

# Rentworks India Pvt. Ltd vs Small Industries Development Bank Of ... on 21 February, 2014

**Author: S.C. Gupte**

**Bench: S.C. Gupte**

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

NOTICE OF MOTION NO.2010 OF 2011  
IN  
SUIT NO. 647 OF 2011

Rentworks India Pvt. Ltd.	...Plaintiff
vs	
Small Industries Development Bank of India	...Defendant.

.....  
Mr Janak Dwarkadas Sr. Counsel with Mr Astad Randeria, Mr Girish Dave, Mr  
Hussain Somji i/b Dave & Girish & Co. for the Plaintiff.  
Mr Sanjay Punalekar with Mr. Madhur Rai i/b PRS Legal for for Defendant.  
.....

CORAM : S.C. GUPTE, J.

Date of reserving the order : 28/01/2014  
Date of pronouncing the order : 21/02/2014

JUDGMENT :

The question in the present Notice of Motion is, whether, having regard to the Plaintiff's case in the suit herein as noted below, the Defendant should be restrained by a temporary injunction (a) from prosecuting its Original Application pending in the DRT at the date of the present suit against the Plaintiff and (b) from taking any step under and/or relying upon the Deed of Indemnity and the Deed of Hypothecation, of which cancellation is sought by the Plaintiff in the present suit.

2. The Plaintiff provided some equipment on lease to Subhiksha Trading Services Pvt. Ltd. ('Subhiksha') under a Master Rental Agreement ('MRA') for a lease rent and on terms and conditions set out therein. The MRA inter alia provided that at the end of the lease period the equipment was to be DIK 2/32 nms.2010.2011 returned to the Plaintiff. The MRA also provided that in the event of default by Subhiksha in payment of rent the Plaintiff had the right to repossess the equipment. During the subsistence of the MRA, the Plaintiff and Defendant entered into a Sale of Receivables Agreement ('SRA') under which the receivables from Subhiksha were assigned to the Defendant together with all legal, equitable and beneficial right, title and interest thereto at or for a discounted price. Under the SRA, in the event of default by Subhiksha, the Defendant was to exercise the rights of the Plaintiff under the MRA or instruct the Plaintiff to take action against Subhiksha. Along with the SRA, the Plaintiff also executed a Deed of Hypothecation, a Deed of Indemnity, a Tax Undertaking and a Power of Attorney in favour of the Defendant to act against Subhiksha in the event of default by the latter in payment of lease rentals. Terms of some of these documents, which are relevant to the present Notice of Motion, will be discussed later.

3. Subhiksha defaulted in payment of lease rentals. The Defendant sent notices to Subhiksha and the Plaintiff demanding payment of unpaid lease rentals. The Defendant filed an Original Application (being O.A. No. 101 of 2011) in the Debts Recovery Tribunal ('OA') against Subhiksha and the Plaintiff for recovery of unpaid lease rentals amounting to approximately Rs.8,49,09,848/-

together with interest. The OA was filed in December 2010, but the Summons was served on the Plaintiff in June 2011.

4. In February 2011, the Plaintiff filed the present Suit praying inter alia for cancellation of the Deed of Indemnity, Deed of Hypothecation and Tax DIK 3/32 nms.2010.2011 Undertaking. The present Notice of Motion is taken out in the suit for restraining the Defendant from (i) relying on the documents of which cancellation is sought in the suit and (ii) prosecuting the OA against the Plaintiff. The orders of a learned Single Judge of this court refusing the ad-interim relief claimed and of the Division Bench in appeal directing the Plaintiff to seek appropriate reliefs from the DRT, were carried in an SLP before the Supreme Court. The Supreme Court, by its order dated 20 November 2012, directed the Single Judge of this court to decide the Notice of Motion expeditiously and uninfluenced by the observations of the Division Bench. That is how the Motion has been argued before me.

5. Mr Dwarkadas, the learned Senior Counsel appearing for the Plaintiff, submits that upon assignment of the receivables from Subhiksha, the Defendant has no recourse to the Plaintiff for recovery of the receivables. The Deed of Indemnity executed by the Plaintiff indemnifies the Defendant in certain contingencies which have not arisen. It is contended by Mr Dwarkadas that the Defendant having already terminated the MRA by reason of the default of Subhiksha, the Deed of Indemnity has become infructuous and cannot be enforced. Mr Dwarkadas submits that the Deed of Hypothecation is not supported by consideration since there is no debt owed by the Plaintiff to the Defendant. It is the case of the Plaintiff that in the premises, the Deeds of Indemnity and Hypothecation are liable to be cancelled. It is contended by Counsel that this court is the only appropriate court to grant the relief of cancellation, since DRT has no jurisdiction to do so, and in the interregnum, the Defendant must be restrained from relying upon the Deeds. Mr. Dwarkadas DIK 4/32 nms.2010.2011 contends that in the facts of the case, this court ought to stay the proceedings in the OA against the Plaintiff. He relies upon the decisions in the cases of Nahar Industrial Enterprises Ltd. vs. Hong Kong & Shanghai Banking Corporation<sup>1</sup>, Oil and Natural Gas Commission vs. Western Company of North America<sup>2</sup>, Kumarappan Chettiar vs. Narayanan Chettiar<sup>3</sup>, and Ramaswami Chettiar vs. Sundara Reddiar<sup>4</sup>.

6. Mr Punalekar, the learned Counsel appearing for the Defendant, submits that the temporary injunction claimed herein, namely, for stay of the OA, cannot be granted under Order XXXIX Rule 1 or 2 of the Code of Civil Procedure. He submits that there is no inherent power in the court either to stay the proceedings of the OA. The learned Counsel submits that there is no injury to be caused to the Plaintiff, if the OA is heard, since all the submissions advanced here can very well be made before the DRT. The learned Counsel submits that the documents executed by the parties would indicate that Subhiksha was the principal borrower of the Defendant and the Plaintiff was the guarantor of Subhiksha's debt. The Defendant had the right to proceed under the Recovery of Debts Due to Banks Act, ('RDDDB Act') against both Subhiksha and the Plaintiff. The Counsel submits that RDDDB Act superseded all laws including Section 151 of the Code of Civil Procedure and this court cannot stay the proceedings of the OA before the DRT.

