IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO.68 OF 2016.

HDFC Housing Development
Fianance Corporation Ltd., thr.
Its const. Att. Mr. Manoj J. Shah. ....Appellant.

Vs

Mr. Satish Krishna Sail and
2 ors. .....Respondents.

Shri S. M. Singbal, Advocate for the appellant.
Shri Balkrishna Sardessai, Advocate for the respondent nos.1 and 2.
Shri Shivan Desai, Advocate for the respondent no.3

Coram:-PRITHVIRAJ K. CHAVAN,J.
Reserved on 5th September, 2017.
Pronounced on :- 18th September,2017.

<u>ORDER:</u>

This appeal is directed against an order of rejection of an application for temporary injunction by the Senior Civil Judge, "B" Court Panaji on 15.10.2016.

2. A few facts necessary for disposal of the appeal can be stated as follows:-

It is a simple suit of recovery of the money filed by the appellant/Housing Development and Finance Company (for short"HDFC") against respondent nos.1 and 2, who are borrowers of loan for purchasing a Villa described in para 4 of the plaint. The appellant had sanctioned loan to the tune of Rs.1,80,00,000/-

(Rupees one crore eighty lakhs only) on 28.4.2009 with interest @11% per annum and on monthly EMI of Rs. 2,05,588/-. The terms and conditions have been incorporated in an agreement between the appellant and respondent nos.1 and 2 dated 27.5.2009. It is the case of the appellant that it had created an equitable mortgage of said Villa in its favour alongwith executing other relevant documents. Original Agreement of Sale is dated 30.3.2009 executed by the respondent nos.1 and 2 in favour of the appellant. The appellant had disbursed an amount of Rs.44,70,000/- (Rupees forty four lakhs seventy thousand only) in favour of respondent nos.1 and 2, which was duly acknowledged by respondent no.3 by its letter dated 6.4.2009. By the said letter dated 6.4.2009, respondent no.3 gave no objection for giving loan of Rs.1,80,00,000/-(Rupees one crore eighty lakhs only) to respondent nos.1 and 2.

3. By communication dated 28.5.2014, respondent no.3 had cancelled the agreement with respondent nos.1 and 2 without knowledge and prior permission of the appellant, which according to the appellant, is illegal and with ulterior motive by keeping it in dark. The respondents are liable to be prosecuted for cheating and fraud played upon the appellant. According to the appellant, respondent nos.1 to 3 in connivance, have played fraud upon the appellant. According to the appellant, since charge has already been created, respondent no.3 has no authority to cancel the allotment of the said Villa without prior permission of the appellant as a banker. It is also

contended in the plaint by the appellant that it reserves a right to enforce the security of the said suit Villa and to initiate a legal action as per Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short “SARFAESI Act”).

4. Thus, the appellant sought a money decree in a sum of Rs.52,55,751/-(Rupees fifty two lakhs fifty five thousand seven hundred fifty one only) against the respondents *inter alia* seeking attachment of the suit Villa before judgment and restraining the respondents from creating any third party interest.

5. The sum and substance of the contention of the respondent no.3 is that it is not aware about the terms and conditions of the loan agreement and Agreement for Sale dated 30.3.2009 between the appellant and respondent nos.1 and 2. Respondent no.3 contends that it was not a party to the terms and conditions of the loan agreement and, therefore, the conditions are not binding upon him.

6. After hearing the respective sides, the learned trial Court by the impugned order rejected the application for temporary injunction by holding that the Agreement of Sale was executed between the respondent *inter se* wherein respondent nos.1 and 2 were bound to pay respondent no.3 in terms of Annexure II of the

Agreement. It is stated that respondent no.3 had received only Rs.44,00,00/- (Rupees forty four lakhs only) towards part payment from respondent nos.1 and 2, out of total consideration of Rs.3,13,00,000/-(Rupees three crores thirteen lakhs only). Respondent no.3 denied of having any equitable mortgage created in respect of suit Villa in favour of the appellant. It is also observed by the learned trial Court that it is not the case of the appellant that it had disbursed entire sale consideration directly in favour of respondent no.3 in respect of suit Villa which was sold to respondent nos.1 and 2. Respondent no.3 was not a party to the loan agreement or terms between respondent nos.1 and 2 and the appellant. The appellant could very well secure its dues under SARFAESI Act and on this premise,the trial Court refused the relief of temporary injunction.

7. I have heard Shri S. M. Singbal, learned Counsel for the appellant and Shri B. Sardessai, learned Counsel for the respondent nos.1 and 2 and Shri S. Desai, learned Counsel for the respondent no.3.

8. Admittedly, price of the suit Villa is Rs.3,13,00,000/-(Rupees three crores thirteen lakhs only) and the appellant had disbursed an amount of Rs.44,70,000/-(Rupees forty four lakhs seventy thousand in favour of respondent nos.1 and 2. It is also not in dispute that respondent no.3 is a builder, who has been developing

