buildcorp Pvt. Ltd.-defendant no.8.

79. More particularly, what is of relevance amongst these annexures are the copies of (i) the Letter of Authority dated 22nd June 2016, purportedly issued by the partners or said to have been issued by the partners of defendant no.2-Sumer Corporation in respect of TL-I (Exhibit-R); (ii) Letter of Authority dated 22nd June 2016 issued by defendant no.9-Sumer Builders, which is undated, in respect of TL-I (Exhibit-T); (iii) Letter of Authority dated 29th September 2017 issued by defendant no.2-Sumer Corporation, which is undated, in respect of TL-II (Exhibit-U); (iv) Letter of Authority dated 29th September 2017 issued by defendant no.9-Sumer Builders, which is undated, in respect of TL-II (Exhibit-W). Reliance is also placed on the End Use Certificates issued by four different Chartered Accountants of defendant no.2-

Sumer Corporation apparently in respect of TL-I and TL-II, but these certificates are bereft of any details of the expenses.

80. In view of the additional affidavit, a rejoinder is filed also to the additional affidavit-in-reply, in which the deponent reiterates that the bank has failed to deal with the amended portion of the application; in particular, detailed allegations regarding forgery by defendants 3 to 5 in collusion with the bank. The detailed allegations of forgery have not been dealt with and serious discrepancies having been pointed out, have not been explained. All these allegations, which are specific, are sought to be denied in one sentence. In its rejoinder to the bank's additional affidavit-in-reply, the plaintiff has reiterated his contention that inspection is incomplete and from whatever has been shown, it is evident that no fraud and forgery has been perpetrated. So also, the Loonkars' signatures had also been forged by the same person.

81. On the other hand, those transaction documents also have interpolations in the Facility Letters dated 22nd June 2016 and 29th September 2017. The facility letters, of which inspection was granted, contained additions and modifications, which were different from those annexed to the affidavit-in-reply dated 23rd March 2021. The deponent relies upon a compilation consisting of different documents. While disputing all the contents of the additional affidavit, the rejoinder highlights the fact that the additional reply is filed only on the basis of records and not on the basis of the personal knowledge. Merely relying upon general procedure of the bank is of

no consequence. Commenting on the account opening form annexed to the additional reply, which only shows that the Partnership Declaration is of 18th August 2010. Different documents bear the same date such as Letters of Authority dated 29th September 2017 in relation to defendants 2 and 9 and to which I have already made reference above.

82. These differences are sought to be highlighted by Mr. Tulzapurkar to buttress his arguments that all these alterations and modifications are without consent and knowledge of the plaintiff and no explanation is forthcoming in relation thereto. Apart from different documents of the same dates, there are different versions of the documents as well, as evident from the compilations filed and sought to be demonstrated before me during submissions. The explanations it is contended are not satisfactory. Photocopy of the document viz. Letter of Authority dated 29th September 2017, which is annexed to the Original Application and to the reply affidavit at Exhibit-U, is different from the photocopy produced at Exhibit-D to the additional affidavit. Thus, it is contended that different versions of Letter of Authority dated 29th September 2017 (Exhibit W to the plaint) can be seen with defendant no.9. Although Exhibit-W is said to have contained handwritten pencil notations, which are said to be internal, the photocopy of the original which is at Exhibit-E to the additional affidavit-in-reply is different. No explanation is forthcoming as to why these differ. All of this is indicative of a case of forgery and fabrication, which calls for forensic investigation and an order directing such investigation. The Board Resolution dated 22nd June 2016 is also said to be

fabricated. Handwritten pencil notings are now seen and a date which was missing is now entered as 22nd June 2016. No explanation has been given as to why photocopies of the same document are different from the photocopy now produced (the document at Exhibit-S to the affidavit-in-reply of the bank is different from Exhibit-G in the additional affidavit of the bank). That the purported scanned version of the final documents is after curing defects is not a satisfactory explanation.

83. Members of the Bharat Group and Loonkars are not signatories to the loan documents. The signatories to the Demand Promissory Note are Ramesh Shah and Rahuul Shah (defendants 3 and 4). These persons have executed the loan documentation. None of the executants of the loan documentation have questioned the LOAs. It is only the Bharat Group and the Loonkars that have questioned availing of term loans based on the LOAs. It is the plaintiff's stated case that the facts, as set out in paragraphs 58(i), (ii), (vi), (viii) and (ix) of the plaint, setting out the provisions between defendant no.1-bank and defendants 3 to 5-Ramesh Group have not been appropriately dealt with. The bank had noticed actual and constructive of the fraud and forgery committed by defendants 3 to 5. The focus of forgery is therefore upon defendants 3 to 5. I did not find any specific allegation of forgery against the defendant no.1-bank. It is however the contention of the plaintiff that the bank had notice of lack of authority of defendants 3 to 5 and the financial exposure of defendant no.2-firm through defendants 3 to 5 was concealed from the plaintiff at the material time and the loan was not taken in the ordinary course of business.

In paragraph 58(vi) of the plaint, the plaintiff has clearly averred that defendants 3 to 5 forged the signatures of the plaintiff on the LOAs and used it for illegal purposes, knowing them to be forged, which would be apparent from the plaintiff's signatures on the Bank Verification Form and PAN Card, which can be used for comparison of the signature of the plaintiff, which is forged one.