7. The relevant terms of the documents referred to above may now be 1 (2009) 8 SCC 646 2 AIR 1987 SC 674 3 AIR 1917 Madras 492 4 AIR 1914 Madras 684 DIK 5/32 nms.2010.2011 noted.

Master Rent Agreement ('MRA'):

Clause 2 of the MRA provided for renting of equipment by Subhiksha based on a Rental Schedule. Under Clause 3, the rental term commenced on the first payment date as specified and continued for the number of months specified in the applicable Rental Schedule. Subhiksha's obligation to pay rent was provided in clause 4. Under clause 9, payment of all rental installments on time was a fundamental and essential term of the MRA. Clause 11 provided that if there was a breach of any essential term provided in clause 9, the Plaintiff could give notice to terminate the renting of all equipment then being rented under the MRA or in its sole discretion only with respect to the equipment rented in terms of the particular Rental Schedule ( for which breach is committed). The consequence of such termination was provided

under Clause 11.3 as follows:

"11.3 If we terminate the renting of any Equipment under clause 11.1 or 11.2, you must immediately:

(a) return the Equipment to us at a place specified by us;

(b) pay to us all moneys then due and payable under this Agreement;

(c) pay to us as liquidated damages equal to the aggregate amount of all future rentals payable under this Agreement computed on a present value basis at the rate mentioned in DIK 6/32 nms.2010.2011 the rental schedule for such asset;

(d) pay to us any early repayment or other break costs (upto 2 % of the moneys due under clause 11.3 (b) and (c) incurred by us or a secured or financing party or the owner of the Equipment in pre-paying any funding arrangements in connection with the purchase and renting of the Equipment to you."

Clause 13.1 provided for return of equipment in the following terms:

"13.1 At the expiration or earlier termination of the renting of the Equipment you will at your expense deliver the Equipment in good working order and condition, packed and crated in such manner to avoid any damage/ loss to the Equipment during transportation, to our nominated place."

Clause 17 provided for the end of the term as follows:

"17. End of Term:

17.1 At the conclusion of the Term, you may either return the Equipment or request us under clause 22 to agree to extend the Term or vary the Equipment rented. You must in either case give us written notice of your intention at least 90 Business Days prior to the expiry of this Agreement. If you do not give us written notice within the above-mentioned period you agree that, unless we otherwise notify you in writing, the Term will be automatically extended for a further term of twelve (12) months."

(Note : MRA is a document executed between the Plaintiff and Subhiksha. The Plaintiff is designated as 'we' or its grammatical variations, whereas Subhiksha is referred to as 'you' or its variations.) DIK 7/32 nms.2010.2011 Sale of Receivable Agreement ('SRA') :

'Receivables' and 'Rental Agreement' were defined as follows:

"Receivables" means, in relation to a Rental Agreement, all the present and future right, title and interest of the Company in the Rental Payments under that Rental

Agreement, including, without any limitation whatsoever, the right, title and interest of the Company to receive Rental Payments.

"Rental Agreement" means the Rent Works terms and conditions for rental agreements authorized by SIDBI in respect of the rental of certain equipment from the Company to a Renter together with the Rental Schedule for each item of equipment.

Clause 2 provided for sale of receivables. Sub-clauses 2.3 and 2.4 contained the following terms:

### 2.3 Sale of Receivables.

(a) In consideration of SIDBI making payment of the Purchase Price to the Company at the time of execution of deed (due receipt of which the Company hereby acknowledges) and in consideration of the mutual covenants hereinafter stated, the Company, does hereby grant, transfer and assign unto and to the use of SIDBI all the legal, equitable and beneficial right, title and interest in the Receivables together with the Underlying Security, being the Equipment given on hire to the Renter under the Rental Agreement, the Receivables of which are, or in future would be, lawfully due and owing to the Company from the Renter, together with all interest due thereon and all other amounts payable to the Company under the Rental Agreement and together with the documents and papers evidencing the Rental Agreement, the Receivables and the Underlying Security in favour of SIDBI and to have and to receive and appropriate them for the SIDBI's absolute use and benefit with absolute power, authority and liberty to SIDBI to enforce payment thereof by suit or otherwise.

(b) It is the express understanding of the Parties that the Purchase Price is sufficient, adequate and the only consideration for this Sale of Receivables.

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### 2.4 Company to act as Servicing and Security Agent

(a) In consideration of the Sale and Purchase of Receivables

contemplated herein the Company shall function as the Servicing and Security Agent

for and on behalf of SIDBI to enforce the Underlying Security on behalf of SIDBI, on the instructions given by SIDBI, in case of defaults;

(b) The Company ( in its capacity as the Servicing the Security Agent) shall, on receipt of written instructions from SIDBI and at the cost and expense of the Company enforce the Underlying Security, being the Equipment given on hire to the Renter, by way of repossession of the Equipment given on hire and consequent sale thereof with the prior consent of SIDBI, irrespective of the fact that the Company per se may not have any other reason to terminate the Rental Agreement;

(c) All amounts realised by the Company (in its capacity as Servicing and Security Agent) on enforcement of the Underlying Security under and pursuant to this Agreement shall be held in trust for and on behalf of SIDBI and shall immediately and without delay be paid to SIDBI;

(d) The Company ( in its capacity as the Servicing and Security Agent) may without limitation, take and enforce any action whether by way of suit, petition, application including enforcement of the security in any court of law, tribunal or other authority, as also to initiate proceedings against the Renters for repossession of the rented Equipment and to prefer any appeal, revision or any other proceedings in higher court or tribunal against any other, award or decree or procurement by any court, authority or tribunal or any other authority and to withdraw any suit or other legal proceedings as aforesaid and to settle the same whether in or out of court as SIDBI may consider appropriate, engage any lawyer, counsel or any other professional experts in any court of law or before any arbitrator or authority;

