
(2015) 01 BOM CK 0014

In the Bombay High Court

Case No : Appeal No. 4 of 2015 in Chamber Summons No. 709 of 2014 and
Appeal No. 14 of 2015 in Chamber Summons No. 748 of 2014 in
Execution Application No. 229 of 2014 in Suit No. 2837 of 2010

Dewanchand Ramsaran Trading Pvt. Ltd. and Others

APPELLANT

Vs

IL and FS Financial Services Ltd. and Others

RESPONDENT

Date of Decision : 29-01-2015

Acts Referred:

Companies Act, 1956 — Section 125, 127, 132, 135
Income Tax Act, 1961 — Section 281

Citation : (2015) 3 ALLMR 114 : (2016) 1 BomCR 174 : (2015) 4 MhLj 358

Hon'ble Judges : Mohit S. Shah, C.J.;B.P. Colabawalla, J.

Bench : Division Bench

Advocate : Milind Sathe, Senior Counsel, Simil Purohit, Ashok Paranjape, Aparna Wagle and Radhika Dixit i/b MDP and Partners, for the Appellant; Ravi Kadam, Sr. Counsel, Birendra Saraf and Rajeev Carvalho, Pinky Shah and Jigisha Vadodalia instructed by Negandhi, Sha

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.—Admit. The Respondents through their respective counsel, waive service. By consent of parties made returnable forthwith and heard finally.

2. These two Appeals take exception to the common order passed by the learned Single Judge dated 28th November, 2014 under which two Chamber Summons filed by the Appellant (original Defendant No. 5) came to be dismissed. Chamber Summons No. 748 of 2014 was filed by the Appellant inter alia seeking a direction that Respondent No. 3 herein (original Defendant No. 6) be ordered to pay to Respondent Nos. 1 and 2 herein (original Plaintiffs) a sum of Rs. 23,50,00,000/-and to ICICI Bank Ltd. a sum of USD 17,000,000/-as per clause 11(a) read with clause 15 of the consent terms dated 28th September 2011, together with interest thereon at the rate of 6% p.a. from 31st October, 2011 till payment. Chamber Summons No. 709 of 2014 was filed by the Appellant seeking a declaration that the consent decree dated 28th September, 2011 be marked as

satisfied and the attachments levied on the movable and immovable properties belonging to Defendant Nos. 1, 2, 4 and 5 be raised. The learned Single Judge, finding no substance in either of the Chamber Summons, dismissed the same by the impugned order. For the sake of convenience, we shall refer to the parties as they were arrayed before the Trial Court.

3. The facts stated briefly are that the Plaintiffs had subscribed to certain convertible debentures issued by Defendant No. 5. As the Defendants failed to honour their commitments, the Plaintiffs filed the above suit on 15th October, 2010 inter alia claiming certain sums of money from Defendant Nos. 1 to 5. In the said suit, the parties entered into consent terms dated 28th September, 2011 wherein Defendant No. 6 was joined as a party Defendant to the suit and Defendant Nos. 1 to 5 submitted to a decree on admission in terms of prayer clauses (a), (c), (d) and (h) of the plaint. In the present Appeals, the controversy revolves around the interpretation of certain clauses of the said consent terms. The relevant clauses of the consent terms read thus:-

4. Defendant No. 5 is inter alia the owner of four rigs being Rig Nos.VIII, IX, X and XI more particularly described in Exh."I" to the plaint. ICICI Bank through its security trustee namely, Unit Trust of India Advisory Services (UTI Advisory Services) has a first charge on the Rig Nos.VIII, IX, X and XI for the credit facilities extended to Defendant No. 5 (First Charge) and the Plaintiff No. 1 through Plaintiff No. 2 as the Security and Debenture Trustee, has a second charge on Rigs Nos.VIII, IX, X and XI in respect of the FCD Investment (Second Charge).