84. Paragraph 58(vii) of the plaint refers to the modus operandi followed by defendants 3 and 4, where signature of the plaintiff and other partners have been forged and it is reiterated that the bank was aware of the MOU and Supplemental MOU and for that reason, the offer letter required defendants 3 to 5 and defendant no.8 to own 100% interest in defendant no.2-Sumer Corporation within eight months. Prima facie, this seems to be so, as otherwise there is no occasion for the bank to have made this a pre-condition. This belief is strengthened by the fact that personal guarantees were taken only from defendants 3 and 4, since if these guarantees were sought from others, including the plaintiff, they would have opposed the loan proposal and therefore the implied authority principle in the partnership cannot be relied upon. All allegations of malafides and illegal and fraudulent behaviour as regards creation of mortgage and securities are attributed to defendants 3 and 4. The bank's complicity is urged on the basis that it had not conducted appropriate due diligence, obtained appropriate board resolutions at the meeting of the shareholders and it acted in concert with defendants 3 and 4 and had actual and constructive notice of illegalities or else had acted with

gross negligence and hence these deeds of mortgage, viz. Mortgage-I and Mortgage-II, are liable to be cancelled. This reasoning does not commend itself to me to the extent that even considering that some of the documents issued and obtained by the bank appear to be defective and questionable, especially the offer letters before signatures of Mr. Sandeep Jain. Similar offer letters bear signatures of persons purporting to be of Mr. Jain, when evidently they are not, which, in my view, by itself does not entitle the plaintiff to all the interim reliefs sought.

85. On the aspect of “fraud”, Mr. Andhyarujina has relied upon *A. Ayyasamy Vs. A. Paramasivam and Ors.*¹⁶, more particularly paragraph 25 reproduced therein, in which the Supreme Court observed that mere allegation of fraud simplicitor may not be a ground to nullify the effect of arbitration agreement. That fraud goes to the validity of the contract itself. This decision was in the background of a reference of disputes to arbitration and allegations of fraud were made as a ground to avoid arbitration. The court must be satisfied that the allegations are serious and complicated in nature that it would require a court to deal with subject-matter rather than relegating the parties to arbitration.

86. In Civil Appeal No.7005 of 2019 in the case of *Rashid Raza Vs. Sadaf Akhtar*¹⁷, the court alluded to principles of law laid down which make distinction between serious allegations of forgery and fabrication in support

¹⁶ (2016) 10 SCC 386

¹⁷ Civil Appeal No.7005 of 2019 arising out of SLP(C) No.4061 of 2019 dt. 4th September 2019

of the plea of fraud as opposed to simple allegations. The court was referring to the law laid down in A. Ayyasamy's case (supra) and in particular the observation in paragraph 25, to which I have already made reference above. The court observed that the two working tests laid down in paragraph 25 are *(1) Does this plea permeate the entire contract and above all, the agreement of arbitration, rendering it void, or, (2) Whether the allegations of fraud touch upon the internal affairs of the parties inter se having no implication in the public domain.* I find the second test appealing and as applicable to the facts of the present case. The disputes between the parties have preceded institution of the suit. They are disputes which have spread over a wider canvass. The controversy pertaining to TL-I and TL-II and the LOAs and Board Resolutions assailed in this suit would all fall within the larger set of disputes. The only distinguishing factor which has caused the suit to be filed is the involvement of the bank, the grant of loans by it after the MOUs had been executed and MOUs have been in operation and of which specific performance has been sought. These disputes also included the allegations of the plaintiff and the Loonkars against the contesting defendants forming part of the Ramesh Group. This clearly meets the test of allegations of fraud, which touch upon internal affairs of the parties bereft of any public domain implications. The disputes between the parties pertain to the businesses carried on by them in partnership and within the framework of the components which involved very same persons as shareholders and directors. Those disputes are also subject-matter of the arbitral reference now pending

and engaging attention of the arbitral tribunal. The dispute in this suit has been excluded from the scope of the reference. In the present case, I am not persuaded to hold that the aspect of forgery cannot be gone into by the DRT. The factual matrix of the case is not so complicated such as to require this court to conduct the trial. These aspects can be gone into by the DRT. As far as the bank's claim is concerned, the allegations of collusion and fabrication levelled against the bank can be dealt with in the O.A. since the plaintiff is still a partner of the firm against which the O.A. is filed.

87. The cured version of the LOA dated 29th September 2018 on behalf of defendant no.2 is said to appear at Exhibit-D to the additional affidavit-in-reply dated 28th July 2021 of the bank at page 882. This letter contains a handwritten date of 29th September 2017. The date, month and year are written in numerals. Clearly, this is a different document. Though it is possible that the date was handwritten, having noticed the absence of the date in the version of the LOA at Exhibit-G and as filed in the DRT. Save and except for this difference, this version of the LOA seems identical to Exhibit-G as filed in the DRT. The names of the signatories and the location of their signatures is also identical. On behalf of Sumer Builders, the LOA at Exhibit-Z of the plaint, Exhibit-D of affidavit-in-rejoinder dated 26th April 2021 and Exhibit II-4 at page 293 of the plaint are different from the version annexed to the Mortgage Deed dated 5th December 2018. In the version annexed in the Mortgage Deed, there is a handwritten date of 29th September 2017, whereas the other version is undated. The contents also are different. The version

annexed to the Mortgage Deed starts with the paragraph which reads “Yes Bank Ltd. has granted credit facilities.....”, whereas, the ones provided to the plaintiff starts with the heading “Term Loan II of INR 150 crores...”. Version-I annexed to the Indenture of Mortgage contains only two descriptive paragraphs. The LOA annexed to the plaintiff contains a heading and three operative paragraphs. Version-II contains names of two signatories who are severally authorized to execute documents being Ramesh Shah and Rahuul Shah; whereas Version-I provided to the plaintiff contains only the name of Rahuul Shah although authority is given to execute documents severally.