(e) The Company ( in its capacity as the Servicing and Security Agent) warrants to exercise due diligence and the same degree of care while enforcing the Underlying Security as the Servicing and Security Agent does with respect to enforcing Underlying Security given to it;

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(f) The Company agrees and undertakes that any sale proceeds or

Equipment received by the Company and/or any insurance monies received by the Company shall be held as the SIDBI's exclusive property specifically appropriated to this security:"

Clause 3.2 provided as follows:

### 3.2 No Recourse to the Company.

Without prejudice to the obligations of the Company expressed in this Agreement / Letter of Intent/ Deed of Indemnity and other Transaction Documents or as constructive trustee of any Receivables, the Company will not be liable to compensate SIDBI by way of damages or on any other basis for any loss or costs incurred by SIDBI;

(a) In collecting or attempting to collect or in failing to receive, any Rental Payments sold to SIDBI; and

(b) In enforcing or attempting to enforce any Receivables sold to SIDBI"

Clause 5 provided further contingency of an default by the Renter. Clauses 5.2, 5.3, 5.4 and 5.5, which are relevant for our purposes are as follows:

5.2 SIDBI's Remedies Without prejudice to any other rights of SIDBI, on the occurrence of a default or an event of default ( howsoever described) under a Rental Agreement in respect of the Receivables which have been sold to SIDBI, the SIDBI may in its absolute discretion;

(a) (SIDBI exercises remedies) exercise any one or more of the Company's powers or remedies by which the Company can recover the Receivables; or

(b) (company exercises remedies) by notice in writing require the DIK 10/32 nms.2010.2011 Company to exercise any one or more of the Company's powers or remedies by which the Company can recover the Receivables"

5.3 Power of Attorney In consideration of the Financer purchasing the Receivables upon the terms and conditions set out therein at the request of the Company, the Company hereby unconditionally and irrevocably authorizes and empowers the Financer to sign, execute and deliver any deeds or deed of assignment so as to complete the assignment of the Receivables as provided under this Agreement as also to exercise all or any of the powers, remedies of the Company by which the Company is entitled to recover Receivables from the Renters as provided in the Rental Agreements and agrees to sign, execute and deliver in favour of the Financer one or more power(s) of attorney as may be required by the Financer to authorize the Financer to do all or any of the aforesaid acts, deeds and things.

### 5.4 Right of SIDBI.

The company may, in the event of default and after written approval of SIDBI, without prejudice to any other of its other rights thereunder.

(a) By notice in writing terminate the Rental agreement and the rental of the Equipment created thereby thereupon, or upon the termination of the hire by

effluxion of time, as the case may be, the renter shall forthwith deliver the equipment at its own expense to the Company and in accordance with any directions given by the company, and in default thereof the company repossesses and retake the Equipment;

(b) Recover liquidated damages equal to the aggregate amount of all future rental payments under Master Rental Agreement;

(c) Recover any early repayment or other break costs incurred by SIDBi with respect to a pre-payment of any funding arrangements in connection with the purchase and renting of the equipment;

Neither party is permitted to disclose any confidential information about the other without the consent of the other unless;

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(a) that information has become publicly available; or

(b) disclosure is required by law; or

(c) disclosure is to any other party providing finance or assuming any

credit risk or participating in the funding of the Equipment or its Agreement; or

(d) to any party SIDBI may assign any of our rights, benefits or obligations hereunder;"

5.5 Company's Remedies On the occurrence of an event of default under a Rental Agreement other than in relation to the obligation of the Renter to return the equipment, the Company may not exercise any of its rights and remedies under a Rental Agreement or any Collateral Security without the prior written consent of SIDBI, which consent must not be unreasonably withheld"

Clause 8 provided for the Plaintiff's right of assignment in the following terms:



## 8. ASSIGNMENT.

8.1 The Company may, with the prior approval of SIDBI in writing, assign or otherwise transfer to a third party and/or to a related corporation ( as defined in the Corporation Law) all or any of its rights and obligations vis-a-vis the ownership and/or any other residual rights available to the company, other than the rights assigned to SIDBI on the Equipment rented to any Renter. In such an event the company shall ensure that the said assignment/ transfer of such rights and obligations shall step into the shoes of the Company and shall strictly adhere and abide by the obligation and duties which the company had agreed to with SIDBI as if the said assignee/ transferee had been a party to the agreement and the Company shall not be released from its obligations till such time the obligation to SIDBI are met;

8.2 SIDBI agrees that in such an event SIDBI shall within a reasonable

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period inform the Company about the SIDBI's consent and/or views;

8.3 If the Assignee/ Transferee fail to adhere to the terms and conditions of the agreement so far as it relates to SIDBI, notwithstanding anything contained anywhere, SIDBI shall have the right forthwith to rescind the contract and demand the dues from the Company".

(Note : SRA is a document executed between the Plaintiff and the Defendant, who are respectively referred to as 'Company' and 'SIDBI' therein.) Deed of Hypothecation:

Recitals 3 and 5 of the Deed of Hypothecation provided as follows;

3. SIDBI, inter alia, by a letter of Intent dated 27/09/2007/ Sale of Receivables Agreement ( with the Underlying Securities) dated 01/11/2007 has agreed to acquire from the Company the Rentals receivable under the Master Rental Agreement, for a consideration of Rs.750 Lakh ( to be paid in on one or more tranches) together with the underlying securities ( being the said receivables and the interest, title and ownership resting with the Company on the Equipment rented by the Company to the Renter) both present and future, or any addition or substitution thereafter as covered under the Master Rental Agreement (hereinafter referred to as "the said assignment Transaction"). The said Letter of Intent, Sale of Receivable Agreement and other transaction documents executed/ agreed to be executed by the Company in

favour of SIDBI are hereinafter together referred to as the ' Transaction Documents'

5. One of the conditions of the transaction documents is that the Rentals receivable from the Renter under the Master Rental Agreement/ Sale of Receivables Agreement together with interest, further interest, liquidated damages, costs, charges, expenses and all other monies as stipulated in the said Transaction shall be secured, inter alia, by a "Exclusive/ first charge by way of hypothecation on all the Equipments including all its tools and accessories, office equipment, computers, furniture and fixtures and other movable, rented/ to be rented to the renter (including the receivables from the Renter in terms of the transaction) both present and future."

