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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION (L) NO.5273 OF 2024
IN
EXECUTION APPLICATION NO.1049 OF 2024

Malvika Herbopharma Pvt. Ltd.

...Applicant /
Decree Holder /
Judg. Creditor

In the matter between
M/s. Hotel Shantidoot & Ors.

...Petitioner /
Judg. Debtor

Versus

The Authorized Officer, Dombivli Nagari
Sahakari Bank Ltd. & Anr.

...Respondents

Mr. Sharan Jagtiani, Senior Counsel, Mr. Sumeet Nankani, Mr. Agnel Carneiro, Mr. Prakhar Tandon, Ms. Gayatri Sathe, Mr. Smith Colaco, and Mr. Smith Barbox i/b. Mulla and Mulla and Craigie Blunt and Caroe for the Applicant.

Mr. A.V. Anturkar, Senior Counsel, Ms. Kalyani Tulankar and Mr. Ranjit Shinde, Mr. Sagar Shahani and Mr. Abheek Melwani i/b. Mr. Ravi Kant Purohit for Judgment Debtor Nos.2 to 4.

Mr. N.C. Pawar, Court Receiver present.

CORAM : R.I. CHAGLA J.

Reserved on : 30TH APRIL, 2025.

Pronounced on : 26TH SEPTEMBER, 2025.

J U D G M E N T :-

1. The Execution Proceedings seek to enforce Consent Terms dated 30th March, 2019 executed between Dombivali Nagari Sahakari Bank Ltd. ("DNS Bank"), the Judgment Debtors (Pradip



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Dixit and his wife) and the Applicant. By these Consent Terms Writ Petition (L) No.110 of 2019 filed by Pradip Dixit before this Court challenging the Order dated 21st December, 2018 passed by the Debt Recovery Appellate Tribunal (“DRAT”) came to be disposed of.

2. By the captioned Interim Application, relief has been sought by the Applicant / Decree Holder / Judgment Creditor seeking (i) dispensation of drawing up of decree of Order dated 5th April, 2019; (ii) continuation of the appointment of the Court Receiver (already appointed in Suit No.1402 of 2018) in these proceedings or alternatively, the appointment of a new Court Receiver in respect of the Suit property namely Hotel Shantidoot situated at Dadar (“Suit property”); (iii) leave to participate in the auction for sale of the Suit property without depositing any further amount and adjustment of the decretal amount for the purposes of the same, (iv) withdrawal of the sale proceeds of the Suit property deposited with the Court Receiver; (v) deposit of the passports of the Judgment Debtors and an order of injunction restraining them from leaving the territorial jurisdiction of this Court.

3. There is a preliminary objection which has been raised to



the maintainability of the Execution Proceedings by the Judgment Debtors.

4. Prior to considering the preliminary objection which has been raised by the Judgment Debtors, certain material facts are necessary to be referred to as under:-

(i) The DNS Bank sanctioned a loan aggregating to INR 10.75 Crores in favour of one Pradip Dixit and his wife on 27th October, 2012.

(ii) Deed of Mortgage was executed by Pradeep Dixit and his wife in favour of DNS Bank, whereby the Suit property stood mortgaged in favour of DNS Bank as security against the said loan.

(iii) Late Pradip Dixit and his wife were unable to repay the dues of DNS Bank and accordingly, their loan account was therefore, declared as a NPA and Notices under Section 13(2) and 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act") were issued by DNS Bank. Further an Application under Section



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14 of the SARFAESI Act was filed before the Chief Metropolitan Magistrate, (“CMM”), Mumbai dated 31st December, 2013.

(iv) The Securitization Application filed by late Pradip Dixit challenging the DNS Bank’s declaration of their account as NPA was rejected by the DRT vide Order dated 29th April, 2017;

(v) Leave and License Agreement was entered into by Pradip Dixit with one Saidammadath N. Abdul Kareem for running the hotel business on and from the Suit property on 17th June, 2017.

(vi) An order was passed by the CMM, Mumbai on 1st December, 2017 in the application filed under Section 14 of the SARFAESI Act, *inter alia* directing the Court Commissioner to take physical possession of the Suit property.

(vii) The Court Commissioner has taken physical possession of the Suit property on 2nd December, 2017 in terms of the Order dated 1st December, 2017.

(viii) An Appeal filed by Pradip Dixit on 21st November, 2017 challenging the rejection of his Securitization Application dated 29th April, 2017 was dismissed by the DRAT on 21st November,



2017.

(ix) A Suit No.1402 of 2018 was filed by the Saidammadath N. Abdul Kareem (Licensee under the purported unregistered Leave and License Agreement dated 17th June, 2017) against Pradip Dixit and his wife on 7th May, 2018 seeking recovery of an amount of Rs.2,22,62,963/-.

(x) An Order was passed by the DRAT on 21st December, 2018 in Miscellaneous Appeal No.22 of 2017 filed by the Pradip dixit dismissing the same.

(xi) A letter dated 28th December, 2018 was addressed by DNS Bank accepting Pradip Dixit's OTS proposal in the amount of INR 11.50 Crores to be paid on or before 27th March, 2019.

(xii) A Writ Petition (L) No.110 of 2019 was filed by Pradip Dixit before this Court on 14th January, 2019 challenging the Order dated 21st December, 2018 passed by the DRAT.

(xiii) A Memorandum of Understanding ("MoU") was executed on 30th March, 2019 between the Applicant and Pradip Dixit, whereby, *inter alia*, the Applicant agreed to take over the loan of



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DNS Bank amounting to INR 11.85 Crores by way of assignment. The said assignment also included a further amount not exceeding INR 65 lakhs towards capex lent to Pradip Dixit (aggregating to INR 12.50 Crores.)

(xiv) Consent Terms were executed on 30th March, 2019 between DNS Bank, Pradip Dixit, his wife and the Applicant. These were filed on 5th April, 2019 in Writ Petition (L) No.110 of 2019.

(xv) A registered Deed of Assignment Agreement was executed on 31st March, 2019 between DNS Bank, the Applicant and Pradip Dixit, as per which, DNS Bank sold, assigned and transferred on an 'As is where is' and 'As is what is' basis, its right in the loan account, together with all security interest created to secure the loan to the Applicant at a consideration of INR 11.85 Crores.

(xvi) A letter was addressed by the DNS Bank on 4th April, 2019 acknowledging that they have received the entire consideration under the Assignment Agreement dated 31st March, 2019 on 3rd April, 2019 and have handed over peaceful physical possession of the Suit property to the Applicant. This letter was signed by the DNS Bank, the Applicant, Pradip Dixit and his wife.



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(xvii) An Order was passed by this Court on 5th April, 2019 disposing of Writ Petition (L) No.110 of 2019 in terms of the Consent Terms dated 30th March, 2019. All undertakings in the Consent Terms were accepted by this Court.

(xviii) A Memorandum of Understanding (“MoU 2”) was executed on 29th April, 2019 between Pradip Dixit (termed as Owner) and one A W Hospitality (termed as ‘service provider’) whereby AW Hospitality came to be appointed to run and manage the Suit property.

(xix) Conducting Agreement was entered into between Applicant and Pradip Dixit on 21st May, 2019, whereby, the latter sought permission from the Applicant to operate the Suit property.

(xx) An Order came to be passed by this Court on 13th August, 2019 in Commercial Suit No.1402 of 2018 attaching the properties and assets of Pradip Dixit and his wife in terms of Order XXXVII Rule 2A of the Code of Civil Procedure, 1908 (CPC) as well as striking of the defence of Pradip Dixit and his wife, in terms of Order XXXVII Rule 11 of the CPC; directing Pradip Dixit and his wife to make disclosures of their assets and deposit their



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passports; appointing a Court Receiver in respect of a flat owned by Pradip Dixit as well as directing the Court Receiver to take possession of the Suit property with the assistance of the concerned police station with further direction to Pradip Dixit and his wife not to dispose of any of their assets without leave of the Court.

(xxi) Mr. Dinesh Sharma – the Applicant’s authorized representative visited the Suit property on 23rd August, 2019, upon which he realized that it was being run by one Mr. Wahab, who informed Mr. Sharma that he has given loan to Pradip Dixit and his wife and for repayment thereof, they have given the Suit property to him.

(xxii) An Order was passed by this Court in Suit No.1402 of 2018 directing the Court Receiver to take physical possession of the rest of the rooms for the time being. The 23 occupied rooms were to be sealed by the Court Receiver as and when they got vacated. The rooms rents collected post 13th August, 2019 were to be deposited with the Court Receiver.