5. In terms of the settlement arrived at between the parties, it is hereby decreed, agreed, declared and confirmed and Defendant Nos. 1 to 5 undertake to this Hon'ble Court that Defendant No. 5 shall -

(a) sell and transfer Rig No.X to Precision Machinery LLC (a company incorporated under the laws of United Arab Emirates having its principal office at Ras Al Khor Industrial Area, Plot No. 58, Street 13-b, Community 16, Al Aweer, Dubai, UAE) in terms of the sale deed to be executed between Defendant No. 5 and Precision Machinery LLC in the form initialed by the parties for identification (Sale Deed for Rig No.X) for an agreed sale consideration of USD 11,111,110 (US Dollars Eleven Million One Hundred Eleven Thousand One Hundred Ten) without any deduction or abatements;

(b) subject to Clause 9 herein, sell and transfer Rig No.IX to Defendant No. 6 for an agreed aggregate sale consideration of USD 17,000,000/-(US Dollars Seventeen Million) and USD equivalent of Rs. 23,50,00,000/-(Rupees Twenty Three Crores and fifty Lakhs) as on date of the sale, without any deduction or abatements;

(c) grant lease in respect of Rig Nos.VIII and XI to Defendant No. 6 in terms of the lease agreements to be executed between Defendant Nos. 5 and 6 in the form initialed by the parties for identification (Lease Agreements) with a first

option to Precision Machinery LLC and a second option to Defendant No. 6 to purchase Rig Nos.VIII and XI in terms of the option agreements to be entered between Defendant Nos. 5 and Precision Machinery LLC and initialed by the parties for identification (Option Agreements).

9. It is further agreed, declared and confirmed that the Defendant No. 6 has an option to purchase Rig No.IX from Defendant No. 5 for an agreed aggregate sale consideration of USD 17,000,000/-(US Dollars Seventeen Million) and USD equivalent of Rs. 23,50,00,000/-(Rupees Twenty Three Crores and fifty Lakhs) as on date of the sale, which it shall exercise on or before 31st October 2011, Defendant Nos. 5 and 6 shall on or before 31st October 2011 execute a sale deed (Sale Deed for Rig No.IX).

10. It is agreed, declared and confirmed and Defendant Nos. 1 to 5 undertake to this Hon'ble Court that Defendant No. 5 shall -

(a) on or before 7th October 2011 make an application to obtain from the Income Tax Authorities Certificate as required under section 281 of the Income Tax act 1961 for the sale and transfer of Rig No.IX to Defendant No. 6 and provide to Defendant No. 6 a duly acknowledged copy thereof;

(b) on the execution of the Sale Deed for rig No.IX hand over all pertinent documents of title in respect of Rig No.IX and be provided an acknowledgment of the receipt thereof.

11.(a) On execution of the Sale Deed for Rig No.IX in favour of Defendant No. 6, Defendant No. 6 agrees and undertakes to this Hon'ble Court, that from the aggregate sale consideration of USD 17,000,000/-(US Dollars Seventeen Million) and USD equivalent of Rs. 23,50,00,000/-(Rupees Twenty Three Crores and fifty Lakhs) as on date of the sale, on or before 31st october 2011, pay to ICICI Bank for and on behalf of Defendant No. 5 a sum of USD 17,000,000/-(US Dollars Seventeen Million) and Plaintiffs for and on behalf of Defendant No. 5 a sum of Rs. 23,50,00,000/-(Rupees Twenty Three Crores and fifty Lakhs). On receipt of the said payments by ICICI Bank and the Plaintiffs, the First Charge of ICICI Bank and Second charge of the Plaintiffs on Rig No.IX shall stand released and extinguished and ICICI Bank and UTI Advisory Services and the Plaintiffs shall within two weeks thereof file the necessary forms with the Registrar of Companies, evidencing satisfaction of such charge.

(b) It is also agreed, declared and confirmed and Defendant Nos. 1 to 5 undertake to this Hon'ble Court that in the event sale of Rig No.IX to Defendant No. 6 does not take place before 31st October 2011, Defendant No. 5 shall sell Rig No.IX to a third party on or before 1st February 2012 after giving to the Plaintiffs and ICICI Bank at least fifteen days of advance written intimation of the proposed sale including all relevant particulars of sale such as name, address and contact details of the proposed purchaser; the price at which the Rig No.IX is being sold and the date of the proposed sale. From the sale proceeds thereof, pay to Plaintiffs a minimum of 23.5% of the sale consideration, within a period of

10 days from the sale of Rig No.IX and whereupon the Second Charge of the Plaintiffs on Rig No.IX shall stand released and extinguished and the Plaintiffs shall within two weeks thereof file the necessary forms with the Registrar of Companies, evidencing satisfaction of such charge.