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Clause 1 provided as follows;

1. In pursuance of the said transaction documents and for the consideration aforesaid, all the Equipments including all its tools and accessories, office equipment, computers, furniture and fixtures and other movable, rented/ to be rented to the renter (including the receivables from the Renter in terms of the transaction: both present and future, whether installed or not and whether now lying loose or in cases or which are now lying or stored in or about or shall hereafter from time to time during the continuance of these presents be brought into or upon or be stored or be in or about all the Company's Renter's premises and godowns or wherever else the same may be or course of transit or on high seas or on other or delivery (hereinafter collectively referred to as "the said assets") short particulars whereof are given in the Schedule-1 hereunder written, are hereby hypothecated as and by way of a "Exclusive/ First Charge to SIDBI as a continuing security for and be charged with the repayment to SIDBI of the Rentals receivable from the Renter under the Master Rental Agreement/ Transaction documents and repayment or payment of other moneys including interest, further interest, liquidated damages, costs, charges and expenses and all other moneys due to SIDBI under the transaction documents and/or these presents (hereinafter referred to as "the said dues").

Clause 4 was in the following terms;

4. The following shall be treated as Event(s) of Default for the purpose of this Hypothecation Agreement -

- i) If the Renter fails to pay any monies to SIDBI which ought to be paid by them in terms of the Master Rental Agreement and the Transaction Documents; or
- ii) shall commit any breach of the Master Rental Agreement on their part herein contained or;
- iii) if any circumstances shall occur which in the sole judgment of the SIDBI is prejudicial to or imperils or is likely to prejudice or imperil this DIK 14/32 nms.2010.2011 security; or
- iv) if any distress or execution is levied or enforced against any of the property of the Renter or the said assets whatsoever;
- v) if any person firm or company shall take steps towards applying for or obtaining an order for the appointment of a Receiver of any of the property of the Renter or the said assets whatsoever; or
- vi) if such Receiver is appointed; or
- vii) if, an order is made or a resolution is passed for the winding up of the Renter or the company or a petition for such winding up is filed or notice of a meeting to pass such resolution is issued; or
- viii) if the Renter or the Company ceases or threatens to cease to carry on business or conduct the business to the satisfaction of SIDBI;

The decision of SIDBI as to whether any such event or default has occurred shall be final and binding on the Company."

(Note : The Plaintiff and the Defendant are respectively referred to as 'Company' and 'SIDBI' in the Deed of Hypothecation.) Deed of Indemnity:

The relevant recitals and Indemnity clause in the Deed was in the following terms:

AND WHEREAS, the Transaction documents, inter alia, provides that in the event of the Renter/ Indemnifier desiring foreclosure/ termination of restructuring of the MRA or part thereof, for any reason whatsoever, including default by the Renter, without prior written consent of SIDBI, an amount equivalent to future instalments under the MRA discounted at a rate of 2 % lesser than the discount rate applied by SIDBI (for discounting of rentals under the facility) would have to be collected by the indemnifier and paid to DIK 15/32 nms.2010.2011 SIDBI. Any excess or shortfall on this account shall be to the account of the indemnifier. Indemnifier would execute an Indemnity in favour of SIDBI in this regard.

NOW, the Indenture, in consideration of SIDBI having entered into the said Transaction and in terms of the Transaction Documents executed/to be executed by the Indemnifier in favour of SIDBI, agrees and undertakes from time to time and at all times hereafter to effectively save, defend, keep harmless and indemnified from

any against all loss, actions, liabilities and expenses, which may be made or taken or incurred by SIDBI by the reason of Renter/ Indemnifier foreclosing /terminating or restructuring the MRA or part thereof, for any reason whatsoever, including default by the Renter, without prior written consent of SIDBI"

(Note : In the Deed of Indemnity, the Plaintiff, the Defendant and Subhiksha are respectively referred to as 'Indemnifier', 'Renter' and 'SIDBI'.)

8. As noted above, Subhiksha admittedly committed default in payment of the lease rentals. A recall notice was thereupon issued to Subhiksha by the Defendant. The Defendant also issued a notice to the Plaintiff calling upon the latter to repossess the equipment, arrange for sale of the equipment and make payment to the Defendant of the sale proceeds. This notice was followed up by another demand notice calling upon the Plaintiff to make payment of all the amounts claimed by the Defendant to be due and payable by Subhiksha under the agreements executed between the parties. The Defendant also invoked the Deed of Indemnity for indemnification of the Defendant "from all loss caused to my Clients (the Defendant herein) on account of non-

performance of the pecuniary obligations caused on STSL (Subhiksha) and Surety and also on account of the loss suffered by my Clients (the Defendant herein) due to non-availability of the hypothecated equipments"

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9. The Defendant, thereafter, proceeded to file the OA referred to above impleading Subhiksha and the Plaintiff herein as party defendants. In the OA, the Defendant has applied for a Recovery Certificate for a sum of Rs.8,49,09,848/- together with interest. The said sum included dues of Subhiksha as per the recall notice and interest calculated upto the date of the OA. In the OA, the Defendant has also applied for recovery of the dues by sale of the goods hypothecated under the Deed of Hypothecation.