(xxiii) Pradip Dixit addressed complaint to the Inspector of Police,

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Bhoiwada dated 26th August, 2019 claiming forceful removal from the Suit property by Dinesh Sharma (the erstwhile Managing Director of the Applicant).

(xxiv) The Court Receiver took symbolic possession of the Suit property on 29th August, 2019, in view of the Orders passed by this Court in Suit No.1402 of 2018.

(xxv) A declaration was executed by Pradip Dixit on 31st August, 2019 to the effect that all persons working in the Suit property are working for him and nobody else and that he had borrowed money from one Mr. Wahab in his personal capacity, but he has no agreement with Mr. Wahab for running the Suit property. Further, he has not done anything which would compromise the Applicant's peaceful possession.

(xxvi) Two Complaints were addressed by Pradip Dixit to the Senior Inspectors of Bandra (East) and Bhoiwada Police Stations on 1st September, 2019 to the effect that he was forced into executing the declaration and that he did not "... retaliate in Dinesh Sharma's office due to his ill health...".



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(xxvii) A letter was addressed by Pradip Dixit's Advocate on 4th September, 2019, *inter alia* contending that Pradip Dixit was in exclusive use and occupation and possession of the Suit property till that date. Further, it was alleged that the Applicant is disturbing Pradip Dixit's business. It is alleged that the MoU was being revoked and cancelled on the ground that the Applicant failed to pay INR 65 lakhs to Pradip Dixit in terms thereof.

(xxviii) A letter was addressed by the Applicant's Advocate on 9th September, 2019 in response to the letter dated 4th September, 2019, *inter alia*, pointing out that the Conducting Agreement stood terminated with effect from 1st August, 2019 due to Pradip Dixit's categorical admission at a meeting held in the first week of July, to the effect that he was not in a position to perform the same. By the said letter, Pradip Dixit was called upon to withdraw the aforesaid letter dated 4th September, 2019.

(xxix) Mr. Wahab did not vacate the Suit property and continue to run the same. In view thereof, the Applicant wrote to the Commissioner of Police, Mumbai, DCP, Mumbai and Senior Police Inspector, Bhoiwada Police Station stating that Pradip Dixit has



committed offence under Sections 420, 383 and 405 of the IPC.

(xxx) A S.C. Suit No.2453 of 2019 was filed by Pradip Dixit on 17th September, 2019 before the City Civil Court, Mumbai against the Applicant, *inter alia*, seeking an Order of permanent injunction restraining the Applicant from dispossessing him, disturbing his business and entering into the said Suit property without following due process of law in view of termination of the MoU by him.

(xxxi) A document titled Request for Demand Loan of 'Rs.2 Crores' executed between Pradip Dixit and the Applicant on 21st December, 2019, as per which, *inter alia*, the Applicant was to provide an additional amount of INR 2 Crores to Pradip Dixit and his wife, which amount was to be transferred towards the cancellation of MoU 2.

(xxxii) A Deed of Cancellation was executed between Pradip Dixit and AW Hospitality services on 21st December, 2019 for the purposes of mutually terminating MoU 2.

(xxxiii) The Consent Terms were executed by the Applicant,



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Pradip Dixit, his wife and their son in S.C. Suit No.2453 of 2019.
(2nd Consent Terms).

(xxxiv) The Applicant on 1st January, 2020 withdrew the criminal complaint filed by it against Pradip Dixit, his wife and son, in accordance with the 2nd Consent Terms.

(xxxv) In compliance with his obligations under the Deed of Cancellation dated 21st December, 2019, Pradip Dixit disbursed an amount of INR 1 Crore towards refund of security deposit in favour of AW Hospitality on 1st January, 2020.

(xxxvi) Pradip Dixit wrote to the Applicant on 1st January, 2020, *inter alia*, stating that he is voluntarily handing over the operational possession of the Suit property to the Applicant.

(xxxvii) A letter was addressed by Pradip Dixit to the Applicant on 4th February, 2020 confirming receipt of INR 1.5 Crores out of the additional loan amount of INR 2 Crores and undertaking to seek payment of the final installment of INR 50 lakhs only after filing *inter alia* the Assignment Agreement dated 31st March, 2019 before this Court and documents germane to the additional loan

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of INR 2 Crores before the City Civil Court, Mumbai i.e. withdrawing S.C. Suit No.2453 of 2019.

(xxxviii) A MoU was executed between the Applicant Rohit Shetty and Pradip Dixit on 4th March, 2020, *inter alia* in respect of availing hotel management services from Rohit Shetty (MOU 3).

(xxxix) The Mumbai Municipal Corporation of Greater Mumbai requisitioned the Suit property under the Epidemic Diseases Act, 1897 and took it over for the purposes of operating a Covid Centre, in lieu of which, the MCGM paid INR 18,66,387/- as compensation to AW Hospitality for the period 1st April, 2020 to 15th August, 2020.

(xl) A letter was addressed by Pradip Dixit on 21st July, 2020 *inter alia* admitting the total outstanding as on 30th June, 2020 to be INR 15,62,62,513/- which outstanding is stated to be certified by a Chartered Account.

(xli) A letter of request was addressed by Pradip Dixit on 27th July, 2020 by which, he sought an extension of 90 days in order to make payment of outstanding amount citing the covid lockdown.



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(xlii) An Order was passed by this Court in Suit No.1402 of 2021, *inter alia*, restraining the Applicant from parting with the possession of or inducting any third parties into the Suit property until further Orders.

(xliii) Further, Order was passed by this Court on 5th April, 2021 in Suit No.1402 of 2021 *inter alia* restraining the Applicant from, in any manner, offering the Suit property for sale.

(xliv) An Order was passed by this Court on 12th July, 2021 in Court Receiver's Report No.17 of 2021 in Suit No.1402 of 2021 *inter alia* directing the Court Receiver to continue to be in symbolic possession of the Suit property and cautioning the Applicant that in the event there is a single incident of obstruction at the Suit property by it, the Court Receiver's Report would be made absolute.

(xlv) The S.C. Suit No.2453 of 2019 which was filed by the Pradip Dixit before the City Civil Court, Mumbai came to be decreed on 14th August, 2021 in terms of the 2nd Consent Terms.



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(xlvi) Pradip Dixit passed away on 20th October, 2021 leaving behind his wife, son and younger son Ishan Dixit as his legal heirs.

(xlvii) The Interim Application (L) No.22763 of 2021 was filed by the Applicant against the Respondents in Suit No.1402 of 2018, on 21st October, 2021 in relation to the protection of their rights under the Consent terms dated 30th March, 2019 and the MoU 1 as well as the Registered Assignment Agreement dated 31st March, 2019. The Applicant sought a discharge of the Court Receiver in respect of the Suit property.

(xlviii) Contempt Petition (L) No.29436 of 2022 was filed by the Applicant against the legal heirs of Pradip Dixit on 8th September, 2022 for breach of the Consent Terms dated 30th March, 2019 and the Order dated 5th April, 2019.

(xlix) The captioned Execution Application was filed on 22nd June, 2023.

(l) The captioned Interim Application in the Execution Application was filed on 13th February, 2024.

5. Mr. A.V. Anturkar, the learned Senior Counsel appearing



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for the Judgment Debtor Nos.2 to 4 has submitted that the Consent Terms dated 30th March, 2019, in Writ Petition (L) No.110 of 2019 has not resulted into the Consent Decree at all. He has submitted that all that the Consent Terms indicate is that the parties to the Writ Petition have already settled the matter. They have agreed to a certain arrangement and they are merely intimating to the Court that such arrangement has been arrived at. That arrangement is merely taken on record only for the purpose of identification and the Writ Petition is disposed of in the light of that understanding, which is already arrived at.

6. Mr. Anturkar has submitted that there is no “satisfaction by the Court” to these Consent Terms as mandated by the provisions of Order XXIII, Rule 3 of the Code of Civil Procedure 1908. He has submitted that there is no satisfaction that the agreement is “scrutinized by the Court”, and the “Court has concluded that it is a lawful Agreement”. He has submitted that for the purpose of converting Consent Terms into a Consent Decree, the conditions namely (a) That the Agreement, must be “lawful Agreement”, and the Court must have applied its mind to that and (b) That the Court must have recorded “the satisfaction”, that the parties have arrived at



a compromise is conspicuously absent here.

