Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 768 OF 2015
WITH
CIVIL APPLICATION NO. 2408 OF 2015 IN F.A. NO. 768 OF 2015

Star Care India Ltd., through
Director Manoj Parasmal Raka … Appellant/Applicant
vs.
Union Bank of India … Respondent

Mr. Vivek V. Phadke i/b. Kaikini Phade & Associates, Advocate for the appellant/applicant.
Mr. Ismail A. Nasikwala, Advocate for the respondent.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE : **AUGUST 28, 2015**

P.C.:

Admit. By consent, the Appeal is heard finally and disposed of at the stage of admission.

2. This First Appeal is filed against the judgment and order dated 12th March, 2015 passed by the learned Judge of the City Civil Court, Greater Mumbai while deciding a preliminary issue on the point of jurisdiction of Civil Court to entertain and try the suit. The learned Judge of the City Civil Court dismissed the suit by deciding that the Court has no jurisdiction to try and entertain the suit filed by the appellant/original plaintiff. The appellant is the borrower of respondent/bank. They have mortgaged a property with the bank by way of security for the loan which they have obtained. There are also further transactions in respect of

offering some other property by way of security and as the appellant was in default in repayment of the loan, the respondent/bank issued notice under section 13(2) of the SARFAESI Act. The appellant has grievance that the property for which the notice issued under section 13(2) of the SARFAESI Act was in fact not mortgaged with the bank but there was replacement of the property and the bank has not considered this fact, therefore, the notice issued was in respect of second or third property was illegal. It is the case of the appellant that notice was sent under section 13(4) of the SARFAESI Act in respect of the property which was not mortgaged.

3. The learned counsel for the appellant has submitted that the issue of declaration whether a property was mortgaged or not cannot be decided by Debts Recovery Tribunal but such declaration can be given by Civil Court and therefore, they have filed the suit before the Civil Court and sought declaration in the suit that the respondent/defendant is not entitled to claim mortgage against the second property or third property. It is further submitted that the learned Judge of the City Civil Court has committed an error in not appreciating the legal position under proviso 13(3)(a) of SARFAESI Act that if a notice is served under section 13(2) and if reply is given by the bank, then under section 13(3)(a) proviso, this does not create any cause of action for the debtor to approach DRT and

challenge the said reply of secured creditor. The learned counsel relied on the judgment of Hon'ble Supreme Court in the case of **Nahar Industrial Enterprises Ltd. vs. Hong Kong and Shanghai Banking Corporation, reported in (2009) 8 SCC 646.**

4. Per contra, the learned counsel for the respondent/bank submitted that the action is already taken by the bank and notice is issued under section 13(4), hence, under section 13(4) of the SARFAESI Act, the Civil Court has no jurisdiction to try any matter under SARFAESI Act. He submitted that the only remedy for the appellant is to approach the DRT by filing Appeal under section 17 of SARFAESI Act. He submitted that the facts and law laid down in the case of **Nahar Industrial Enterprises** *(supra)* is not applicable to this case because the Hon'ble Supreme Court has considered the issue in respect of transfer of suit before the DRT, as a counter claim whether it is permissible or not. On the point of scope and jurisdiction of DRT and bar on the Civil Court, he relied on the case of **Jagdish Singh vs. Heeralal & Ors., reported in (2014) 1 SCC 479**. He submitted that in this ruling, judgment of **Nahar Industrial Enterprises** is considered .

5. Perused the order passed by the learned Judge of the City Civil Court, plaint and the prayers made therein. It is a position that the

appellant is a borrower and mortgaged one property and also replaced the second and third property as security. It is an admitted fact that under section 13(2) of SARFAESI Act, notice is given by the bank, so also under section 13(3)(a), the borrower has approached secured creditor and the secured creditor has also filed to the said application of the borrower and thereafter further steps are also taken by the respondent/defendant and notice under section 13(4) is issued. My attention is drawn to the fact that a symbolic possession of the property is taken and the said fact is also mentioned in the plaint. The appellant/plaintiff has challenged the mortgage of the second property of which symbolic possession is admittedly taken. Considering these developments and the steps taken under the Act especially Section 13(4), the only remedy before the appellant is to file Appeal under section 17 of the SARFAESI Act. In the case of **Jagdish Singh**, the Hon'ble Judges of the Supreme Court after considering various provisions of the SARFAESI , placed reliance on the ratio laid down in **Mardia Chemicals Ltd. & Ors. vs. Union of India & Ors., reported in (2004) 4 SCC 311** in respect of scope of Section 34 of the Act, which places bar on the jurisdiction of the Civil Court in respect of entertaining any suit or proceedings in respect of the matter of DRT and also to determine any issue. In the last two paragraphs of the judgment, the Hon'ble Judges of the Supreme Court has also considered that under section 34, no Civil

Court has any jurisdiction to entertain any suit in respect of any matter (emphasis supplied), which a DRT or Appellate Tribunal is empowered by or under the SARFAESI Act to determine. The learned Judge of the City Civil Court has discussed all the provisions and also the ratio laid down by the Supreme Court in various judgment and has passed the correct order. The order passed by the learned Judge of the City Civil Court cannot be faulted with. Hence, the First Appeal is dismissed.

6. In view of dismissal of First Appeal, Civil Application does not survive and hence, the same is accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)