10. As far as the Plaintiff is concerned the OA raises inter alia the following issues:

(i) Whether, having regard to the terms of the SRA and the Deed of Indemnity, the Defendant can recover the receivables under the MRA from the Plaintiff ?; and

(ii) Whether the Defendant can have recourse to sale of hypothecated goods towards recovery of the receivables ?

11. It is the Plaintiff's case in the present suit that the Defendant cannot have any recourse to the Plaintiff at all under the SRA for recovery of the receivables. It is also the Plaintiff's case that the Plaintiff retains the ownership of the equipment rented by Subhiksha and this equipment cannot be brought to sale by the Defendant for recovery of the receivables. The Plaintiff claims that both the Deed of Indemnity and the Deed of Hypothecation are void and DIK 17/32 nms.2010.2011

unenforceable for the reasons which shall be presently discussed.

12. Let me first dispose of the preliminary point raised by the learned Counsel for the Defendant on the jurisdiction of the court to grant interim relief under Order XXXIX Rule 1 or 2. It is submitted that the temporary injunction in respect of prosecution of the OA cannot be claimed either under Rule 1 or Rule 2 of Order XXXIX. Rule 1 of Order XXXIX provides for power of the Court to grant a temporary injunction to restrain acts of a defendant of waste, damage etc. to, or dispossession or any other injury to the plaintiff in respect of, any property in dispute in the suit, or removal or disposal of any property by the defendant with a view to defrauding creditors. Rule 2, on the other hand, is for restraining any breach of contract or injury of any other kind. It is true that the injunction asked for in the present case does not fall under either of the provisions. But then, the court has an inherent power to issue temporary injunctions in cases which are not covered by the provisions of Order XXXIX of the Code of Civil Procedure.

The Supreme Court in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal<sup>5</sup> held (per Raghubar Dayal J speaking for the majority) that the court has such inherent power, observing as follows:

"19. There is nothing in O. XXXIX, rules 1 and 2, which provide specifically that a temporary injunction is not to be issued in cases which are not mentioned in those rules. The rules only provide that in circumstances mentioned in them the Court may grant a temporary injunction.

20. Further, the provisions of S. 151 of the Code make it clear that the inherent powers are not controlled by the provisions of the Code. Section 151 reads :

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make 5 AIR 1962 SC 527 DIK 18/32 nms.2010.2011 such orders as may be necessary for the ends of the justice or to prevented abuse of the process of the Court."

21. A similar question about the powers of the Court to issue a commission in the exercise of its power under s. 151 of the Code in circumstances not covered by s. 75 and Order XXVI, arose in Padam Sen v. The State of Uttar Pradesh, 1961-1 SCR 884 : (AIR SC 218), and this Court held that the Court can issue a commission in such circumstances. It observed at page 887 (of SCR) : (at p. 219 of AIR) thus :

"The inherent powers of the Court are in addition to the powers specifically conferred on the Court by the Code. They are complementary to those powers and therefore it must be held that the Court is free to exercise them for the purposes mentioned in s. 151 of the Code when the exercise of those powers is not in any way in conflict with what has been expressly provided in the Code or against the intentions of the Legislature."

These observations clearly mean that the inherent powers are not in any way controlled by the provisions of the Code as has been specifically stated in s. 151 itself. But those powers are not to be exercised when their exercise may be in conflict with what had been expressly provided in the Code or against the intentions of the Legislature. This restriction, for practical purposes, on the exercise of those powers is not because these powers are controlled by the provisions of the Code but because it should be presumed that the procedure specifically provided by the Legislature for orders in certain circumstances is dictated by the interests of justice."

13. The question then is whether such a temporary injunction should be granted in exercise of the inherent powers of this Court. The learned Counsel for the Plaintiff submits that the Plaintiff cannot seek the relief of declaration and cancellation claimed in the present suit in respect of the Deed of Indemnity and Deed of Hypothecation before the DRT. He relies upon the judgment of the Supreme Court in Nahar Industrial Enterprises case (supra) and argues that the subject matter of the present suit cannot be taken up by the DRT. The DIK 19/32 nms.2010.2011 learned counsel submits that since the present suit cannot go before the DRT whilst the DRT is seized of the same issue in the Defendant's OA, the injunction applied for is necessary to prevent multiplicity of judicial proceedings. He relies on clause (a) of Section 41 of the Specific Relief Act. On the other hand, it is submitted by the learned Counsel appearing for the Defendant that even if the DRT has no jurisdiction to grant the relief of declaration or cancellation of documents, the DRT can very well accept the Plaintiff's defence in the OA that the Deeds invoked by the Defendant in support of its claim in the OA are void or inoperative.

Secondly, it is submitted that the multiplicity of proceedings contemplated by clause (a) of Section 41 of the Specific Relief Act does not cover the present case. The learned Counsel further submits that DRT is not sub-ordinate to this Court within the meaning of clause (b) of Section 41 of the Specific Relief Act and an injunction to restrain the Defendant from prosecuting the OA pending in the DRT cannot be issued by this Court.

14. In Nahar Industrial Enterprises case (supra), the Supreme Court, relying upon the decision in Indian Bank Vs. ABS Marine Products (P) Ltd. 6, held that Sections 17 and 18 of the RDDB Act bar the Civil Court's jurisdiction only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of Civil Courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief. No one has any independent right to approach the DRT without having to wait for the bank or financial institution to approach it first. Though such a person may approach the DRT with his claim by way of a defence of set off or a counter-claim upon being 6 (2006) 5 Supreme Court Cases 72 DIK 20/32 nms.2010.2011 made a defendant in the Bank's OA, the continuance of his claim for set off or counterclaim, as the case may be, is entirely dependent on the application filed by the bank. At any rate, even in such a case the DRT cannot grant any declaratory relief to the claimant or even a decree of cancellation of any document. It is, therefore, clear that this Court has jurisdiction to entertain the Plaintiff's suit and the Plaintiff cannot be compelled to go to the DRT for redressal of its grievances. This much is clear from the law laid down by the Supreme Court in Nahar Industrial Enterprises Case (supra).