7. Mr. Anturkar has submitted that the phrases, such as the Consent Terms, is marked 'X' taken on record "only for the purpose of identification" shows that the Court has not participated, in applying its mind as well as, of recording, any satisfaction, that factually and actually, the Consent Terms have been arrived at between the parties. He has submitted that in the absence of compliance, demonstrably absent of the provisions of Order XXIII Rule 3 of the Code of Civil Procedure, clearly show that what has been produced, as Consent Terms is actually "not the Consent Terms", but it is only "intimation" to the Court that the parties *inter-se*, have arrived at, some arrangement and in the light of the arrangement, both of them are requesting that the Writ Petition should be disposed off "and nothing more than that".

8. Mr. Anturkar has placed reliance upon the judgment of the Supreme Court in ***K. Venkatachala Bhat and Anr. V/s. Krishna Nayak and Ors.***¹ which has clearly laid down that notwithstanding the proviso to Section 141 of the CPC, the legal position is that the provisions of Order XXIII do apply to the Consent Terms which have

¹ (2005) 4 Supreme Court Cases 117 decided on 9th March, 2005.



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been filed even in a Writ Petition filed under Article 226. The Applicant had in counter placed reliance upon the judgment of the Supreme Court in *Commissioner of Endowment Vs. Vithal Rao*² which had been decided prior to *K. Venkatachala Bhat (Supra)* to contend that the Writ Court is not bound by Order XXIII of the CPC. He has submitted that in the light of subsequent judgment no reliance can be placed upon the judgment in *Commissioner of Endowment (Supra)*. He has submitted that *K. Venkatachala Bhat (Supra)* has been subsequently followed in *Sneh Gupta Vs. Devi Sarup & Ors.*³.

9. Mr. Anturkar has submitted that assuming that the Court has applied its mind to the Consent Terms, the Consent Terms does not indicate that there was any application of mind by the Court “to the Memorandum of Understanding” dated 30th March, 2019, or the “Deed of Assignment” dated 31st March, 2019. He has submitted that although in the Consent Terms there is an in built reference to the MoU as well as Deed of Assignment, in the Order passed by this Court, there is no reference that the Court has scrutinized the MoU and / or the Deed of Assignment.

² (2005) 4 Supreme Court Cases 120.

³ 2009 (6) SCC 194.

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10. Mr. Anturkar has submitted that from elevating the Consent Terms to Consent Decree, the compliance of Order XXIII (or even if it is assumed that Order XXIII strictly does not apply, at least, principles analogues to Order XXIII), would be attracted. He has submitted that in the instant case, the Consent Terms dated 30th March, 2019 neither records that this Court has gone through the MoU or Assignment Agreement. He has submitted that so far as these derivative documents are concerned, there is neither any satisfaction recorded nor the Court has applied its mind to that effect.

11. Mr. Anturkar has submitted that in the Consent Terms there are only three undertakings given. Conspicuously, there is no undertaking to pay the money. The undertakings are given in paragraphs 9 and 11.

12. Mr. Anturkar has submitted that it is evident from the Consent Terms that, this Court has not passed decree in terms of Consent Terms. This Court has merely taken the Consent Terms on record, marked it merely for identification and accepted the undertakings given therein and disposed of the Writ Petition. This only amounts to the Court recording that the parties have already



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arrived at an agreement in the light of that, they do not want to prosecute the Petition and therefore, the Petition is disposed of.

13. Mr. Anturkar has submitted that the first Consent Terms dated 30th March, 2019 is clearly novated by the second Consent Terms filed in S.C. Suit No.2453 of 2019. He has placed reliance upon Clause 1 (viii) and the use of the word ‘fresh loan’ as against, the outstanding debt. He has submitted that the expression fresh loan refers to the amount of Rs.2,00,00,000/- and the outstanding loan refers to the amount, which was payable as per the first Consent Terms; and the use of the word is “loans” in plural in Clause 9 and Clause 9(4) of the second Consent Terms.

14. Mr. Anturkar has submitted that the most important is paragraph 4 of the second Consent Terms which *inter alia* states that “funds will be bifurcated as per the terms mentioned in the demand document dated 21st December, 2019 at Exhibit ‘D’.”

15. Mr. Anturkar has submitted that a perusal of clauses (a), (b), (c) and (d) would show that the entire payment will be utilized in the manner by invoking the doctrine of waterfall mechanism. Clause (c) clearly provides that the amount will be utilized towards

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the payment of the interest to the investor for the loans availed now and the previous loan availed on 31st March, 2019 as per the terms of that contract and the document by the borrower for the month.

16. Mr. Anturkar has submitted that the first Consent Terms have been completely substituted by the second Consent Terms. He has submitted that in ***Lata Construction & Ors Vs. Dr. Rameshchandra Ramniklal Shah & Anr⁴*** at paragraph 10, the Supreme Court has held that novation should be complete substitution and not partial. This judgment which completely supports the Judgment Debtors. He has submitted that the reliance placed by the Applicant upon ***Pushpa Devi Bhagat Vs. Rajinder Singh & Ors.⁵*** at paragraph 17 is completely misconceived. This would apply if the Judgment Debtors wanted to challenge the Consent Terms on the ground that the Consent Terms was obtained by fraud or coercion or that the signature on the Consent Terms are not that of the Judgment Debtors, then only this judgment would apply.

17. Mr. Anturkar has submitted that it is an admitted position that the Decree Holder has received amounts under the

⁴ 2000 (1) SCC 586.

⁵ (2006) 5 SCC 566.



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second Consent Terms, and has appropriated amounts received under the second Consent Terms, as per Clause (c) waterfall mechanism, for the amount of Rs.2,00,00,000/-.

18. Mr. Anturkar has submitted that two payments which were available with the Decree Holder have been utilized by the waterfall mechanism clause and not exclusively for the purpose of either the amount of Rs.2 Crore or for the amount of the earlier loan. These are amounts of Rs.22,00,000/- and Rs.18,66,837/- received by the Decree Holder from the MCGM for using the Suit property as Covid - 19 Centre for the period of 1st April, 2020 to 15th August, 2020 and which amounts were utilized as per the waterfall mechanism.

19. Mr. Anturkar has submitted that the Decree Holder has on the one hand come with a case that there is no novation; that the second Consent Terms is only for the purpose of loan amount of Rs.2,00,00,000/- and on the other hand the Decree Holder has taken the responsibility to run the Hotel and service the entire loan amount including the one under the first Consent Terms and after running the hotel property made profits and adjusted the same towards the

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satisfaction of their claim in the present Execution Application. He has submitted that not only has the Decree Holder come with unclean hands, but the admission by the Decree Holder of the payments received pursuant to the second Consent Terms which are adjusted towards the loan liability arising out of the first Consent Terms are based upon the arrangement of the parties in the second Consent Terms which *inter alia* provided for a repayment manner as stated therein.

20. Mr. Anturkar has submitted that second Consent Terms provides that in the event of auction of the Suit property in Clause 9(f), the Applicant will release its charges on the Suit property completely as per 'Assignment Deed' dated 31st March, 2019.

21. Mr. Anturkar has submitted that the Decree Holder has not disclosed that the Decree Holder has in fact, illegally tried to auction the Suit property by taking recourse to the second Consent Terms and sent an auction notice on 17th March, 2021. He has submitted that it has been admitted in the said Notice that the dues are required to be cleared as per the second Consent Terms dated 25th December, 2019 and Assignment Agreement dated 31st March,



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2019. Furthermore, the e-auction sale notice sent by the Decree Holder refers to the first Consent Terms dated 30th March, 2019 and second Consent Terms dated 25th December, 2019. He has submitted that fully aware that the auction mechanism was provided only in second Consent Terms, auction sale notice provides for the amount demanded as Rs.28 Crores. He has submitted that there is no mechanism to auction the Suit property in the first Consent Terms and this only goes to show that the first Consent Terms stood novated.

22. Mr. Anturkar has submitted that it was the responsibility and obligation of the Decree Holder to run the hotel property as per the second Consent Terms through the service provider appointed by the Decree Holder. He has submitted that the Decree Holder not only started running the property but also serviced the loan liability arising from the first Consent Terms with the payments of Rs.22,00,000/- and Rs.18,66,837/-. He has submitted that it is the failure on the part of the Decree Holder to keep the hotel property running that has led to the present situation and loss caused to the Judgment Debtor. He has submitted that the Second Consent Terms also novated the mechanism for running the property and servicing



the loans.

23. Mr. Anturkar has submitted that the Consent Terms have to be read along with MoU. He has submitted that the 'event of default' provides for the moratorium for the repayment of the interest for 6 months. It also provides for moratorium on the principal amount for 24 months. Thereafter, it provides that if there is default in making payment of interest and principal then it will be necessary to give two months notice, to make good, that default. It is only after the period of two months notice then, the default, would take place.