88. In Version-I, on behalf of the Sumer Builders, the LOAs signed by Rahuul Shah, purportedly bears the plaintiff, Manakchand Loonkar and Mahendra Loonkar and Pawan Ramesh Shah, whereas the signature of Pawan R. Shah described as (Mr. Pawan R. Shah although she is Mrs. Pawan R. Shah) Pawan Ramesh Shah is missing. Thus, clearly, this version is different. Moreover, this is on a letterhead of Sumer Builders showing the registered office as Peninsula Corporate Park when it is the contention of the plaintiff that the office had shifted later and the letterhead is fabricated. There is substance in these contentions that different letters are being used by the defendant-bank in support of their case against the plaintiff and the other defendants.

89. My attention has also been invited to the fact that even the offer letters appear to be altered and/or fabricated and signatures had been forged.

Inviting my attention to the execution page / page no.20 of the offer letter of Yes Bank, it is pointed out that one Punit Malik, Group President and MD Corporate Finance and Sandeep Jain, Executive Director Corporate Finance are believed to have executed the letter of offer, which was valid for acceptance till 20th July 2016. The offer seems to be accepted on behalf of Sumer Corporation by Ramesh Shah as partner with his name and rubber-stamp of the firm affixed thereto, but the date is blank while the place is shown as Mumbai.

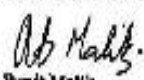
90. The second letter of offer is valid for acceptance till 15th November 2017. It is signed by Satya Mohapatra, Senior President Corporate Finance and Mr. Sandeep Jain, President Corporate Finance, but apart from the change of designation of these two persons, the signature of Sandeep Jain is very different in the second letter of offer. This letter of offer is accepted on behalf of Sumer Corporation apparently by Rahuul Shah on 16th October 2017. In a further third letter of offer, which was valid for acceptance of offer till October 28, 2017, the signature of Sandeep Jain as President Corporate Finance is missing. The date is however shown as 29th September 2017. In a second version of this third letter of offer, the portion providing for signature of Sandeep Jain is seen to be signed by some other person “for” Sandeep Jain.

91. For ease of reference, images of those pages are reproduced below.

This offer shall be valid for acceptance until July 20, 2016. Kindly confirm to us, by signing on the duplicate copy of this letter, your acceptance of the foregoing terms and conditions and return the same to us as to be received by us prior to the above date.

Should you have any query regarding the above terms and conditions, please do not hesitate to contact the right-hand undersigned.

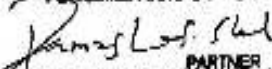
Yours faithfully,
YES BANK LIMITED


Punit Malik
Group President and MD
Corporate Finance


Sandeep Jain
Executive Director
Corporate Finance

We, Sumer Corporation confirm acceptance of the above terms and conditions:

~~FOR SUMER CORP.~~


PARTNER

Signature(s) / Company's stamp
*Please sign on the preceding pages as well!

Title: Partner

Date:

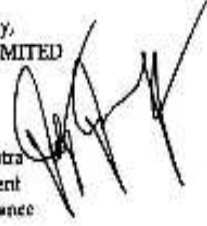
Place: Mumbai

(Ramesh Shah)

This offer shall be valid for acceptance until November 15, 2017. Kindly confirm to us, by signing on the duplicate copy of this letter, your acceptance of the foregoing terms and conditions and return the same to us as to be received by us prior to the above date.

Should you have any query regarding the above terms and conditions, please do not hesitate to contact the right-hand undersigned.

Yours faithfully,
YES BANK LIMITED


Satya Mohapatra
Senior President
Corporate Finance


Sandeep Jain
President
Corporate Finance

We, Sumer Corporation confirm acceptance of the above terms and conditions:

~~For Sumer Corporation~~


Partner

Signature(s) / Company's stamp
*Please sign on the preceding pages as well!

Title: Partner

Date: 16/10/2017

Place: Mumbai

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thereof or any other documents or security relating thereto. The facilities will be reviewed by September 28, 2018.

- 17 In the event of there being any inconsistency between the terms and conditions set out herein and set out in security documents then in that case the terms and conditions contained in the security documents shall prevail. The word security documents would mean all the documents, which are executed in pursuance of the credit facilities granted to you.

- 18 **Supersession:** This letter supersedes all our earlier correspondence in this regard.

This offer shall be valid for acceptance until October 28, 2017. Kindly confirm to us, by signing on the duplicate copy of this letter, your acceptance of the foregoing terms and conditions and return the same to us so as to be received by us prior to the above date.

Should you have any query regarding the above terms and conditions, please do not hesitate to contact the right-hand undersigned.

Yours faithfully,
YES BANK LIMITED

Satya Mohapatra
Senior President
Corporate Finance

Sandeep Jain
President
Corporate Finance

We, Sumer Corporation confirm acceptance of the above terms and conditions:
For Sumer Corporation

Signature(s) / Company's stamp
[Please sign on the preceding pages as well]
Title: Partner
Date: 29th September 2017
Place: Mumbai

End

thereof or any other documents or security relating thereto. The facilities will be reviewed by September 28, 2018.

- 17 In the event of there being any inconsistency between the terms and conditions set out herein and set out in security documents then in that case the terms and conditions contained in the security documents shall prevail. The word security documents would mean all the documents, which are executed in pursuance of the credit facilities granted to you.

- 18 **Supersession:** This letter supersedes all our earlier correspondence in this regard.

This offer shall be valid for acceptance until October 28, 2017. Kindly confirm to us, by signing on the duplicate copy of this letter, your acceptance of the foregoing terms and conditions and return the same to us so as to be received by us prior to the above date.