(c) In the event, the Plaintiffs are not paid the entire sum of Rs. 23,50,00,000/- (Rupees Twenty Three Crores and Fifty Lakhs) for any reason whatsoever, then Defendant Nos. 1 to 5 undertakes to this Hon"ble Court, to pay the balance amount on or before 31st January 2012.

(d) It is hereby further agreed, declared, confirmed that in the event sale of Rig No.IX does not take place before 31st January 2012 or there is any shortfall as mentioned in sub-clause (c) hereinabove for any reason whatsoever, Defendant Nos. 1 to 5 agree and undertake to this Hon"ble Court to pay to the Plaintiffs within a period of 24 months from 31st January 2012 a sum of Rs. 23,50,00,000/- (Rupees Twenty Three Crores Fifty Lakhs only) along with interest thereon @ 6 % per annum to be calculated from 1st February 2012 payable monthly. However, in the event Defendant No. 5 does not have sufficient cash flows to make such interest payments, such interest will be accrued and payable from 1st February 2014. On receipt of the aggregate sum of Rs. 23,50,00,000/-along with the entire interest thereon, as mentioned above, by the Plaintiffs, the Second Charge of the Plaintiffs on Rig No.IX shall stand released and extinguished and the Plaintiffs shall within two weeks thereof file the necessary forms with the Registrar of Companies, evidencing satisfaction of such charge.

(emphasis supplied)

4. It is common ground before us that the only dispute in the present case is with reference to sale of Rig No.IX which forms a part of the consent terms dated 28th September, 2011. After the consent terms were entered into, admittedly, there were defaults committed by Defendant Nos. 1 to 5 inasmuch as the amount of Rs. 23,50,00,000/-payable to the Plaintiffs and the sum of USD 17,000,000/-payable to ICICI Bank Ltd. were in fact not paid. In view thereof, the consent terms were sought to be executed by the Plaintiffs by filing the above Execution Application. It is in this Execution Application, the Appellant (original Defendant No. 5) filed the above two Chamber Summons seeking the reliefs as more particularly stated earlier.

5. Dr. Sathe, the learned Sr. Counsel appearing on behalf of the Appellant (Defendant No. 5), relied upon certain clauses of the consent terms and contended that the amounts of Rs. 23,50,00,000/-and USD 17,000,000/-were payable by Defendant No. 6 to the Plaintiffs and ICICI Bank Ltd. respectively and therefore, the Plaintiffs could not look to Defendant Nos. 1 to 5 for recovery of the said amount of Rs. 23,50,00,000/-. In this regard, he laid particular stress on clauses 5(b), 9 and 11(a) of the consent terms. Relying upon the aforesaid clauses, Dr. Sathe submitted that on the sale of Rig No.IX by Defendant No. 5 to

Defendant No. 6, Defendant No. 6 had agreed and undertaken, for and on behalf of Defendant No. 5, to pay the amounts of Rs. 23,50,00,000/-and USD 17,000,000/-to the Plaintiffs and ICICI Bank Ltd., respectively. Dr. Sathe submitted that even though a formal Sale Deed was not executed, Defendant No. 6 had exercised its option to purchase Rig No.IX as contemplated under clause 9 of the consent terms and therefore, it was bound by the undertaking given by it under clause 11(a) to pay these amounts to the Plaintiffs and ICICI Bank Ltd. In support of his argument that Defendant No. 6 had exercised its option to purchase Rig No.IX, Dr. Sathe relied upon several documents which are enumerated hereunder:-

(i) an Investment Proposal dated 27th May, 2011 made by the Appellant (original Defendant No. 5) showing Defendant No. 6 as the investee and signed by the Appellant (original Defendant No. 5), Defendant No. 6 and the Plaintiffs respectively;

(ii) an agreement dated 27th May, 2011 between the Appellant and Defendant No. 6 under which the Appellant agreed to handover possession inter alia of Rig No.IX to Defendant No. 6;

(iii) the Bare Boat Lease Agreement dated 15th September, 2011 entered into between Defendant No. 6 and one PT RADIANT UTAMA (PRU), a Company incorporated under the laws of Indonesia.