24. Mr. Anturkar has submitted that in the Interim Application, it is the contention of the Decree Holder that the default has been committed on 5th July, 2019. He has submitted that in the written note of argument submitted on behalf of the Decree Holder, this date is surprisingly changed, and now it is said that the default has taken place not on 5th July, 2019 but in October, 2019.

25. Mr. Anturkar has submitted that between the first Consent Terms on 30th March, 2019 and the second Consent Terms on 25th December, 2019, there was an Independent Agreement which was executed on 21st May, 2019 between the Decree Holder



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and the Judgment Debtors.

26. Mr. Anturkar has submitted that in the Commercial Suit No.104 of 2021 filed by the Decree Holder on 19th December, 2019 for the recovery and for the purpose of foreclosure of the mortgage, in paragraph 3(r) of the Plaint, it is stated that the Defendant No.1 has failed to make payment of the first installment of interest amount of Rs.21,72,500/- which was due and payable on 5th July, 2019. This date is of significance as default is seen from the pleading at page 12 of the said Commercial Suit No.104 of 2021.

27. Mr. Anturkar has submitted that if the Decree Holder wants to execute the decree as per the Consent Terms then he must take into consideration the mechanism contemplated by the 'Date of Event' in the MoU and he cannot rely upon some other document, which is not the part and parcel admittedly of the Consent Terms namely the agreement dated 21st May, 2019. He has submitted that on this ground alone the Execution Application is required to be dismissed as the default as pleaded in the Interim Application by the Decree Holder relates as per their own admission not of the Consent Terms but of the agreement dated 21st May, 2019 which is not

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disclosed and is not a part of the first Consent Terms and the Order passed by this Court on 5th April, 2019.

28. Mr. Anturkar has submitted that it is the contention on behalf of the Applicant / Decree Holder that if the default is committed, then the Judgment Debtors should have made the election. He has submitted that what is completely forgotten and overlooked is that the Judgment Debtors have made an election and sent the notice of terminating the contract. He has placed reliance upon notice dated 4th September, 2019 which is now treated as the date of cause of action in the Commercial Suit No.104 of 2019.

29. Mr. Anturkar has submitted that the Decree Holder has by filing the Commercial Suit No.104 of 2019 in this Court on 19th September, 2019 and thereafter filing the present Execution Application on 22nd June, 2023, has made an election.

30. Mr. Anturkar has submitted that the first Consent Terms provides that in the eventuality, of the frustration, of the contract or in the event of default, the Decree Holder will be at liberty to take all and every step for enforcement of the security and all action for recovery of its entire amount due and payable and the borrower and



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the guarantor shall not raise any objection or protest to such action by the Respondent No.3, after due compliance of the provisions of law.

31. Mr. Anturkar has submitted that if the breach has been committed there is no undertaking to make the payment and the only right which is available to the Decree Holder is to take steps for enforcement of the security and to take all action for recovery of the entire amount due. The only recourse available to the Decree Holder is to file the Suit for foreclosure of the mortgage, which right of the erstwhile mortgagee namely DNS Bank has been assigned to the Decree Holder by the Deed of Assignment dated 31st March, 2019. This has been done by filing Commercial Suit No.104 of 2019 in this Court on 19th December, 2019. Now it is not open for the Applicant / Decree Holder to file the Execution Application.

32. Mr. Anturkar has submitted that in the Commercial Suit No.104 of 2019 in Interim Application (L) No.9236 of 2021, this Court passed Order dated 5th April, 2021 which had restrained the Plaintiff from in any manner, offering the Suit property on sale by public auction. He has submitted that the words “in any manner” is

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wide enough even to file the Execution Application. He has submitted that the filing of the Execution Application and requesting the Court, to auction the Suit property even before the decree is obtained in Commercial Suit No.104 of 2019 is in contempt of the said Order passed by this Court on 5th April, 2021.

33. Mr. Anturkar has submitted that there were reciprocal promises in the MoU and the Applicant was to pay capex amount of INR 65,00,000/-, which it defaulted in paying and hence it cannot seek execution of the Consent Terms. He has submitted that in a contract where there are reciprocal promises if the party fails to comply with the reciprocal promise, either party will be absolved of their obligation under such contract. In other words, the Judgment Debtors are absolved from repayment obligations in respect of loan amount of Rs.11.85 Crores by virtue of the Applicant failing to comply with its reciprocal promise of payment of capex amount of INR 65,00,000/- to the Judgment Debtors.

34. Mr. Sharan Jagtiani, the learned Senior Counsel appearing for the Applicant / Decree Holder has submitted that admittedly the first Consent Terms dated 30th March, 2019 is filed in



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Writ Petition No.1172 of 2019 and by virtue of the Order of this Court dated 5th April, 2019, the Writ Petition is disposed of in terms of the Consent Terms.

35. Mr. Jagtiani has submitted that the first Consent Terms having received the imprimatur of this Court vide Order dated 5th April, 2019 is indeed a Consent Decree and must be held to be binding between the parties until and unless it is set aside. He has placed reliance upon the judgment of this Court in ***Govind Waman Shabhag Vs. Murlidhar Shrinivas Shanbhag & Ors.***⁶ in this context. The said judgment followed a judgment of the Privy Council in ***Charles Hubert Kinch Vs. Edward Keith Walcott & Ors***⁷.

36. Mr. Jagtiani has submitted that the Writ Court is not bound by Order XXIII Rule 3 of the CPC. This has been held by the Supreme Court in ***Commissioner of Endowments (Supra)*** at paragraph 17.

37. Mr. Jagtiani has submitted that the contention of the Judgment Debtors that the derivative agreements referred to in the Consent Terms do not form part of it, absent “proof to the satisfaction

⁶ 1953 Bom. 412.

⁷ (1929) AIR 289 PC.

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of this Court” in terms of Order XXIII Rule 3 of the CPC is misconceived. He has submitted that in paragraph 13 of the Affidavit in Reply of the Judgment Debtors, there is categorical admission to the fact that the Consent Terms came to be filed “based on the above documents” and which above documents are the MoU dated 30th March, 2019 and the Assignment Agreement dated 31st March, 2019. Further, at paragraph 17 of the Judgment Debtors Affidavit in Reply the non-payment of Rs.65,00,000/- has been stated to be “...nothing but serious breach of MoU which forms a part of the Consent Terms ...”. He has submitted that on the Judgment Debtors own showing the aforementioned contention is in teeth of its pleaded case.

38. Mr. Jagtiani has submitted that even in the schedule to the MoU under the head “documentation”, there is an express reference *inter alia* to the Consent Terms. Likewise, Clauses 7, 9 and 10 of the Consent Terms refer to the MoU. The MoU, is therefore, incorporated in the Consent Terms by reference.

39. Mr. Jagtiani has submitted that the Conducting Agreement dated 21st May, 2019 also refers to the MoU at Clause 4. Recital G of the Conducting Agreement defines the term “Loan



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amount” as being the amount of INR Rs.11.85 Crores. This has also been confirmed by the Judgment Debtors in the repayment schedule furnished by them in compliance with their obligations under Clause 8 of the MoU.

40. Mr. Jagtiani has submitted that the material understanding between the parties under the MoU have been duly acted upon them.

41. Mr. Jagtiani has submitted that on a plain reading of the MoU along with the Consent Terms as well as the Judgment Debtors pleadings it conclusively establishes that the MoU forms an integral part of the Consent Terms. He has in particular placed reliance upon Clause 7 of the Consent Terms.

42. Mr. Jagtiani has submitted that without the MoU, the Consent Terms cannot, in and of itself, be implemented. For this reason, and with a view to give effect to the Consent Terms, the MoU has to be read conjointly with and / or part and parcel of the Consent Terms.

43. Mr. Jagtiani has submitted that the obligation to pay an

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amount of INR 65,00,000/- arises under the MoU. The MoU cannot be selectively relied on by the Judgment Debtors to argue, on the one hand, that the non payment of the said amount of INR 65,00,000/- and the resultant breach of Clause 1 of the MoU, render the Consent Terms incapable of execution, whilst on the other, contend that the derivative agreements referred to in the Consent Terms, such as the MoU, have not been “proved to the satisfaction of the Court” in terms of the Order XXIII Rule 3 of the CPC.