15. Nahar Industrial Enterprises case does not, however, support the Plaintiff's case for the injunction asked for. According to that case, this Court has jurisdiction to adjudicate the Plaintiff's claim in this suit, but the question is whether the DRT should be asked to stay its hands pending such adjudication by this Court. That the DRT has no jurisdiction to order cancellation of the documents relied upon by the Defendant in its OA is no ground for seeking to stay its hands. After all, it can very well consider all the grounds which can be urged in support of the case for cancellation and accept the defence of the Plaintiff to the OA.

16. But then, submits the learned Counsel for the Plaintiff, the injunction applied for is necessary for avoidance of multiplicity of proceedings.

No doubt the law seeks to avoid two parallel trials on the same issue by two Courts and recording of conflicting findings by the Courts. The provision of Section 10 of the Code of Civil Procedure seeks to achieve that very object. It protects a person from multiplicity of proceedings between the same parties by DIK 21/32 nms.2010.2011 stay of the suit instituted later subject of course to the conditions provided in that Section. Our case, admittedly, does not fall within Section 10. But apart from the provision of Section 10, there is also a jurisdiction with the Court to restrain a litigant from prosecuting a judicial proceeding. This jurisdiction may be called inherent jurisdiction vesting in the Court and it is expressly saved by Section 151 of the Code of Civil Procedure. This jurisdiction is, however, subject to limitations. These are provided by Clauses (a) and (b) of Section 41 of the Specific Relief Act, which are noted below.

"41. Injunction when refused.- An injunction cannot be granted-

(a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;

(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought."

The net result of these provisions is that the power to restrain a person from prosecuting a pending proceeding can only be exercised (i) for preventing multiplicity of proceedings and (ii) by a court superior to the court in which such proceeding is pending.

17. The Supreme Court in the case of Cotton Corporation of India Ltd. Vs. United Industrial Bank Ltd. 7 considered the provisions of Section 41(b) of the Specific Relief Act and held as follows:

7 (1983) 4 SCC 625 DIK 22/32 nms.2010.2011 "9. Viewed from a slightly different angle, it would appear that the legal system in our country envisages obtaining of redressal of wrong or relief against unjust denial thereof by approaching the court set up for the purpose and invested with power both substantive and procedural to do justice that is to grant relief against invasion or violation of legally protected interests which are jurisprudentially called rights.

If a person complaining of invasion or violation of his rights is enjoined from approaching the court set up to grant relief by an action brought by the opposite side against whom he has a claim and which he wanted to enforce through court, he would have first to defend the action establishing that he has a just claim and he cannot be restrained from approaching the court to obtain relief. A person having a legal right and complains of its violation or infringement, can approach the court and seek relief. When such person is enjoined from approaching the court, he has to vindicate the right and then when injunction is vacated, he has to approach the court for relief. In other words, he would have to go through the gamut over again : When defending against a claim of injunction the person vindicates the claim and right to enforce the same. If successful he does not get relief but a door to court which was bolted in his face is opened. Why should he be exposed to multiplicity of proceedings ? In order to avoid such a situation the Legislature enacted Section 41(b) and statutorily provided that an injunction cannot be granted to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought. Ordinarily a preventive relief by way of prohibitory injunction cannot be granted by a court with a view to restraining any person from instituting or prosecuting any proceeding and this is subject to one exception enacted in larger public interest, namely, a superior court can enjoin a person from instituting or prosecuting an action in a subordinate court with a view to regulating the proceeding before the subordinate courts. At any rate the court is precluded by a statutory provision from granting an injunction restraining a person from instituting or prosecuting a proceeding in a court of coordinate jurisdiction or superior jurisdiction."

In *Cotton Corporation of India (supra)*, the Supreme Court also rejected the argument that the court had inherent power to issue an injunction restraining prosecution of a proceeding even if such a course was not DIK 23/32 nms.2010.2011 permissible under Section 41(b), observing as follows:

"21. Mr. Sen, learned Counsel for the respondent-Bank however, contended that even if the respondent-Bank is not entitled to injunction, temporary or perpetual, under Section 41(b) or under order 39 of the Code of Civil Procedure, yet the court had inherent power to grant injunction and therefore this Court should not interfere with the decision of the High Court at this stage. Reliance was placed on *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal* (1962 Supp 1 SCR 450: Air 1962 SC

527). Raghobar Dayal, J. speaking for the majority in terms held that the court has inherent power to issue temporary injunction in cases which were not covered by the provisions of order 39 of the Code of Civil Procedure.

Shah, J. in his dissenting judgment took the contrary view and relied upon *Padam Sen v. State of U.P.* (1961) 1 SCR 884 : AIR 1961 SC 218 : (1961) 2 SCJ 79 : 1961 (1) Cri LJ 322. In view of the majority decision, it must be conceded that the court can in appropriate cases grant temporary injunction in exercise of its inherent power in cases not covered by order 39 CPC. But while exercising this inherent power, the court should not overlook the statutory provision which clearly indicates that injunction to restrain initiation of proceeding cannot be granted. Section 41(b) is one such provision. And it must be remembered that inherent power of the court cannot be invoked to nullify or stultify a statutory provision."



18. Prima facie it may well be accepted that there is a case of multiplicity per se if the two proceedings, namely, the present suit and the OA, are allowed to continue. But the question is, whether the DRT is a court subordinate to this Court whilst this Court exercises its ordinary original civil jurisdiction to decide a civil suit.

19. The Key to the answer of that question is to be found in the judgment of Nahar Industrial Enterprises (supra). In that case, the Supreme Court was considering the position of the DRT vis-a-vis the High Court. The court DIK 24/32 nms.2010.2011 held that the DRT was neither a civil court nor a court subordinate to the High Court exercising its ordinary civil jurisdiction, though the DRT would be a Tribunal subordinate to the High Court exercising its writ jurisdiction under Article 226 or Supervisory jurisdiction under Article 227 of the Constitution of India. The Supreme Court observed as follows:

"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 counter-claim 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.