Should you have any query regarding the above terms and conditions, please do not hesitate to contact the right-hand undersigned.

Yours faithfully,
YES BANK LIMITED

Satya Mohapatra
Senior President
Corporate Finance

Sandeep Jain
President
Corporate Finance

We, Sumer Corporation confirm acceptance of the above terms and conditions:
For Sumer Corporation

Signature(s) / Company's stamp
[Please sign on the preceding pages as well]
Title: Partner
Date: 29/09/2017
Place: Mumbai

End

Annexure I

92. As seen above, the date which was written as 29th September 2017 below the signature of Mr. Rahuul Shah is now seen to be entered in numerals as 29/09/2017; clearly indicative of alterations. It is on this basis that the learned counsel for the plaintiff has strenuously urged before this court that there is an obvious attempt to mislead the court and the DRT. The attempt of the bank is to use different versions of LOAs, offer letters and other documents to assert a claim against the plaintiff and the Loonkars as well, since in the Loonkars' suit, the allegations are similar. When these discrepancies were pointed out by me to Mr. Andhyarujina during the course of submissions on behalf of the bank, Mr. Andhyarujina had no answers as to why there were marked differences in (1) the content of the LOAs; (2) the dates; (3) the identity of the signatories and; (4) the provision for signatories at different locations within the said documents. Similarly in the case of the letters of offer, the obvious absence of signatures on behalf of the bank and prima facie evidence fabrication of the signature of Mr. Sandeep Jain, the use of the words "for" prior to a signature, which is sought to be passed off as that of Mr. Sandeep Jain is not explained.

93. Clearly, there is an attempt to pass off the signature appearing in the second version of the facility letter, which was due for acceptance till 28th October 2017. Since the earlier version did not contain any signature above the name Sandeep Jain, the date was also written in a different form as "29th September 2017". The second version attempts to replicate the signatures of Mr. Sandeep Jain from the earlier offer letters. In fact, the offer letter valid till

15th November 2017 contains a different signature of Mr. Jain with a different designation from that on the offer letter valid till 20th July 2016.

94. I can understand that the designation may have undergone a change, but the signature does not change with a designation and thirdly, the letter of offer valid till 28th October 2017 is sought to be signed for Mr. Jain. The signature appearing on this letter is very similar to the one appearing on the offer letter valid till November 15, 2017. Not to mention the fact that one version of the letter of offer valid till October 28, 2017 does not bear the signature of Mr. Sandeep Jain at all. None of these could be explained by the bank. Thus, prima facie, there is clearly something amiss. The question is in the face of these obvious deficiencies and contradictory versions, the plaintiff is entitled to reliefs sought for.

95. A forged document is non-existent qua the person whose signature is forged and no claim can be based thereon. Thus, it is submitted that the LOAs which were preconditions to the grant of the loan having been forged, the loan could not have been granted in the first place and even otherwise the plaintiff is not liable under that loan, which is not taken in the ordinary course of business. In *A.V. Papayya Sastry*, the court found that the fraud vitiates all acts and the court interferes where justice, equity and good conscience so requires. Even a judgment, decree or order obtained by playing fraud on the court or tribunal or authority is a nullity and non est in law and such a judgment must be treated as a nullity by every court superior or

inferior. It is contended that if the present Original Application is allowed to proceed and the DRT passes an order thereon allowing the Original Application, that judgment would be flawed inasmuch as it would be afflicted by fraud since the very origin of the claim is on the basis of forged documents non est in law and therefore the judgment itself would be a nullity. It is therefore contended that the OA cannot proceed in the light of the fraud and forgery which has been demonstrated by the plaintiff.

96. This aspect of fraud also engaged the attention of the Supreme Court in *Ram Chandra Singh*, which considered the primal question of the effect of fraud on the court. That commission of fraud on court and suppression of material facts were core issues, wherein a fraud would vitiate every act. Fraud could be by conduct, by letter or by words or inducing another person to take a determinative stand. The plaintiff must prove actual fraud and fraud is proved when it is shown that a false representation has been made knowingly and without belief in its truth or recklessly without caring whether it be true or false. In the instant case, it is contended that the plaintiff had not executed the LOAs, had not consented to the grant of the term loans and the loan having been granted is a product of the fraud played by the contesting defendants in collusion with one another and that such an act should be viewed seriously. Collusion and conspiracy is one aspect of fraud, which would render the loan transaction itself void ab initio. The plaintiff has sought to rely upon these principles to support his case that not having executed the LOAs which contained demonstrably varying signatures which are not of the

plaintiff, the very basis of the pre-condition has disappeared are absent such compliance with the pre-condition which mandated an authentic LOA which the plaintiff had never agreed to grant and did not in fact grant, the action by the bank could not be sustained and in that light, it is appropriate that the relief be granted since otherwise it will result in a judgment afflicted by fraud. This, in my view, may be a good ground inter se parties, but as far as the bank is concerned, the loan has been disbursed and its recovery can only be sought by filing an Original Application in the DRT. The offer letters may be questionable but no one has denied that loans were sanctioned and disbursed. At this prima facie stage, I am unable to find material to suggest that the bank was involved in fabricating documents originating from the borrowers.