(iv) Form No. 8 filed by Defendant No. 6 before the Registrar of Companies;

(v) An inventory prepared on 17th October, 2011 by Defendant No. 6 of Rig No.IX that was signed by Defendant No. 6 as well as one Pernata Selares Mandiri (the original lessees of Rig No.IX);

(vi) an e-mail dated 28th October, 2011 addressed by the attorneys of Defendant No. 6 to Defendant No. 6; and

(vii) MOU dated 27th January, 2012 executed by certain third parties showing the Appellant and Defendant No. 6 as parties.

6. Relying upon the aforesaid documents and what was stated therein, Dr Sathe submitted that all these documents clearly establish that Defendant No. 6 had exercised its option to purchase Rig No.IX from Defendant No. 5 (Appellant) and only a formal Sale Deed remained to be entered into, which was not done. He therefore submitted that Defendant No. 6 was bound by the undertaking given by it in the consent terms to make payment to the Plaintiffs in terms of clause 11(a) thereof. In view of the aforesaid undertaking, the Plaintiffs could not look to Defendant Nos. 1 to 5 for the aforesaid payment, was the submission of Dr. Sathe.

7. On the other hand, Mr. Kadam, learned Sr. Counsel appearing for the Plaintiffs, submitted that the consent terms were absolutely clear in its terms which provided that in the event the Plaintiffs are not paid the entire sum of Rs.

23,50,00,000/-for any reason whatsoever, then Defendant Nos. 1 to 5 undertook to pay these amounts to the Plaintiffs on or before 31st January, 2012. He submitted that the Plaintiffs were not concerned with any inter-se dispute between Defendant Nos. 1 to 5 and Defendant No. 6 with reference to the sale of Rig No.IX. It was his contention that as per the consent terms, and more particularly clause 11(c) thereof, even if the sale of Rig No.IX had taken place as contemplated under the consent terms, and payments were not made by Defendant No. 6, the Plaintiffs could look to Defendant Nos. 1 to 5 for being paid the entire sum of Rs. 23,50,00,000/-or any part thereof. He therefore submitted that there was no merit in both the Chamber Summons filed by Defendant No. 5 and the learned Single Judge was fully justified in dismissing the same. He therefore urged that these appeals be dismissed with costs.

8. Mr. Narichania, learned Sr. Counsel appearing on behalf of Defendant No. 6, contended that Defendant No. 6 was involved in the proposal whereby the Appellant (Defendant No. 5) was to sell four rigs (Rig Nos. VIII to XI) to Defendant No. 6 for paying its debts inter alia to the Plaintiffs. At the time of discussions, it was revealed that Rig No.IX was stationed in Indonesia for a project of an Indonesian State owned Company viz. Pt. Pertamina Gaothermal Energy (PGE). The said PGE had awarded the contract to one Pt. Radiant Utama (PRU) who in turn had sub-contracted the work to National Drilling Services Company LLC and one Permata Selares Mandiri (Original Lessees). The Appellant had entered into a Bare Boat Agreement dated 19th May 2010 with the said Original Lessees and by virtue of the same, the said Rig No.IX was in their control and possession. As there were several disputes between Defendant No. 5 and the Original Lessees, Defendant No. 5 requested Defendant No. 6 to help Defendant No. 5 to start operations and settle the disputes, as only when the said disputes were settled, the purchase of Rig No.IX could make commercial sense and thereafter be considered. It was with this understanding that the document titled "Investment Proposal" dated 27th May, 2011 and which was relied upon by Dr. Sathe, came to be entered into. It was under this interim Agreement that Defendant No. 6 had infused funds for starting operations of inter alia Rig No.IX. However, the said interim Agreement dated 27th May, 2011 further provided that it would stand terminated upon the execution of the definitive agreements as contemplated in the Investment Proposal or upon termination of the Investment Proposal itself. With the hope that with the intervention of Defendant No. 6 the Original Lessees would be persuaded to settle their disputes with Defendant No. 5, the Bare Boat Lease Agreement dated 15th September, 2011 came to be entered into between Defendant No. 6 and PRU. Mr. Narichania submitted that Defendant No. 5 was well aware of the said transaction and permitted the same with the hope of the disputes being settled and thereby regain control over Rig No.IX. Mr. Narichania laid specific stress on clause 19 of the Bare Boat Lease Agreement which sets out the condition precedent for the said Agreement to become effective. It reads thus:-