86. The Debts Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act]. The power of the Tribunal to grant interim order is attenuated with circumspection. [See Dataware Design Labs. (P) v. SBI (2005) 127 Comp Cas 176 (Ker), Comp Cas at pg.184] Concededly in the proceeding before the Debts Recovery Tribunal detailed examination; cross-

examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debts Recovery Tribunal centers round the legally recoverable dues of the bank.

87. Should we adopt the principle of purposive interpretation so as to hold that the DRT would be a Civil Court?

88. We have noticed hereinbefore that civil courts are created under different Acts. They have their own hierarchy. They necessarily are subordinate to the High Court. The appeals from their judgment will lie before a superior court. The High Court is entitled to exercise its power of revision as also superintendence over the said courts. For the DIK 25/32 nms.2010.2011 aforementioned purpose, we must bear in mind the distinction between two types of courts, viz., civil courts and the courts trying disputes of civil nature. Only because a court or a tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it

is a civil court. For the said purpose, as noticed hereinbefore, a legal fiction is required to be created before it would have all attributes of a civil court.

89. The Tribunal could have been treated to be a civil court provided it could pass a decree and it had all the attributes of a civil court including undertaking of a full-

fledged trial in terms of the provisions of the Code of Civil Procedure and/or the Evidence Act. It is now trite law that jurisdiction of a court must be determined having regard to the purpose and object of the Act. If the Parliament, keeping in view the purpose and object thereof thought it fit to create separate tribunal so as to enable the banks and the financial institutions to recover the debts expeditiously wherefor the provisions contained in the Code of Civil Procedure as also the Evidence Act need not necessarily be resorted to, in our opinion, by taking recourse to the doctrine of purposive construction, another jurisdiction cannot be conferred upon it so as to enable this Court to transfer the case from the civil court to a tribunal."

After holding that the DRT was not a civil court, the Supreme Court considered the question whether the DRT was subordinate to the High Court, in the following words :

"92. We have held that the Tribunals are neither civil courts nor courts subordinate to the High Court. The High Court ordinarily can be approached in exercise of its writ jurisdiction under Article 226 or its jurisdiction under Article

227 of the Constitution of India. The High Court exercises such jurisdiction not only over the courts but also over the Tribunals. The Appellate Tribunals have been constituted for determining the appeals from judgments and orders of the Tribunal.

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99. The Court would be subordinate to High Court in terms of the provisions of the Code only in the event it DIK 26/32 nms.2010.2011 comes within the purview of the hierarchy of the court as contained in Section 3 of the Act. This, however, does not mean that even when the Presiding Judge or the Presiding Officer of the Court exercises power conferred upon it under a statute still then it would not be a court subordinate to the High Court. A court while adjudicating a dispute under the Employees State Insurance Act or a Reference Court under the Land Acquisition Act, Election Tribunal or a tribunal acting as a Motor Accidents Claims Tribunal, while exercising revisional jurisdiction from an order passed by the Executive Magistrate under the Code or exercising an appellate power under special statutes like Municipal Acts would still be a court subordinate to the

High Court. However, for the aforementioned purpose the Presiding Officer must be holding a Court which would otherwise come within the purview of the hierarchy of the courts."

20. It is, thus, clear that the DRT is not a court subordinate to this court when the latter exercises its ordinary original civil jurisdiction. If that is so, this court cannot, whilst hearing a suit in its ordinary original civil jurisdiction, injunct any bank from prosecuting a proceeding before the DRT. Mr. Dwarkadas, the learned Senior Counsel appearing for the Plaintiff, however, relied upon the case of Oil and Natural Gas Commission (supra) to get over the dicta of Cotton Corporation of India (supra) quoted above. In Oil and Natural Gas Commission, the Supreme Court considered the power of the High Court to grant an injunction or a restraint order in exercise of its inherent power to prevent a party before it from proceeding further with an action instituted by it in a foreign court on the basis of an arbitral award (passed in an arbitration proceeding held abroad but governed by the Arbitration Act, 1940). The Supreme Court repelled the argument against grant of such injunction based on Section 41(b) of the Specific Relief Act. The court quoted with approval the following passage from Halsbury's Laws of England:

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" With regard to foreign proceedings the Court will

restrain a person within its jurisdiction from instituting or prosecuting proceedings in a foreign Court whenever the circumstances of the case make such an interposition necessary or expedient. In a proper case the Court in this country may restrain person who has actually recovered judgment in a foreign Court from proceeding to enforce that judgment. The jurisdiction is discretionary and the Court will give credit to foreign Courts for doing justice in their own jurisdiction."

This case does not in any way help the Plaintiff in our case. Oil and Natural Gas Commission was decided on a completely different principle as noted above. Besides, in that case, the Supreme Court did not go by the provisions of Section 41(b) or follow the principle enunciated in Cotton Corporation of India (supra), holding as follows:

" This provision, in our opinion, will be attracted only in a fact-situation where an injunction is sought to restrain a party from instituting or prosecuting any action in a Court in India which is either of co-ordinate jurisdiction or is higher to the Court from which the injunction is sought in the hierarchy of Courts in India. There is nothing in Cotton Corporation's case which supports the proposition that the High Court has no jurisdiction to grant an injunction or a restraint order in exercise of its

inherent powers in a situation like the one in the present case."

21. In the present case, we are concerned with an action in India in a court which is not subordinate in the hierarchy of courts in India to the court from which an injunction is sought. There is no reason why Section 41(b) and the law stated in Cotton Corporation of India (supra) should not apply to the present case.

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22. In this view of the matter, prayer (b) of the Notice of Motion cannot be granted.