97. The plaintiff stressed upon the fact that the defendants' affidavits are evidence of the correctness of the plaintiff's case because the defendants had failed to deal with the material allegations in the plaint. The affidavits filed on behalf of the defendant-bank was full of evasive denials. True, a general denial of facts is not enough. In *Gian Chand and Brothers & Anr. Vs. Rattan Lal @ Rattan Singh*¹⁸, the court held that the onus lies on a person asserting a particular fact to affirmatively establish it and the case at hand absent a proper and detailed denial, the plaintiff's case must be believed. The plaintiff had repeatedly demonstrated that his signatures appearing on the LOAs differ from his real signature, which has by now part of the record of this court in

18 (2013) 2 SCC 606

the plaint and affidavits-in-rejoinder. He invites the court to hold that prima facie there has been a forgery and that is being used to his detriment.

98. The plaintiff had been consistently denying having executed the LOAs and those denials have not been met with the evidence to the contrary. The defendant no.1-bank was duty bound to demonstrate how and where these LOAs were signed by the plaintiff, but no such evidence is forthcoming. The bank has not stated that the LOA was signed in the presence of a bank's official or whether the plaintiff signed the document in the bank or elsewhere in the presence of a bank's official. There are no witnesses. Even the other signatories to the LOAs being the contesting defendants do not say that the plaintiff executed these LOAs in their presence or in the presence of any one of them. The Loonkars, who are also defendants in this suit, had filed their own suit wherein they also deny that they executed these LOAs. In these circumstances, it is contended that the denial on behalf of the bank ought to have been specific and should have made an attempt to convince the court that the plaintiff's allegation is baseless. That not having been done, the court is urged to view it seriously and hold that the letters are not to be acted upon at this interim stage and pending a full-fledged trial, at which the falsity of the bank's case would be established. The plaintiff has contended that an evasive denial would be amounting to an admission of the fact pleaded in the plaint. All of these aspects can be considered by the DRT as well and it is not an aspect that only a civil court can examine.

99. The law is laid down in *Mardia Chemicals* and as reiterated in *A. Ayyasamy* and as considered in *Bank of Baroda (Supra)*, was in the context that pleadings should be sufficient enough to bring the matter within the jurisdiction of the civil court and the allegations of fraud in the case at hand will not prevent the DRT from exercising jurisdiction. In my view, qua the bank, these are aspects that can be gone into by the DRT at the trial.

100. Mr. Andhyarujina has also relied upon the definition of “forgery” in Section 463 of the Indian Penal Code and the provisions of Section 464 IPC which deal with making of a false document. These are reproduced below for ease of reference.

“463. Forgery .–

Whoever makes any false documents or false electronic record or part of a document or electronic record, with intent to cause damage or injury, to the public or to any person, or to support any claim or title, or to cause any person to part with property, or to enter into any express or implied contract, or with intent to commit fraud or that fraud may be committed, commits forgery.

464. Making a false document .–

A person is said to make a false document or false electronic record–

First – Who dishonestly or fraudulently –

- (a) makes, signs, seals or executes a document or part of a document;*
- (b) makes or transmits any electronic record or part of any electronic record;*
- (c) affixes any electronic signature on any electronic record;*
- (d) makes any mark denoting the execution of a document or the authenticity of the electronic signature,*

with the intention of causing it to be believed that such document or part of document, electronic record or electronic signature was made, signed, sealed, executed, transmitted or affixed by or by the authority of a person by whom or by whose authority, he knows that it was not made, signed, sealed, executed or affixed; or

Secondly – Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document or an electronic record in any material part thereof, after it has been made, executed or affixed with electronic signature either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly – Who dishonestly or fraudulently causes any person to sign, seal, execute or alter a document or an electronic record or to affix his electronic signature on any electronic record knowing that such person by reason of unsoundness of mind or intoxication cannot, or that by reason of deception practiced upon him, he does not know the contents of the document or electronic record or the nature of the alteration.”

101. Mr. Andhyarujina submitted that these are offences pertaining to documents and the bank is not guilty of any such offence. According to him, the LOA was provided to the bank by the Ramesh Group members, who had been interacting with the bank and as such there is no occasion for the bank to indulge in any forgery. Attention was also invited to Section 467 which deals with forgery of a document purporting to give authority to any person to make or transfer any valuable security or to receive the principal interest or dividends thereon. In this case also, it is contended that the defendant-bank cannot be found liable and that under Section 470, a forged document is a false document and an electronic record made wholly or in part by forgery.

Only then it can be designated a forged document or electronic record. In the present case, the bank has not indulged in any forgery. No evidence has been produced to indicate forgery on behalf of the bank or active participation or collusion of the bank in such forgery, nor is a bank liable under Section 474, which deals with possession of a document described in Sections 466 or 467, knowing it to be forged or intending it to use it as genuine. No offence is made out under this section as well since the bank was unaware of whether or not the signatures were forged. It has relied upon its constituent who presented the document to it and hence no reliance could be placed on this aspect.

102. The disputes in the present case are clearly relating to the functioning of the firms forming part of Sumer Group as a whole and the individual sub-groups comprising of Bharat Group, Ramesh Group and Loonkars. *Avitel Post Studioz Ltd.* does not take things further. Yet, in another decision of the Supreme Court in *Deccan Paper Mills Co. Ltd. Vs. Regency Mahavir Properties and Ors.*¹⁹, a Three-Judge Bench adopted the reasoning in *Avitel Post Studioz Ltd.* in respect of the law and invocation of fraud etc. Besides, there is nothing to suggest that the DRT cannot consider the plaintiff's case on merits. *A. Ayyasamy* reiterates that a court while dealing with an application under Section 8 of the Arbitration and Conciliation Act finds that there are very serious allegations of fraud, which make a virtual case of criminal offence or where allegations of fraud are so complicated that it becomes absolutely essential that such complex issues can be decided only by the civil

19 2020 SCC OnLine SC 655

court on appreciation of voluminous evidence that needs to be produced, the court can sidetrack the arbitration agreement by dismissing the application under Section 8 and proceed with the suit on merits. It was also contemplated by the court that where fraud goes to the validity of the contract itself of the entire contract, which contains the arbitration clause or the validity of the arbitration clause itself, the contrary position is to be adopted where the allegations of fraud are touching upon the internal affairs of the party inter se and in this case, the disputes that have given rise to the suit clearly arose from internal disputes between members of the Sumer Group and its sub-group.