19. Condition Precedent

19.1 This Agreement shall become effective upon the completion of the following condition precedents:

Confirmation Letter signed by the Lessor and DRIPL regarding the transfer of ownership of the Rig to the Lessor;

a. Confirmation Letter issued and signed by DRIPL regarding the cancellation of the First Lease.

(emphasis supplied)

9. He submitted that admittedly, (i) the confirmation letter regarding the transfer of ownership of Rig No.IX to Defendant No. 6; or (ii) the confirmation letter regarding cancellation of the First Lease; was never executed and / or issued by Defendant No. 5. Therefore, the said Bare Boat Lease Agreement did not become effective as set out in clause 19 therein. He submitted that a one line statement in the said Agreement wherein it was stated that Defendant No. 6 had purchased and acquired from Defendant No. 5, Rig No.IX on 28th May 2011, was clearly erroneous. Mr. Narichania further submitted that looking at the consent terms, it was clear that on the date when the Bare Boat Lease Agreement was entered into (15th September, 2011), Defendant No. 6 was not the owner of Rig No.IX. This, according to him, has been affirmed by Defendant No. 5 in the consent terms dated 28th September, 2011 and more particularly in clause 4 thereof. For all the aforesaid reasons, Mr. Narichania submitted that they had never exercised their option to purchase Rig No.IX as contemplated under the consent terms and consequently they were not bound by the undertaking given by them under clause 11(a) thereof which required them to make payment of USD 17,000,000/- to ICICI Bank Ltd. and Rs. 23,50,00,000/-to the Plaintiffs.

10. We have heard the learned counsel at great length and perused the papers and proceedings in the Appeals as well as the impugned order. From the facts as narrated above it is clear that the claims in the suit filed by the Plaintiffs were settled between the parties by entering into consent terms dated 28th September, 2011. Under the said consent terms, Defendant No. 6 was joined as a party Defendant for the first time. Clause 11(c) of the consent terms in unequivocal terms states that in the event the Plaintiffs are not paid the entire sum of Rs. 23,50,00,000/-(Rupees Twenty Three Crores and Fifty Lakhs) for any reason whatsoever, then Defendant Nos. 1 to 5 undertake to pay the balance amount on or before 31st January, 2012. It is not in dispute that the sum of Rs. 23,50,00,000/-has in fact not been paid to the Plaintiffs. In this view of the matter, we are in full agreement with the submission of Mr. Kadam that by virtue of clause 11(c), there is no question of (i) either forcing the Plaintiffs to look only to Defendant No. 6 for recovery of this amount; or (ii) marking the consent terms / decree as satisfied. The undertaking given by Defendant Nos. 1 to 5 in Clause 11(c) is clear and unequivocal, and they are bound by the same.