44. Mr. Jagtiani has submitted that the Judgment Debtors reliance upon the judgment of the Supreme Court in ***K. Venkatachala Bhat (Supra)*** is misplaced. The judgment came to be passed in a situation where the High Court disposed of the proceedings before it in terms of a ‘consent memo’ and an accompanying Affidavit which was only signed by one of the parties to the proceedings i.e. the Respondent. He has submitted that this is not the case here. Further, a plain reading of the finding in paragraph 11 of the judgment is that, “...the requirement under Order XXIII Rule 3 can be pressed into service in the writ proceedings...” shows that it is an exception to the norm given the particular facts at hand. The judgment in ***Commission of Endowments (Supra)*** relied upon by the Applicant was not



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brought to the notice of three Judge Bench in *K. Venkatchala Bhat (Supra)*. The reference to *Commissioner of Endowments (Supra)* is only by way of editor's comment / note.

45. Mr. Jagtiani has submitted that in the judgment *Dwarka Prasad Agarwal Vs. B.D. Agarwal*⁸ which is also a judgment of three Judge Bench of the Supreme Court, aligns with the ratio of the applicability of Order XXIII Rule 3 of the CPC to writ proceedings. He has placed reliance upon paragraph 35 of the said Judgment. He has submitted that from the said paragraph 35, it is clear that Order XXIII Rule 3 of the CPC cannot as an absolute proposition said to bind the writ Court.

46. Mr. Jagtiani has submitted that the Judgment Debtors contention that the Order dated 5th April, 2019 does not constitute "compromise decree" since all that the Division Bench did was to take note of the fact that the parties arrived at an *inter se* settlement and simplicitor, without any application of mind, disposed of Writ Petition No.1172 of 2019 in terms thereof, ought to be stated only to be rejected. He has submitted that this is primarily because there is absolutely no basis for a persistently defaulting Judgment Debtor to

8 (2003) 6 SCC 230



speculate and suggest, at this stage, that the Division Bench did not apply its mind as to the lawfulness of the first Consent Terms before disposing of Writ Petition No. 1172 of 2019 in terms thereof vide Order dated 5th April, 2019.

47. Mr. Jagtiani has referred to the said Order dated 5th April, 2019 and has submitted that there are readily discernible indicators of application of mind on the part of the Division Bench in the said Order which includes the acceptance of undertakings given in the first Consent Terms as undertakings to this Court. He has placed reliance upon the judgment of a Division Bench of this Court in *Bajaranglal Khemka and Anr. V/s. Messrs Kapurchand Ltd⁹*, Which holds that when the Court passes a decree it puts its imprimatur on those terms and makes the terms a rule of this Court. It would be open to the Court, before it did so to accept an undertaking given by a party to the Court.

48. Mr. Jagtiani has submitted that the obligation to make payment of INR 65,00,000/- arises under the MoU, Non payment thereof would at best entitle the Judgment Debtor to file a Suit for seeking specific performance of the MoU. No such Suit has been filed.

⁹ AIR 1950 Bom 36.



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Instead, the Judgment Debtor filed S.C. Suit No.2453 of 2019 before the City Civil Court seeking an injunction from being dispossessed from the Suit property. This is in view of the Judgment Debtors having cancelled the MoU vide letter dated 4th September, 2019. The basis of the said letter dated 4th September, 2019, to seek cancellation / revocation of MoU was the non-payment of the amount of INR 65,00,000/-. The said Suit came to be disposed of by the second Consent Terms dated 25th December, 2019.

49. Mr. Jagtiani has submitted that there is no reference to the amount of Rs.65,00,000/- in the second Consent Terms. The repayment schedule provided by Judgment Debtors is an annexure to the Conducting Agreement. This confirms the 'Loan Amount' to be INR 11.85 Crores. Thus, the Judgment Debtors cannot be heard to contend that such non-payment comes in the way of the execution of the Consent Terms.

50. Mr. Jagtiani has submitted that the Applicant, by virtue of admittedly, being the assignee of this debt, is well within its right to recover the same. He has placed reliance upon *Harikrishna Engineering Works & Ors. Vs. Syndicate Bank and Ors*¹⁰ at Paragraphs

¹⁰ 2021 SCC OnLine Guj 112.



4, 13 – 15 and *Landmark Real Estate Developers Ltd. & Ors. Vs. The Malkapur Urban Co-Operative Bank Ltd*¹¹ at paragraphs 9 – 11.

51. Mr. Jagtiani has submitted that the Applicant has stepped into the shoes of DNS Bank as Assignee of the debt solely in view of the Judgment Debtors' representations to the effect that the Suit property would be let out to OYO Rooms and / or Alcott Town Planners Pvt. Ltd. ("OYO"). The MoU came to be executed with this understanding in mind.

52. Mr. Jagtiani has submitted that from Clauses 1 and 4 of the MoU, it becomes clear that the amount of INR 65,00,000/- was to be expended towards capex for the purposes of carrying out renovation and / or repair works on the Suit property in order to bring it to a level where it could be let out / licensed to OYO.

53. Mr. Jagtiani has submitted that the Judgment Debtors have not explained the need for further capex of INR 65,00,000/- having already expended INR 28,00,000/- towards the same purpose. He has submitted that this amount had been paid under the MoU dated 29th April, 2019. This also goes to show that the amount of

¹¹ Interim Application (L) No.10943 of 2021 decided on 13th December, 2021.



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INR 65,00,000/- contemplated under the aforementioned clauses was only to be paid if the deal with OYO was going through.

54. Mr. Jagtiani has also placed reliance upon Clause 8 of the Conducting Agreement which provides that “In case the performance is not given as per the projections given by him, the Assignee will enter into a contract with Alcott Town Planners Pvt. Ltd. and / or OYO Rooms or any other agency of their choice...”. He has submitted that admittedly, the transaction with OYO did not fructify. In these circumstances, the need to disburse the said amount of INR 65,00,000/- never arose.

55. Mr. Jagtiani has submitted that the contention of the Judgment Debtors that there is an inherent contradiction between the ‘event of default’ clauses of the MoU and the Consent Terms is misconceived.

56. Mr. Jagtiani has submitted that there is no inherent contradiction in the event of default clauses of the MoU and the Consent Terms. Under Clause 7 of the Consent Terms, the Petitioner has confirmed the aforesaid transaction and further agreed to make payment as per the understanding to Respondent No.3 under the

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MoU. Further, Clause 9 of the Consent Terms provides that, the borrower and guarantors undertake that in the event of default in payment of the stipulated amount as per these Consent Terms read with the MoU, they shall immediately peacefully vacate the entire hotel premises. Further Clause 10 of the Consent Terms, *inter alia* makes express reference to “...any of the installments of the agreed Memorandum of Understanding as per these Consent Terms...”.

57. Mr. Jagtiani has submitted that the clauses of the Consent Terms including Clause 10 which is the ‘event of default’ clause, expressly refers to the MoU. The understanding of the parties is that the categorical inclusion of the Consent Terms in the schedule to the MoU under the head ‘documentation’ leaves no manner of doubt that parties always intended for the MoU and the Consent Terms to be harmoniously read and implemented.

58. Mr. Jagtiani, has submitted that there is no contradiction between the Clause 6 of the MoU and Clause 10 of the Consent Terms as sought to be contended by the Judgment Debtors. Clause 6 of the MoU confers upon the Applicant the right to seek peaceful handover of operational possession of the Suit property from the



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Judgment Debtors, where there have been three consecutive defaults in repayment of interest and principal. He has submitted that it is indisputable that there have been in fact three consecutive defaults in the present case. This is for the reason that not a single installment, whether of interest or principal, has been paid by the Judgment Debtors since the payment of interest in the month of October, 2019.

59. Mr. Jagtiani has submitted that the requirement of 60 day notice under Clause 6 of the MoU only arises when recovery of operational possession is sought by the Applicant. The Applicant is not seeking that, owing to the fact that the Judgment Debtors voluntarily handed over operational possession of the Suit property sometime in December 2019, as evidenced by their letter dated 1st January, 2020.

60. Mr. Jagtiani has submitted that in the Execution Proceedings, the Applicant, *inter alia*, seeks the auction / sale of the Suit property in order to recover its dues, in terms of Clause 10 of the Consent Terms read with Clauses 6 and 7 of the MoU and the schedule thereto. The Applicant's right to do so does not get extinguished by virtue of the fact that operational possession has



been voluntarily handed over to the Applicant by the Judgment Debtors.

61. Mr. Jagtiani has referred to Clause 7 of the MoU by which the investor shall reserve the right to enforce the security at anytime after the default is made and no resolution of the same can be worked out within two months of the default, the property would be disposed of by following due process of law.

62. Mr. Jagtiani has submitted that Clause 7 of the MoU does not contemplate three consecutive defaults. Further, there is nothing in the MoU to suggest that the word ‘default’ means three consecutive defaults. He has submitted that the language of Clause 10 of the Consent Terms to the extent it says “...in the event of default in payment of any of the installments of the agreed MoU as per these Consent Terms...” must be read not only in light of Clause 6 of the MoU but also in light of Clause 7 thereof.