103. *A. Ayyasamy* has held in paragraph 45.1 that the judgment in *N. Radhakrishnan* does not subscribe to the broad proposition that a mere allegation of fraud is ground enough not to compel parties to abide by their agreement to refer disputes to arbitration and conscious of the fact that the context in which the judgments were rendered were in the background of arbitration agreement embodied in contracts and the choice of some party or some of them to approach the civil court in a suit only to be made with an application under Section 8. In the present case, we are not concerned with that contextual basis but rather considering whether the disputes as set out in the suit should be heard by civil court rather than the DRT. The suit as filed seeks (i) a decree and declaration that the LOAs, the loan agreements and the mortgaged documents are illegal, null and void and not binding upon the plaintiff and are liable to be cancelled; (ii) for cancellation of the originals of these documents listed in Exhibit-LL to the plaint; (iii) a decree for permanent

injunction is sought once again restraining the bank from acting in pursuance of these documents; (iv) a decree and a declaration that the plaintiff is not liable in respect of the loans granted by the defendant no.1 and; (v) for a permanent injunction restraining bank and its officers from taking or continuing with any steps in furtherance of the documents listed in Exhibit-LL to the plaint or the impugned SARFAESI notice and show cause notices. Apart from these prayers, the remaining reliefs are sought against defendants 3 to 5. Damages are also sought in a sum of Rs.100 crores. If any of these injunctions are granted, it will paralyze the bank's attempts to recover monies that have admittedly been lent in advance.

104. In the course of his submissions, Mr. Andhyarujina has placed reliance on a decision of the Supreme Court in *Canara Bank Vs. Canara Sales Corporation and Ors.*²⁰, in which the court had occasion to consider that it deals with the relationship with the banker and customer and inter alia holds that if an account-holder informs the bank as soon as fraud comes to his knowledge, his claim is sustainable and negligence on the part of an account-holder by itself is not sufficient to absolve the bank from the liability. This decision is in the context of the relationship between a customer of a bank and the bank as creditor and debtor. The defence of the bank on the basis of constructive notice in general law is not sufficient to cover a relationship between the bank and its customer. In the present case, it is contended that the bank has been provided advance notice of the forgery and fraud and the

20 (1987) 2 SCC 666

plaintiff's contention that he is not liable since the plaintiff had not signed the LOAs. The import of relying upon this judgment is that the defendant no.1-bank has been made aware of the fact that the signature of the plaintiff on the LOAs is not genuine and hence there was no mandate for the bank to rely upon the same and issue the loan. Having now sanctioned the loan, it is not open for the bank to prosecute the case against the plaintiff. The bank has proceeded on the basis of the plaintiff's signature as a genuine one, it cannot now seek to recover the amount from the plaintiff, nor can it seek to recover the amounts claimed by the bank by seeking to enforce the mortgage property in which the plaintiff has an interest. The question is where else can the bank file proceedings for recovery of the debt, which is admittedly created ? Surely, the bank cannot be compelled to file a suit in the civil court.

105. In the present case, the plaintiff cannot be considered to be negligent inasmuch as prima facie it has been established that he has diligently informed the bank of the fact that the signature on the LOA is not his. What the plaintiff seeks to do in the present case is to defend the claim of the bank on the basis that his signature is forged. Although references have been made to the case of *London Joint Stock Bank Ltd. Vs. MacMillan*²¹, those aspects do not appear to be relevant in the facts of the present case since in MacMillan's case, the court observed that the customer had dispensed with ordinary precautions and he had complete faith in his clerk's honesty. In the present

21 [1918] A.C. 777

case, the plaintiff has alleged forgery. There is sufficient material to show that the plaintiff had protested at the appropriate stages. Alluding to the fact that the MOUs placed restrictive covenants on the power of the contesting defendants, reference was made to the decision of the Supreme Court in *M.V. Shankar Bhat and Anr. Vs. Claude Pinto*²², in which the court was considering the clause in agreement for sale, which was subject to ratification by co-heirs. The term “hereinafter appearing” subject to ratification by co-heirs were sought to be interpreted and in paragraph 31, the court observed that even an agreement is entered into subject to ratification by others, a concluded contract is not arrived at and whenever ratification by some other persons who were not parties to the agreement is required, such a clause must be held to be condition precedent for coming into force of a concluded contract. In this behalf, useful reference can be made to the case of Privy Council in *Warehousing and Forwarding Company of East Africa Limited Vs. Jafar Ali and Sons Ltd.*²³ in which the Privy Council held that subject to ratification by a principal, there would be no concluded contract until ratification had been obtained. It was contended on behalf of the respondents that ratification by the principal can operate back to the date when the contract was made by the agent without the necessity of communicating to the other party but in that case the limitation of the agent’s authority was not known to the other contracting party. In such a case, the agent contracts as principal and his principal is bound by the ratification taking place. However, when the other

22 (2003) 4 SCC 86

23 (1964) A.C. 1

party to the contract has intimation of the limitation of the agent's authority, neither party can bound until ratification has been duly intimated to the other party to the contract and that it would be contrary to good sense to hold that a concluded contract had been made in these circumstances.