11. In answer to this, Dr. Sathe submitted that clause 11(c) would come into play only if no sale was effected for Rig No.IX in favour of Defendant No. 6. If the

sale was effected of Rig No.IX in favour of Defendant No. 6, then the Plaintiffs could look only to Defendant No. 6 for recovery of the amount of Rs. 23,50,00,000/-and could not look to Defendant Nos. 1 to 5, was the submission. He submitted that clause 11(c) ought to be read subject to clause 11(a) of the consent terms. We cannot agree. The words used in clause 11(c) are unequivocal and clearly spell out the intention of the parties viz. that if for any reason whatsoever, the Plaintiffs are not paid the entire sum of Rs. 23,50,00,000/-, in that event, Defendant Nos. 1 to 5 undertook to pay the said amount or any part thereof to the Plaintiffs. If clause 11(c) was to come into operation only in the event of the sale not taking place of Rig No.IX to Defendant No. 6, the consent terms would have so stated. That is admittedly not the case. In fact, the words "for any reason whatsoever" appearing in clause 11(c) make it clear that the Plaintiffs are primarily concerned with the payment of Rs. 23,50,00,000/-. Only to facilitate this payment, clause 11(a) provides that on Defendant No. 6 purchasing Rig No.IX, Defendant No. 6 undertakes to pay this amount of Rs. 23,50,00,000/-to the Plaintiffs directly. This does not in any way absolve Defendant Nos. 1 to 5 to make payment of the aforesaid amount to the Plaintiffs. In this view of the matter, on this ground alone, we find that the learned Single Judge was fully justified in dismissing both the Chamber Summons.

12. Having said this, we shall now examine whether in fact, Defendant No. 6 had exercised its option to purchase Rig No.IX as contemplated under clause 9 of the consent terms, thereby binding them to the undertaking given in clause 11(a) thereof.

13. As stated earlier, Dr. Sathe relied upon several documents to support his submission that even though no formal Sale Deed was executed with reference to the sale of Rig No.IX, Defendant No. 6 had exercised its option to purchase the said Rig as contemplated under clause 9 of the consent terms. In order to deal with this submission, we shall presently deal with these documents individually.

(i) Investment Proposal dated 27th May, 2011 made by the Appellant (original Defendant No. 5) showing Defendant No. 6 as the investee:-

We find the reliance placed on this document by Dr. Sathe is wholly misplaced. This Investment Proposal is dated 27th May, 2011 which shows Defendant No. 6 as the Investee. This Investment Proposal was signed by Defendant No. 5, Defendant No. 6 and the Plaintiffs. It was executed much prior to the consent terms dated 28th September, 2011 which gives the option to Defendant No. 6 to purchase Rig No.IX. We therefore fail to see how a document executed on 27th May, 2011 can throw light on whether an option to purchase had been exercised under a subsequent document (viz. the consent terms dated 28th September, 2011). Even otherwise, nothing has been brought to our notice in the said document which would indicate that Defendant No. 6 had in fact purchased Rig No.IX from Defendant No. 5 prior to entering into the consent terms dated 28th September, 2011. The Investment Proposal has no reference to the agreement of

the parties in the consent terms for sale of Rig No.IX or taking over the liability of Defendant No. 5. We therefore find that the reliance placed on the Investment Proposal is of no avail to Defendant No. 5 to contend that Defendant No. 6 had exercised its option to purchase Rig No.IX on or before 31st October, 2011 as more particularly set out in the consent terms. (ii) Agreement dated 27th May, 2011 between the Appellant and Defendant No. 6 under which the Appellant agreed to handover possession inter alia of Rig No.IX to Defendant No. 6:-

Firstly, even this document is executed long before the consent terms dated 28th September, 2011. Secondly, we find that this was only an Agreement handing over legal possession of Rig No.IX to Defendant No. 6. It is not in dispute that actual control and possession of Rig No.IX was with the Original Lessees and continues till date. Under this Agreement, there is admittedly no transfer of ownership of Rig No.IX from Defendant No. 5 to Defendant No. 6. In this view of the matter, the reliance placed on this document is also wholly misplaced. (iii) The Bare Boat Lease Agreement dated 15th September, 2011 entered into between Defendant No. 6 and one PT RADIANT UTAMA (PRU), a Company incorporated under the laws of Indonesia:-