63. Mr. Jagtiani has submitted that it is abundantly clear that the Applicant seeks execution of the Consent Terms for the purposes of seeking recovery of its dues to the tune of INR 14.72 Crores (approximately) in terms of Clause 10 of the Consent Terms read



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with Clauses 6 and 7 of the MoU and schedule thereto.

64. Mr. Jagtiani has submitted that there is default on the part of the Judgment Debtors which subsists even upon expiry of the moratorium period under the MoU. He has submitted that the moratorium in respect of interest expired on 30th September, 2019, i.e. six months from the date of the MoU. Accordingly, interest was payable for the month of October, 2019 and onwards. He has submitted that moratorium in respect of the repayment of the principal amount expired on 31st March, 2021 i.e. 24 months from the date of the MoU. An amount of INR 19.50 lakhs was paid by the Judgment Debtors towards interest for the month of October, 2019. Besides this, no payment has been made, whether towards interest or towards repayment of principal. He has accordingly, submitted that therefore there have been more than three consecutive defaults.

65. Mr. Jagtiani has submitted that the only remedy available to a party to a Consent Decree, who wishes not to be bound by it, is to make an appropriate application to the Court which recorded the compromise. He has placed reliance upon the judgment of the Supreme Court in *Pushpa Devi Bhagat (Supra)*. He has

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submitted that the Judgment Debtors cannot express their unwillingness to be bound by the Consent Terms before the Executing Court.

66. Mr. Jagtiani has submitted that in order for there to be novation, there must be ‘complete substitution’ of the old contract by a new one. He has placed reliance upon the judgment of the Supreme Court in *Lata Construction and Anr. (Supra)*. He has submitted that the second Consent Terms pertain to a further loan of INR 2 Crore. This amount was sought by the Judgment Debtor from the Applicant in order to settle his dispute with one Abdul Wahab of A W Hospitality (“Wahab”). Wahab had paid the Judgment Debtors INR 2 Crores towards an interest free Security Deposit, in terms of a MoU dated 29th April, 2019. He has submitted that out of which a sum of INR 28 lakhs was to be utilized towards capex for the purposes of refurbishment of the Suit property and towards renewal of licenses.

67. Mr. Jagtiani has submitted that the Judgment Debtors have not explained the need for further capex of INR 65 lakhs having already expended INR 28 lakhs towards the same purpose. This further goes to show that the amount of INR 65 lakhs contemplated



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under Clause 1 read with Clause 4 of the MoU was only to be paid if the deal with OYO was going through.

68. Mr. Jagtiani has submitted that the ambit of the second Consent Terms has been expressly spelt out after Clause 9 thereof and which provides that “The only purpose of the loan is to discharge Mr. Pradip S. Dixit obligation for payment of Rs.2 Crore as interest free refundable deposit to Mr. Abdul Wahab Amir Shaikh against the cancellation of Service provide MoU with him dated 29th April, 2019”. He has submitted that this is a classic case of commercial dishonesty and cheating by the Judgment Debtors, by unjustly enriching themselves by accepting a payment to the tune of INR 2 Crores, on or before 28th April, 2019, whereby out of this INR 2 Crores, INR 1.72 Crores was towards a security deposit as well as capex amount whereas INR 28 lakhs was paid to the Judgment Debtors on signing of this document for repair, renovation and renewal of all licenses, electrical and water connection for the premises. Despite which the Judgment Debtor illegally demanded INR 65 lakhs in June, 2019.

69. Mr. Jagtiani has submitted that the “only purpose” of the



second Consent Terms does not align with that of the first Consent Terms. Accordingly, Clause 9 of the second Consent Terms, by no means, can be said to ‘completely substitute’ the first Consent Terms.

70. Mr. Jagtiani has submitted that the second Consent Terms nevertheless do provide, at Clause 9 thereof, for auction / sale of the Suit property, in the event there is “...no resolution to Malvika Herbopharma loans...”. He has submitted that the sale in execution of a decree is to be mandatorily carried out by this Court in accordance with Order XXI Rule 64 to 73 of the CPC. He has placed reliance upon the judgment in ***K. Sankaranarayana Pillai Vs. S.P. Sankara Iyer***¹² at paragraphs 8 – 10, wherein the Division Bench has held that although Rule 64 refers, in terms to ‘attached property’, this would apply to sales of any immovable property in public auction by Court.

71. Mr. Jagtiani has submitted that valuation of the Suit property has already been carried out by Mr. Shetgiri and Associates pursuant to the Order dated 1st October, 2024 passed by this Court. The Applicant is now pressing for further orders, in terms of prayer Clauses (b) and (c) of the captioned Interim Application as well as

¹² 1953 SCC OnLine Ker 74.



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for leave, under Order XXI Rule 72 of the CPC, to participate in the auction for the sale of the Suit property.

72. Mr. Jagtiani has submitted that Clause 10 of the Consent Terms *inter alia* grants liberty to the Applicant “...to take all necessary steps for enforcement of the security and all actions for recovering its entire amount due and the Borrower and guarantors shall not raise any objection or protest to such actions...”. He has submitted that the Applicant under Clause 10 is free to initiate any proceedings for the purposes of recovering its outstanding dues, so long as such proceedings are in accordance with law. He has submitted that accordingly, the Applicant has filed Suit No.104 of 2021 before this Court seeking foreclosure of mortgage, wherein, the Judgment Debtors have also filed their Written Statement on 8th October, 2021. The Applicant has undertaken to withdraw the said Suit, in view of having elected to recover its dues by the captioned Interim Application. He has placed reliance upon Section 47 of the CPC, sub-section (1) of which, *inter alia*, provides that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate Suit. He has in this context placed reliance upon the judgment of the



Supreme Court in *Pradeep Mehra Vs. Harijivan J. Jethwa*¹³ at paragraphs 10 – 20.

73. Mr. Jagtiani has submitted that the Suit No.104 of 2021 (Mortgage Suit) was filed by the Applicant on 19th December, 2019. The Second Consent Terms were executed on 25th December, 2019, 6 days after the filing of the Mortgage Suit. Clause 7 of the Consent Terms contains an undertaking of the Applicant to withdraw all court cases and police complaints on execution of this document against Mr. Pradip Dixit and his family members. The Applicant intends on abiding by its undertaking given to this Court and which has been reiterated in the course of oral submission. It is by reason of this undertaking that the Applicant has not even moved the Mortgage Suit.

74. Mr. Jagtiani has submitted that assuming arguendo, that the Applicant elected to file the Mortgage Suit, in terms of Section 39 of the Contract Act, and thereby lost its sight to institute these proceedings, the aforementioned undertaking, which forms part of ‘consent terms’ between the parties, i.e. the second Consent Terms necessarily nullifies any such election.

¹³ 2023 SCC OnLine SC 1395.



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75. Mr. Jagtiani has submitted that the Applicant's failure to disclose the filing of the Mortgage Suit in the captioned Application was not wilful. The Applicant did not consider, the filing thereof to be a material fact warranting disclosure in execution proceedings since the Applicant had already undertaken, under the second Consent Terms to withdraw, *inter alia*, the Mortgage Suit. He has submitted that the Applicant accepts with the benefit of hindsight that it should have disclosed the mortgage Suit for good Order and completeness.

76. Mr. Jagtiani has submitted that the Applicant repeats and reiterates that under Section 47 of the CPC, this Court, in exercise of its executory jurisdiction, is the only appropriate forum for the Applicant to receive its dues and / or seek enforcement of the first Consent Terms and recovery thereunder.

77. Mr. Jagtiani has submitted that reliance on an Order dated 5th April, 2021 passed by the learned Single Judge of this Court to contend that the Applicant is enjoined from offering the subject property for sale, which injunction has not been vacated to date is misconceived. He has submitted that the Order dated 5th April, 2021 restrains the Applicant from offering the subject property

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for sale. That is not what is sought to be achieved by these proceedings. The Applicant seeks sale of the subject property through this Court in exercise of its executory jurisdiction under *inter alia* Order XXI of the CPC. He has submitted that this mode of sale is not proscribed by the Order dated 5th April, 2021.

78. Mr. Jagtiani has submitted that the objections raised by the Judgment Debtors on the maintainability of the Execution Proceedings be rejected and the Executing Court is require to execute the First Consent Terms dated 30th March, 2019 which, by disposing of the Writ Petition No.1172 of 2019 vide Order dated 5th April, 2021, is in the form of a Consent Decree.