106. The effort on behalf of the bank was that the bank was unaware of the restrictions on borrowing which were contemplated in the MOUs and therefore the borrowing by the firm would bind all the partners. This is to be contrasted with the contentions of the plaintiff that the bank is deemed to be aware of these MOUs and it is for that reasons that the facility letter restricts the signatories to that of the Ramesh Group members. Even the personal guarantees are of the Ramesh Group members. The demand promissory note and agreements were also signed by them. The plaintiff was never called upon to sign these. This is prima facie indicative of the fact that the bank was aware of the restrictive nature of the authority that the Ramesh Group enjoyed post the execution of the MOUs. This is an aspect which in my view could be considered by the DRT. To what extent this will assist the plaintiff in seeking interim relief will now have to be considered.

107. One of the other key issues is whether the defendants 3 and 4 had acted on the basis of implied authority and in this respect Sections 19 to 22 of the Partnership Act clearly empowers defendants 3 and 4 from exercising implied authority as long as the plaintiff continues to be a partner. It is the

firm that had borrowed monies from the bank and there is nothing to suggest why the plaintiff continued as a partner. The plaintiff had restricted the implied authority. One must also consider owing to Section 20 of the Partnership Act, whether there is a contract extending or restricting implied authority of the partner and if one considers the MOUs, the question is whether the implied authority of the partners was curtailed by operation of the MOUs. One other aspect to be considered is whether the borrowing is in a nature such that it was intended to bind the firm in a manner as contemplated in Section 22 of the Partnership Act. Prima facie, it does appear that TL-I and TL-II were taken by the contesting defendants prior to actual reconstitution but during a window period that the reconstitution had been proposed. It is in this context that useful reference may be made to *Sanganer Dal and Flour Mill Vs. F.C.I. and Ors.*²⁴, wherein the Supreme Court found that the partner had implied authority to conduct business on behalf of the partnership firm and the implied authority binds all the partners. Hence, under Section 18 of the Partnership Act, a partner is an agent of the firm for the purposes of its business and under Section 19, an act of a partner, which is done to carry on in the usual way the business of the kind carried on by the firm, binds the firm. The question is whether in the instant case, the defendants 3 and 4 have acted to carry on business of a firm “in the usual course”, which would determine whether the firm can be held liable.

24 (1992) 1 SCC 145

108. The Supreme Court in *Dr. Jiwan Lal and Ors. Vs. Brij Mohan Mehra and Anr.*²⁵ dealt with the aspect of waiver of conditions on a part of a contract for specific performance and the court found that Clause 6 in the agreement had been inserted for the exclusive benefit of the vendees, who could waive that benefit. The institution of the suit after two years did not cause any disadvantage to the respondent. One other judgment Mr. Andhyarujina has relied upon is in the case of *Om Builders (P) Ltd. Vs. Anil Chinubhai Kilachand and Ors.*²⁶, which once again followed *M.V. Shankar Bhat and Anr. Vs. Claude Pinto (Since Deceased) By LRs. and Ors.*²⁷. However, on facts, the court found that the suit contract was not subject to any conditions. Referring to the scope of Section 41(b) of the Specific Relief Act, Mr. Andhyarujina invited my attention to the judgment of the Full Bench of this court in *Export Credit Guarantee Corporation of India Ltd. Vs. Annamma Philips and Ors.*²⁸, which reiterated the position that a court cannot grant an injunction to stay proceedings in a court not subordinate to that from which the injunction is sought. In other words, only a proceeding in a subordinate court could be stayed and effectively what the plaintiff is seeking is a restraint on the proceedings in the DRT, which is not a court subordinate to the High Court. The court also considered provisions of Section 3 of the Civil Procedure Code, which sets out subordination of courts and holds that the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that

25 (1972) 2 SCC 757

26 2015 SCC OnLine Bom 5010

27 (2003) 4 SCC 86

28 2010(5) Mh.L.J. 659

of a District Court and every Court of Small Causes is subordinate to the High Court and District Court. In the present context, it cannot be said that the DRT is subordinate to the Bombay High Court on its Original Side.

109. In the light of the above, I proceed to deal with the reliefs. In prayer (a), disclosure on oath is being sought as to the exact nature of transactions between defendants 1 and 3 to 5 with respect to defendants 2, 8 and 9–Sumer Entities and for an order directing deposit of all original documents in this court and furnishing true copies thereof to the plaintiff. I do not see any impediment in first part of the prayer (a) of the IA being granted; however considering the fact that the proceedings are now pending in the DRT, I am not inclined to order deposit of original documents in this court. True copies of all documents are already said to have been provided to the plaintiff, failing which the plaintiff will be entitled to the same. As far as prayer seeking injunction against the bank from proceeding on the basis of the documents enlisted in Exhibit LL and Exhibit D to the plaint and the SARFAESI notice dated 18th July 2019 and show cause notices dated 6th and 7th January 2020 are concerned, I am not inclined to grant any relief.