Dr. Sathe relied upon this Bare Boat Lease Agreement, and in particular clause 4 thereof, wherein it is stated that Defendant No. 6 confirms that it has purchased and acquired from Defendant No. 5 Rig No.IX on 28th May, 2011. Relying upon the aforesaid statement, Dr. Sathe contended that this clearly goes to show that Defendant No. 6 had exercised its option to purchase Rig No.IX. We find this argument to be wholly fallacious for more than one reason. Firstly, despite the aforesaid statement, clause 19 of the said Agreement itself states that the said Agreement would become effective only on a confirmation letter being signed by Defendant No. 6 and Defendant No. 5 regarding the transfer of ownership of Rig No.IX. Admittedly, no such letter has been executed between Defendant No. 5 and Defendant No. 6. Secondly, it is important to note that the Bare Boat Lease Agreement is dated 15th September, 2011 whereas the consent terms entered into between the parties was dated thereafter i.e. 28th September, 2011. Clause 4 of the consent terms categorically states as under:-

4. Defendant No. 5 is inter alia the owner of four rigs being Rig Nos.VIII, IX, X and XI more particularly described in Exh."I" to the plaint. ICICI Bank through its security trustee namely, Unit Trust of India Advisory Services (UTI Advisory Services) has a first charge on the Rig Nos.VIII, IX, X and XI for the credit facilities extended to Defendant No. 5 (First Charge) and the Plaintiff No. 1 through Plaintiff No. 2 as the Security and Debenture Trustee, has a second charge on Rigs Nos.VIII, IX, X and XI in respect of the FCD Investment (Second Charge).

(emphasis supplied)

Therefore, after entering into the Bare Boat Lease Agreement, in the consent terms, Defendant No. 5 clearly reiterates that it is the owner of Rig No.IX and

thereafter gives an option to Defendant No. 6 to purchase the said Rig on or before 31st October, 2011. (see Clause 9 of the consent terms). If the Rig had already been purchased by Defendant No. 6 on 28th May, 2011 (as erroneously set out in the Bare Boat Lease Agreement), there was no question of Defendant No. 5 reiterating its ownership over Rig No.IX in the consent terms (dated 28th September, 2011), or giving an option to Defendant No. 6 to purchase the said Rig on or before 31st October, 2011. Thirdly, as late as on 14th February 2013, Defendant No. 5 has written a letter to ICICI Bank Ltd. once again reiterating their ownership over Rig No.IX. The relevant portion of the said letter reads as under:-

I will not at this stage delve into the details, as the same is well documented. However, for no fault of ours and by circumstance we continue to remain owners of Rig IX, until the matter is resolved. Unfortunately, we are also on that account responsible for taking steps to secure the Rig. We have recently been informed by Ahmad Ganis of PRU that the Indonesian Custom authorities have served a notice on PRU to re-export the Rig, failing which the bond submitted by PRU to the Customs Authorities will be encashed.

In view of securing the Rig, and without prejudice to our contentions, (as recorded in various communique including letters dated 21st May 2012, 23rd July 2012 and 24th September 2012) we set forth, for ICICI's information and consideration, the proposal made by Mr. A. Ganis.

Until the Rig, free from all encumbrances, is in the port of re-export or at Batam a buyer cannot be found for the rig;

Therefore, he will at first in order to repossess Rig equipment taken by the creditors, negotiate with them to considerably reduce their claims, so that the contractual liability that affixes on PRU (which he has unfairly passed on to DRIPL) is below USD 3 million;

...

...

Once the Rig reaches port, AG has promised to assist in finding a buyer for the Rig (whilst DRIPL should make similar attempts) and from the sale consideration after making the aforesaid payments, the balance paid to ICICI.

On perusing the said letter, it is clear that even as late as on 14th February 2013, Defendant No. 5 reiterated that it continued to remain the owner of Rig No.IX. We therefore find that this document also does not carry the case of Defendant No. 5 any further to indicate that Defendant No. 6 had exercised its option to purchase Rig No.IX. As stated earlier, this Bare Boat Lease Agreement is also dated prior to the date of the consent terms and it would be unrealistic to contemplate a situation whereby the option to purchase was exercised even before that option was actually made available to Defendant No. 6 under the consent terms.