79. Having considered the submissions, I find much merit in the submission on behalf of the Applicant that the Order dated 5th April, 2019, which disposed of Writ Petition No.1172 of 2019 in terms of the first Consent Terms dated 30th March, 2019 is a Consent Decree and binding between the parties thereto, until and unless it is set aside. The Judgment of the Division Bench of this Court in ***Bajranglal Gangadhar Khemka (Supra)***, has held that when the Court passes a Decree, it puts its imprimatur upon those terms and makes



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the terms a rule of the Court and it would be open to the Court, before it did so, to accept an undertaking given by a party to the Court. Therefore, there is nothing contrary to any provision of the law whereby an undertaking cannot be given by a party to the Court in the Consent Decree. In the present case at Paragraph 3 of the Order dated 5th April, 2019 the Division Bench of this Court has whilst disposing of Writ Petition No.1172 of 2019 in terms of the Consent Terms accepted the undertakings given in the Consent Terms as undertakings to this Court. The first Consent Terms can only be set aside by the Judgment Debtors challenging the legality or validity of the Consent Terms which is a Consent Decree by adopting appropriate proceedings. This Court vide Order dated 5th April, 2019 having put its imprimatur of the first Consent Terms and the said Consent Terms / decree not having been set aside, their execution cannot be resisted on the ground raised by the Judgment Debtors. The reliance placed by the Applicant on ***Govind Waman Shanbhag (Supra)*** which has followed the Privy Council Judgment in ***Charles Hubert Kinch (Supra)*** is apposite.

80. I do not find merit in the contention on behalf of the Judgment Debtors that the first Consent Terms indicate that the

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parties to the Writ Petition have already settled the matter and they are merely intimating to the Court that such arrangement has been arrived at. The contention of the Judgment Debtors that there is no “satisfaction by the Court” as mandated by the provisions of Order XXIII Rule 3 of the CPC is misconceived. The Writ Court is not bound by Order XXIII Rule 3 of the CPC. The Judgment relied upon by the Applicants viz. ***Commissioner of Endowment (supra)*** at Paragraph 17 is apposite. Although the Judgment Debtors have relied upon a subsequent Judgment of the Supreme Court in ***K. Venkatachala Bhat (supra)*** to contend that the provisions of Order XXIII Rule 3 do apply to the Consent Terms which have been filed even in Writ Petition under Article 226, this Judgment came to be passed in a situation where this Court disposed of the proceedings before it in terms of a “Consent Memo” and an accompanying Affidavit which was only signed by one of the parties to the proceedings i.e. the Respondent. This is not the factual situation here. The Consent Terms have been signed by both the parties and by the Order dated 5th April, 2019 this Court has disposed of the Writ Petition No.1172 of 2019 in terms thereof. It is not open for the Judgment Debtors who are in default of the Consent Terms to speculate and suggest that the Division Bench did not apply its mind as to the lawfulness of the first Consent Terms



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before disposing of the Writ Petition.

81. Further, the contention of the Judgment Debtors that the Division Bench of this Court in accepting the Consent Terms dated 30th March, 2019 and disposing of the Writ Petition in terms thereof has not applied its mind to the MoU dated 30th March, 2019 or Deed of Assignment dated 31st March, 2019 is also misconceived. The Judgment Debtors have in their Reply to the Interim Application filed in the above Execution Application, admitted that the Consent Terms came to be filed based on the above documents which are the MoU dated 30th March, 2019 and the Assignment Agreement dated 31st March, 2019. Further, at Paragraph 17 of the Judgment Debtors' Reply, the non payment of INR 65 Lakh has been stated to be nothing but a serious breach of the MoU which forms a part of the Consent Terms. In view of the Judgment Debtors' admission, it would not be open to them to raise the above contention that this Court had not applied its mind to the MoU or the Deed of Assignment.

82. The Consent Terms at Clauses 7, 9 and 10 have also referred to the MoU and hence the MoU is incorporated in the Consent Terms by reference. The parties have also acted on the

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premise that they were executing the MoU and provided the repayment schedule in the form of Annexure to the Agreement dated 21st May, 2019 ("Conducting Agreement"). The Conducting Agreement also refers to the MoU at Clause 4 thereof. Recital G of the Conducting Agreement defines the term "Loan Amount" as being the amount of INR 11.85 Crores. This has also been confirmed by the Judgment Debtors in the repayment schedule furnished by them in compliance with their obligations under Clause 8 of the MoU. Thus, the material understanding between the parties under the MoU has been duly acted upon by them. I find from the plain language of the MoU and the Consent Terms as well as the Judgment Debtors' pleadings that the MoU forms an integral part of the Consent Terms. Without the MOU, the Consent Terms cannot, in and of itself, be implemented. Accordingly, the MOU has to be read conjointly with and/or as part and parcel of the Consent Terms.

83. The Judgment Debtors have on the one hand relied upon the MoU to contend that the non payment of INR 65 Lakh and the resultant breach of Clause 1 of the MOU, render the Consent Terms incapable of execution, whilst on the other hand, they have contended that the derivative agreements referred to in the Consent



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Terms, such as the MoU, have not been "proved to the satisfaction of the Court", in terms of the Order XXIII Rule 3 of CPC.

84. The Judgment Debtors have also relied upon the Judgment of the Supreme Court in *Dwarka Prasad Agarwal (supra)* which they contend like *K. Venkatachala Bhat (supra)* is also a Bench of the three Judges of the Supreme Court and according to them holds that the Order XXIII Rule 3 of the CPC is applicable to the proceedings under Article 226 of Constitution of India. The reliance on the Judgment of the Supreme Court in *Dwarka Prasad Agarwal (supra)* is misplaced as the Supreme Court in Paragraph 35 has held that “*In terms of Section 141 of the CPC, the provisions thereof are not applicable in a Writ Proceeding. No provision of the CPC has been made applicable in terms of the rules framed by the High Court of Judicature at Nagpur...*” “*In any event the applicability of the provisions of the Code of Civil Procedure, if any, would be only with regard to the procedural and machinery provisions contained therein....*”. Accordingly, it follows that Order XXIII Rule 3 of the CPC cannot as an absolute proposition be said to bind the Writ Court as alleged.

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85. I also do not find any merit in the contention on behalf of the Judgment Debtors that in view of the Applicant having defaulted in payment of the capex amount of INR 65 Lakh, the Applicant cannot seek execution of the Consent Terms. It is evident from the MoU that the obligation to make payment of INR 65 Lakh arises thereunder. Non-payment thereof would, at best, entitle the Judgment Debtors to file a suit seeking specific performance of the MoU. Instead of filing a Suit, the Judgment Debtors filed S.C. Suit No. 2453 of 2019 before the City Civil Court seeking an injunction from being dispossessed from the Suit Property. This is in view of the Judgment Debtors having cancelled the MoU vide Letter dated 4th September, 2019. The stated basis, in the Letter dated 4th September 2019, to seek cancellation/revocation of the MoU, was the non-payment of the amount of INR 65 Lakh. The Suit premised on the Applicant's non-payment of the amount of INR 65 Lakh came to be disposed of by the Consent Terms dated 25th December 2019 ("2nd Consent Terms"). Having opted not to include any payment terms in respect of the amount of INR 65 Lakh in the 2nd Consent Terms, which disposed of the proceedings where the cause of action was expressly stated to be the non-payment thereof, the Judgment Debtors cannot be heard to contend that such non-payment comes in



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the way of the execution of the first Consent Terms. The Applicant, by virtue of, admittedly, being the assignee of the debt of INR 11.85 Crores, is well within its right to recover the same. The Judgments relied upon by the Applicants in this context are apposite. The failure to advance INR 65 lakh does not discharge the debt of INR 11.85 Crores. The Applicant stepped into the shoes of DNS Bank as Assignee of the Debt solely in view of the Judgment Debtors representations to the effect that the Suit Property would be let out to OYO Rooms and / or Alcott Town Planners Pvt. Ltd ("OYO"). The MoU appears to have been executed with this understanding in mind.

86. The transaction with OYO did not fructify. The Judgment Debtors have cited "financial unfeasibility" and "high capex requirement" as the reasons for the same. Thus the circumstance for payment of the amount of INR 65 Lakh never arose.