110. In the course of submissions in support of the plaint, reliance has been placed on the Statement of Claim filed by the plaintiff, along with his son, before the Sole Arbitrator. The array of parties in arbitration is as follows; plaintiff and his son are the claimants and defendant nos.2, 8 and 9–Sumer Entities, defendant no.3–Ramesh Shah, defendant no.4–Rahuul Shah,

defendants 6 and 7-Loonkars and one Pawan Ramesh Shah are the respondents. It describes the “Ramesh Group” as constituted by respondents 1, 2 and 5, namely, Ramesh Shah, Rahul Shah and Pawan Ramesh Shah and their family members including Deepak Shah. It sets out the background of family connections, the businesses and deals extensively with the Family Settlement resulting from the MOU and the Supplemental MOU. It deals with loans of the parties to the group concerned and transfer of assets, as proposed. It inter alia seeks an award declaring the Family Settlement as valid, subsisting and binding inter se. The group members seek (i) specific performance of the Family Settlement, including disclosures on oath of sale of premises to various entities; (ii) directions to effect transfer of shares to execute Deeds of Conveyance; (iii) to discharge income tax liabilities and in respect of loans and debts, the claimants require the Ramesh Shah Group to disclose on oath complete loans and debts in the name of Sumer entities and directing to discharge these debts save and except to the extent covered by the present suit; (iv) to execute indemnities in favour of the plaintiff and; (v) in the alternative, to obtain effective and valid discharge letters from banks, creditors and financial institutions effectively discharging the claimants from outstanding loans; (vi) for appointment of an Administrator to control the affairs of Sumer Corporation, Sumer Builders, both partnership firms, and Sumer Buildcorp Pvt. Ltd.

111. Thus, the plaintiff seeks comprehensive reliefs to give effect to specific performance of the MOUs and to the proceedings for discharging the plaintiff

from all the liabilities in terms of and as contemplated in the MOUs. No doubt, the bank is not a party, but one must consider the effect of any award that may be passed. The arbitration agreement has already been invoked and I am mindful of the fact that the reliefs sought in the present suit have been kept out of reference for the time being. As far as prayer clause (b) is concerned, for the very same reasons that I declined to grant second part of prayer clause (a) viz. pendency of the proceedings in the DRT, I am not inclined to direct deposit of original documents in this court. If these documents are forged and fabricated, the bank and the contesting defendants will face the consequences and this is an aspect of defence, which the plaintiff can claim in the DRT. The allegations of fraud and forgery are indeed serious and do not appear to be an afterthought and the DRT will consider these allegations on merits. I am however making it clear that all these aspects urged in the plaint and in the IA qua the claims of the parties inter se are kept open for consideration before the appropriate forum.

112. I am convinced that it is necessary to grant relief in terms of prayer clause (c), which seeks an injunction restraining Ramesh Shah Group from availing of any loans or any credit facilities from any banks or financial institutions without prior written consent of all partners. These are matters which pertain to the business relationship inter se the partners and largely encompassed by the MOUs. The arbitral reference has excluded the issues covered in this suit and hence it is necessary to ensure that the interest of the plaintiff and Loonkars is protected. If this relief is not granted, there is a

probability of further loans being obtained with consequences that can be avoided pending resolution of all disputes.

113. Prayer clause (d) seeks a direction to the bank to deposit transaction documents in this court, I am not inclined to grant any relief since the DRT will continue to exercise the jurisdiction and the documents can be examined by the DRT in the light of the facts of the case. No case is made out therefore for directing deposit of these documents in this court.

114. I am not inclined to grant an injunction restraining the bank from proceeding with the actions that it has initiated and hence there will be justification in granting prayer clause (e). It will be open to the plaintiff to make an application for examination of documents by a forensic expert before the DRT and all the allegations in the plaint qua the bank may be urged by the plaintiff before the DRT, which is expected to consider it on merits.

115. Relief in terms of prayer (f) can be sought in arbitration notwithstanding the fact that no such prayer is presently included. Moreover, this is an aspect which pertains to specific performance of the MOUs, which are already engaging attention of the arbitral tribunal especially since it is not the case of any of the parties that the disputes arising out of availing of TL-I and TL-II are beyond the scope of the arbitration under the MOUs.

116. As far as reliefs under prayer clauses (g), (h) and (i) are concerned,

considering the view that I have taken in relation to prayer clause (a) to (e), I do not find that a case has been made out for interference since these are aspects which cannot be prejudged.

117. In conclusion, the plaintiff's Interim Application No.1370 of 2020 succeeds in part and I pass the following order :-

- (i) The defendant no.1 and defendant nos.3, 4 and 5 are directed to disclose on oath the particulars of all transactions between the defendant no.1-bank and defendant nos.3, 4 and 5 in relation to defendant nos.2, 8 and 9.
- (ii) True copies of all the documents pertaining to these transactions shall be furnished by defendant no.1-bank to defendant nos.3, 4 and 5 to the plaintiff-applicant within a period of three weeks from today.
- (iii) Defendant nos.3, 4 and 5, both inclusive, are restrained by interim injunction from availing of any loan / credit facility from any bank or financial institution or any other third-party in the name of defendant nos.2, 8 or 10 without prior written consent of all partners of defendant nos.2 and 9 including the plaintiff and all shareholders of defendant no.8.

118. In Interim Application (Lodging) No.5376 of 2021, the arguments made in support of the Interim Application No.1370 of 2020 in Commercial Suit No.319 of 2020 have been adopted in toto by Mr. Mody and in relation to the facts of the case in Commercial Suit (Lodging) No.5374 of 2021, I have

considered the factual matrix of the case for the reasons set out in the above order. I find that only one prayer in the IA is liable to be granted in part and accordingly, I pass the following order :-

- (i) Pending the hearing and final disposal of the suit, defendant no.1-bank and defendant nos.3, 4 and 5 shall disclose on oath the particulars of all transactions between the defendant no.1-bank and defendant nos.3, 4 and 5 in relation to defendant nos.2, 8 and 9.
- (ii) True copies of all the documents pertaining to these transactions shall be furnished by defendant no.1-bank to defendant nos.3, 4 and 5 to the plaintiffs-applicants within a period of three weeks from today.

119. Both the Interim Applications are allowed in the above terms.

(A.K. MENON, J.)