(iv) Form No. 8 filed by Defendant No. 6 before the Registrar of Companies:-

Reliance placed by Dr. Sathe on this document is totally misconceived. Form 8 is filed pursuant to sections 125, 127, 132 and 135 of the Companies Act, 1956 which has been filed by Defendant No. 6. This document, at clause 15(i) states as under:-

a. rigs means collectively (i) National 1320 UF ACASCR 2000 HP (Rig 9) proposed to be purchased by the borrower. Furthermore, clauses 16(a) and (b) of Form 8 states that the Rig in question (Rig No. 9) is registered in the name of Defendant No. 5. We therefore fail to see how this document is of any assistance to Defendant No. 5 to contend that Defendant No. 6 had exercised its option to purchase Rig No.IX. In fact, this document indicates otherwise.

(v) An inventory prepared on 17th October, 2011 by Defendant No. 6 of Rig No.IX that was signed by Defendant No. 6 as well as one Pernata Selares Mandiri (the original lessees of Rig No.IX):-

We find that the reliance placed on this document is wholly misconceived. This is merely an inventory of Rig No.IX and in no way indicates either the title passing to Defendant No. 6 or the fact that they had exercised their option to purchase Rig No.IX from Defendant No. 5 on or before 31st October, 2011.

(vi) E-mail dated 28th October, 2011 addressed by the attorneys of Defendant No. 6 to Defendant No. 6:-

This is an e-mail written by the attorneys of Defendant No. 6, to Defendant No. 6 asking them to send their official letter to Defendant No. 5 prior to 31st October, 2011 exercising their option to purchase Rig No.IX as per the provisions of the consent terms. The reliance placed on this e-mail by Dr. Sathe is also wholly misconceived. It must be stated that this e-mail was not produced before the learned Single Judge to suggest that the option to purchase was in fact exercised by Defendant No. 6. This e-mail has been produced for the first time before us. Be that as it may, even reading the said e-mail, we find that all it states is asking Defendant No. 6 to send an official letter to Defendant No. 5 exercising its option to purchase Rig No.IX prior to 31st October, 2011 as per the provisions of the consent terms. Admittedly, no such letter has been written by Defendant No. 6 to Defendant No. 5. In this view of the matter, this e-mail does not carry the case of Defendant No. 5 any further.

(vii) MOU dated 27th January, 2012 executed by certain third parties showing the Appellant and Defendant No. 6 as parties.

The reliance placed by Dr. Sathe on this MOU is also wholly misplaced. This MOU has not been signed either by Defendant No. 5 or Defendant No. 6 and neither do the contents thereof state that Defendant No. 6 had exercised its option to purchase Rig No.IX on or before 31st October, 2011.

14. We therefore find that even otherwise, Defendant No. 6 never exercised its

option to purchase Rig No.IX on or before 31st October, 2011 as contemplated under clause 9 of the consent terms. This being the case, there was no question of Defendant No. 6 having to pay the aggregate sale consideration of USD 17,000,000/-to ICICI Bank Ltd. and Rs. 23,50,00,000/-to the Plaintiffs, for and on behalf of Defendant No. 5.

15. It is pertinent to note that clause 11(a) begins with the words "On execution of the Sale Deed for Rig No.IX in favour of Defendant No. 6, Defendant No. 6 agrees and undertakes to this Hon'ble Court,.....". It is an admitted fact that no Sale Deed has been executed between Defendant No. 5 and Defendant No. 6 with reference to Rig No.IX. In the absence of a Sale Deed as contemplated under clause 11(a) of the consent terms, it would be unfair to enforce the undertaking against Defendant No. 6 to pay the amounts of USD 17,000,000/-to ICICI Bank Ltd. and Rs. 23,50,00,000/-to the Plaintiffs, respectively. These amounts represented the sale consideration for Rig No.IX, and not having exercised its option to purchase it, Defendant No. 6 cannot be asked to pay these amounts.

16. For all the aforesaid reasons, we find no merit in these Appeals and the same are dismissed. The Appellant (Original Defendant No. 5) shall pay costs of Rs. 50,000/-to the Plaintiffs, and Rs. 50,000/-to Defendant No. 6 in each of the Appeals.