87. Having perused the "event of default" clauses of the MoU and the Consent Terms, I do not find that there is any "inherent contradiction" as contended by the Judgment Debtors. The relevant clauses of the MoU viz. Clause 6 and Clause 7 have to be read accordingly. Clause 6 of the MoU confers upon the Applicants the

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right to seek peaceful handover of operational possession of the Suit Property from the Judgment Debtors, where there have been 3 consecutive defaults in repayment of interest and principal. The requirement of the 60 days notice under Clause 6 of the MoU only arises when recovery of operational possession is sought by the Applicant. The Applicant is not seeking such recovery, owing to the fact that the Judgment Debtors have voluntarily handed over operational possession of the Suit Property sometime in December 2019, as evinced by their Letter dated 1st January, 2020. Whereas Clause 7 of the MoU reserves the right of the Investor to enforce the security at anytime after the default is made and where no resolution of the same can be worked out within 2 months of the default, the property will be disposed off by following due process of law. Clause 7 of the MoU does not contemplate 3 consecutive defaults.

88. Further, the language of Clause 10 of the Consent Terms to the extent it says "...in the event of default in payment of any of the installments of the agreed Memorandum of Understanding as per these consent terms...", must be read not only in light of Clause 6 of the MoU, but also in light of Clause 7 thereof. The Applicant's right to seek execution of the Consent Terms does not get extinguished by



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virtue of the fact that operational possession has been voluntarily handed over to the Applicant by the Judgment Debtors. In the present case it is abundantly clear that the Applicant seeks execution of the Consent Terms for the purposes of seeking recovery of its dues to the tune of INR 14.72 Crores (approx.) in terms of Clause 10 of the Consent Terms read with Clauses 6 and 7 of the MoU and the Schedule thereto.

89. I find much merit in submission on behalf of the Applicants that the event of default subsists even upon expiry of the moratorium period under the MoU. As per the Repayment Schedule under the MoU there is:

(i) a moratorium for 6 months on the payment of interest (which monthly interest is to be added to the principal every month for these 6 months); and

(ii) a moratorium for 24 months on the repayment of the principal amount, after which, repayment of the outstanding is to be made within 84 months.

90. The moratorium in respect of interest expired on 30th

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September 2019 i.e. 6 months from the date of the MoU. Accordingly, interest was payable for the month of October 2019 and onwards. Whereas the moratorium in respect of repayment of the principal amount expired on 31st March 2021 i.e. 24 months from the date of the MoU. The Judgment Debtors paid an amount of INR 19.50 Lakhs towards interest for the month of October 2019. Besides this, no payment has been made, either towards interest or towards repayment of principal. Accordingly, it is evident that there has been more than 3 consecutive defaults.

91. The contention of the Judgment Debtors that the Consent Terms have been novated by the second Consent Terms is misconceived. The remedy available to a party to a Consent Decree, who wishes not to be bound by it, is to make an appropriate application to the Court which records the compromise. This has been held by the Supreme Court in ***Pushpa Devi Bhagat Vs. Rajinder Singh & Ors. (supra)*** relied upon by the Applicants. The Judgment Debtors cannot express their unwillingness to be bound by the Consent Terms before the Executing Court. In order for there to be novation, there must be "complete substitution" of the old contract by a new one. This has been held in ***Lata Construction & Anr. (supra)***.



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The second Consent Terms pertain to a further loan of INR 2 Crores which amount had been sought by the Judgment Debtors from the Applicant in order to settle their dispute with one Abdul Wahab of A. W. Hospitality ("Wahab"). Wahab had paid the Judgment Debtor INR 2 Crores towards an interest-free Security Deposit in terms of the MoU. Out of this amount, INR 28 Lakhs was to be utilized towards capex for the purposes of refurbishment of the Suit Property and towards renewal of licenses. The ambit of the second Consent Terms has been expressly spelt out after Clause 9 and which provides "The only purpose of the loan is to discharge Mr. Pradip S. Dixit obligation for payment of Rs. 2 crore as interest free refundable deposit to Mr. Abdul Wahab Amir Shaikh against the cancellation of Service Provider MoU with him dated 29th April 2019."

92. I find much merit in the submission on behalf of the Applicant that the Judgment Debtors inspite of enriching themselves by accepting a payment to the tune of INR 2 Crores, on or before 28th April, 2019, whereby out of INR 2 Crores, INR 1.72 Crores was towards a security deposit as well as capex amount of INR 28 Lakh was paid to the Judgment Debtors, the Judgment Debtors have made a demand of INR 65 Lakh in June 2019.



93. The "only purpose" of the second Consent Terms does not align with that of the Consent Terms. Accordingly, Clause 9 of the 2nd Consent Terms, by no means, can be said to "completely substitute" the Consent Terms.

94. It is the contention of the Judgment Debtors that the second Consent Terms provides at Clause 9 for auction / sale of the Suit Property, in the event there is "...no resolution to Malvika Herbopharma loans..." and hence the auction / sale of the subject property is only provided in the second Consent Terms. This contention overlooks the fact that the Execution Application and Interim Application taken out therein is for sale of the Suit property in execution of a Decree which is to be mandatorily carried out by the Executing Court in accordance with Order XXI Rules 64 to 73 of the CPC. Order XXI Rule 65 of the CPC mandates the executing Court to carry out "every" sale in execution of a decree by way of a public auction. In ***K. Sankaranarayana Pillai (supra)*** relied upon by the Applicants, the Division Bench of the Travancore-Cochin High Court in the context of Order XXI Rule 64 refers, in terms, to 'attached property', which has been held to apply to sales of any immovable property in public auction by the Court. The Applicants have in their



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Interim Application pressed for prayer Clauses (b) and (c) as well as for leave, under Order XXI Rule 72 of the CPC, to participate in the auction for the sale of the Suit Property. The valuation of the Suit property has already been carried out by M/s Shetgiri & Associates pursuant to Order dated 1st October 2024 passed by this Court.

95. I do not find any merit in the contention on behalf of the Judgment Debtors that the Applicant's only remedy for default of the Consent Terms is a Suit for foreclosure of mortgage. A plain reading of Clause 10 of the Consent Terms makes it clear that the Applicant is free to initiate any proceedings for the purposes of recovering its outstanding dues, so long as such proceedings are in accordance with law. The Applicant had filed Suit No.104 of 2021 before this Court seeking foreclosure of mortgage. The Judgment Debtors have also filed their Written Statement on 8th October, 2021. The Applicant undertakes to withdraw the said Suit in view of having elected to recover its dues by the captioned Application. Section 47 of the CPC, sub-section (1) *inter alia* provides that all questions relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate Suit. This has been held by the Supreme Court in ***Pradeep Mehra v.***

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Harijivan J. Jethwa (supra) relied upon by the Applicant. The Judgment Debtors have contended that the Applicant has elected to file the Suit for foreclosure of mortgage and thus, have exercised its choice by filing the Commercial Suit (L) No.1374 of 2019 on 19th December, 2019 prior to the Execution Application (L) No.17358 of 2023, filed on 27th June, 2023.

96. It is the contention of the Judgment Debtors that the Applicant having taken steps for execution of the security and action for recovery of the entire amount due, by filing the above Suit, it would not be open for the Applicant to file the present Execution Application. I find this contention to be misconceived. Section 47 of the CPC as aforementioned is available to the Applicant and this Court is entitled to exercise its executory jurisdiction being the only appropriate forum for the Applicant to receive its dues and / or seek enforcement of the first Consent Terms and recovery thereof. Although the Applicant has failed to disclose the filing of the mortgaged Suit in the captioned Application, I find that such non-disclosure is not willful. The Applicant has accepted with the benefit of hindsight that it should have disclosed the mortgaged Suit for good order and completeness. In any event, as held by the Supreme



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Court in *Pradeep Mehra (supra)* all questions relating to execution, discharge or satisfaction of the Decree shall be determined by the Court executing the Decree in terms of Section 47 of the CPC and not by a separate Suit.

97. The Judgment Debtors' reliance on Order dated 5th April, 2021 passed by the learned Single Judge of this Court to contend that the Applicant is enjoined from offering the Suit property for sale, which injunction has not been vacated to date, is misplaced. The Order dated 5th April, 2021 restrains the Applicant from offering the Suit property for Sale. The injunction order cannot be read as restraining the Applicant from seeking sale of the Suit property through this Court in exercise of its executory jurisdiction under, *inter alia*, Order XXI of the CPC. This mode of sale is not proscribed by the Order dated 5th April, 2021.

98. Accordingly, I do not find any merit in the preliminary objections raised by the Judgment Debtors to the maintainability of the above Execution Application and Interim Application taken out therein.

99. The preliminary objections raised by the Judgment



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Debtors are decided against them. The Applicants are entitled to pursue the Execution Proceedings. They are at liberty to move the Interim Application in the Execution Application and which shall be taken up by the Executing Court.

[R.I. CHAGLA J.]