23. As regards prayer (a), which seeks temporary injunction restraining the Defendant from relying upon the documents of which cancellation is sought in the present suit, it needs to be noted at the outset that the documents are sought to be relied upon by the Defendant for two purposes. One, for claiming enforcement of an indemnity clause under the Deed of Indemnity read with the SRA, and two, for bringing the goods covered by the Deed of Hypothecation to sale. The salient provisions of these documents, which are relevant for these purposes, are already reproduced above. Their effect prima facie will now be considered.

24. It is claimed by the Plaintiff that the Deed of Indemnity is void ab initio and unenforceable for want of consideration. Without prejudice to this, it is claimed that since the occurrence of the condition upon which the Deed of Indemnity is premised, has become impossible, the Deed is void. The Plaintiff has, in these premises, prayed for cancellation of the Deed. The Deed of Indemnity is supported by a consideration, namely, the Defendant having entered into the SRA with the Plaintiff for assignment of receivables of the Plaintiff from Subhiksha. The consideration is lawful. There is nothing pointed out by the learned Counsel for the Plaintiff to show that the agreement of indemnity is void at its inception for any reason. The ground that the consideration, on which the Indemnity is premised, having become impossible, the Deed of DIK 29/32 nms.2010.2011 Indemnity has become void, also has no merit. In a contract of indemnity, there is a promise to save the promisee from harm or loss caused by the conduct of the promisor or any other person or even by events which do not, or may not, depend upon the conduct of the promisor or such other person. In the present case, the promise is to save the Defendant from a loss caused to it by the conduct of both the Plaintiff and Subhiksha. It is not a promise to save the Defendant from the loss caused by the happening of any event, which may or may not happen. There is no question of the event being impossible and therefore, the contract of indemnity becoming void. Upon the MRA being terminated by the Defendant, whether the Defendant can enforce the indemnity against the Plaintiff, is a question of performance of the Deed of Indemnity. That question can be considered by the court which has been asked to enforce the indemnity. It is not for this Court to grant an interim restraint on such enforcement on the ground that the document, namely, the Deed of Indemnity has become void.

25. As far as the Defendant's claim to the goods being the subject matter of the MRA is concerned, the Deed of Hypothecation, under which such claim is asserted, is supported by a consideration, namely, the Defendant's agreement under the SRA to acquire from the Plaintiff the rentals

receivable under the MRA for a consideration of Rs. 750 Lakh together with the underlying securities. The underlying securities, under the SRA, include the equipment given on hire to the Renter, namely, Subhiksha, under the MRA, the receivables of which were or would be, lawfully due to the Plaintiff from the Renter. Under the SRA, the Plaintiff was to act as Servicing and Security Agent of the Defendant DIK 30/32 nms.2010.2011 and was bound to enforce the underlying security by way of repossession of the equipment and sale thereof, on receipt of written instructions from the Defendant and at the cost and expense of the Plaintiff. (Such instructions were admittedly given by the Defendant to the Plaintiff on 4 December 2009.) One of the conditions of the transaction documents between the parties was that the receivables under the MRA/SRA shall be secured by an exclusive / first charge in favour of the Defendant by way of hypothecation of all equipment rented / to be rented to Subhiksha. In pursuance of the consideration and of the condition of the transaction documents, as noted above, the Deed of Hypothecation was executed by the Plaintiff as owner of the equipment in favour of the Defendant.

There is no merit prima facie in the Plaintiff's contention that there is no consideration for the Deed of Hypothecation.

26. The Deed of Hypothecation prima facie places the Plaintiff in the position of a guarantor for Subhiksha's debt, the discharge of Subhiksha's liability being secured by means of hypothecation and sale of the goods owned by the Plaintiff and rented to Subhiksha. The learned Counsel for the Plaintiff relied upon Section 2(d) of the Contract Act and argued that in the present case, the promisor was Subhiksha, its promise being to pay rentals; and that the Deed of Hypothecation does not disclose that it is executed at the desire of Subhiksha or in consideration of anything the promisee, namely, the Defendant, has done or abstained from doing at the desire of Subhiksha. The fallacy of this argument is in the very opening premise. The promisor in this case is the Plaintiff. At the Plaintiff's desire the Defendant (the promisee) has taken over the rentals payable by Subhiksha to the Plaintiff in consideration of payment of Rs. 750 Lakh to the DIK 31/32 nms.2010.2011 Plaintiff. This is the consideration for the Plaintiff's promise contained in the Deed of Hypothecation.

27. The submission of the learned Counsel for the Plaintiff that upon assignment of receivables from Subhiksha, the Defendant has no recourse to the Plaintiff for recovery of receivables is for the DRT to consider. Whether a decree can be passed personally against the Plaintiff for the debt of Subhiksha or recourse can be had to the goods owned by the Plaintiff and rented to Subhiksha for recovery of such debt, depend on a true interpretation of the documents, namely, the SRA read with the MRA, and the Deed of Indemnity, the Deed of Hypothecation and other documents executed between the parties.

These are matters for the decision of the court to which the Defendant has applied for reliefs against the Plaintiff on the basis of these documents. As explained by me above, this court's jurisdiction is invoked by the Plaintiff for cancellation of some of these documents, on the ground that these are void or voidable and if not cancelled, may cause serious injury to the Plaintiff. As explained above, I do not find any merit prima facie in the case of cancellation.

All these grounds are, however, open to the Plaintiff to resist any recourse to it by the Defendant in enforcement of these documents before the DRT.

28. For all these reasons, the Plaintiff's prayer in prayer clause (a) of the Motion also cannot be granted.

29. The Notice of Motion is, accordingly, dismissed with no order as to costs. It is clarified that the observations made in this order reflect the prima DIK 32/32 nms.2010.2011 facie view of the court for the purposes of deciding the Plaintiff's interlocutory application. These observations shall not come in the way of an independent assessment of the merits of the case by the DRT in O. A. No. 101 of 2011.

30. On the request of the learned Counsel for the Plaintiff, the ad-

interim order operating till date is continued for a period of three weeks from today.

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(S.C. Gupte, J.)