the said project and an amount of Rs.44,70,000/-(Rupees forty four lakhs seventy thousand only) has been received by respondent no.3 at the time of booking the said Villa. A limited prayer in this appeal is to restrain the respondents from disposing or creating any third party right in the suit Villa by quashing the impugned order is made. It is well settled that while entertaining an appeal under Order XLIII Rule 1 of CPC the Appellate Court shall not interfere in the exercise of discretion by the trial Court under Order XXXIX Rules 1 and 2 of CPC, unless discretion is palpably incorrect or untenable. If the view taken by the trial Court is a possible view, the same is not liable to be interfered with by the Appellate Court. Admittedly, there was no privity of contract between respondent no.3 and the appellant. Though, it is the contention of the learned Counsel for the appellant and, as pleaded in the plaint that it has contemplated action against the respondents under SARFAESI Act, what prevented the appellant from initiating action under the SARFAESI Act is unfathomable. If it is a secured creditors, it can enforce its interest as per Section 13 of the SARFAESI Act. Section 34 of the SARFAESI Act clearly bars the jurisdiction of the Civil Courts to entertain any suit or proceedings in respect of any matter which a Debts Recovery Tribunal or Appellate Tribunal is empowered. Section further bars the issuance of any injunction by any Civil Courts or other Authority in respect of any action taken or to be taken in pursuance of any powers conferred by the said Act.

9. Learned Counsel for the appellant drew my attention to a letter dated 6.4.2009 issued by respondent no.3 in favour of the appellant by which it is stated that respondent no.3 has no objection in giving loan of Rs.1,80,00,000/- (Rupees one crore eighty lakhs only) to respondent nos.1 and 2 and mortgaging the said Villa with the appellant by way of security or repayment of the said amount only by virtue of this letter. This letter is not itself sufficient to create charge.

10. Without going into merits, what is required to be seen as to whether there is prima facie case and whether balance of convenience tilts in favour of the appellant. It is also required to be seen whether the appellant would suffer irreparable loss in case of denial of injunction. As already stated, the agreement of loan between the appellant and respondent nos.1 and 2 speaks for itself wherein learned Counsel for the appellant could not lay his hands by which respondent no.3 can be held liable for the amount of loan sanctioned and disbursed in favour of respondent nos.1 and 2. It is not the case of the appellant that the respondents have created any mortgage by deposit of the title Deed. Respondent no.3 contends that there was no mortgage deed executed by him nor there is any instrument of mortgage contemplated by law in favour of the appellant and, therefore, there is no question of creation of the mortgage; rather respondent no.3 contends that it had issued several letters to respondent nos.1 and 2 dated 21.09.2009, 12.11.2009,

21.10.2009, 28.062009, 30.11.2011, 22.10.2012 and 12.05.2014 asking them to make payment as per terms of the Schedule but respondent nos.1 and 2 did not comply with the same and, therefore, respondent no. 3 had cancelled the allotment of the said Villa. The point is very simple, if the appellant cannot claim final relief in the main suit, there is no question of granting the same at an interim stage. The learned Counsel for respondent no.3 has pressed into service a case law reported in ***(2005)11 SCC 520, Bank of India Vs Abhay D. Narottam and others***, paragraphs no.9,10 and 11 read thus:-

> "9. It is not necessary for us to determine the import of Section 125 of the Companies Act as we are of the opinion that the appeal must be dismissed on a much more basis ground. "Mortgage" has been defined in Section 58(1) of the transfer of Property Act, 1882 as a transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, etc. Without a transfer of interest there is no question of there being a mortgage. The same principle would apply to a charge under Section 100 of the Transfer of Property Act. Section 100 provides that all the provisions which apply to

a simple mortgage shall, so far as may be, apply to such charge. The definition of simple mortgage in Section 58(b) of the Act merely speaks of the procedure and describes that species of mortgage.

10. As far as the land is concerned, we agree with the learned Judge that a mere undertaking to create a mortgage is nt sufficient to create any interest in any immovable property.

11. As far as the flat is concerned, it needs no authority to say that a contract for sale of immovable property does not of itself create any interest in or charge over such property. This is provided in Section 54 of the Act and is well-settled law. In this case, the agreement for sale which was deposited by respondent 2 with the appellant Bank was not an agreement by which respondent 2 agreed to sell the property to a third party, but an agreement to sell the flat to respondent 2. No interest was created in favour of respondent 2 by virtue of this agreement for sale which could have been transferred by way of security to the appellant Bank. There is as such no question of the appellant Bank having

any charge over such non-existent interest.”

11. Similar is the situation in the case at hand, merely issuing a letter dated 6.4.2009 by respondent no.3 would not by itself create any interest or charge over the suit Villa. Thus, balance of convenience does not favour the appellant and, therefore, there is no question of appellant suffering any irreparable loss which cannot be compensated in terms of money as the value of the suit Villa can be determined in terms of the money. Learned Counsel has also pressed into service an authority of the Hon'ble Supreme Court in the case of ***Raman Tech. and Process Engg. Co. and anr Vs Solanki Traders, (2008) 2 SCC 30***. This is on the point of Order XXXVIII Rule 5 of CPC. It is held that in order to invoke Order XXXVIII Rule 5 the plaintiff would prima facie show that his claim is bonafide and satisfy the Court that defendant is about to remove or dispose of whole or part of his property with an intention of obstructing or delaying execution of a decree that may be passed against him. Except bare contention as regards knowledge of the appellant that respondent no. 3 is going to create third party interest, without any supporting material, it cannot be said that the appellant would be entitled to invoke provisions of Order XXXVIII Rule 5 of CPC. Power under Order XXXVIII Rule 5 of CPC are indeed extraordinary and not to be exercised mechanically or merely for the asking. It is observed by the Hon'ble Supreme Court at paragraph 5 thus:-

> *"The power under Order 38 Rule 5 CPC is a drastic and extraordinary power, such power should not be exercised mechanically or merely for the asking. It should be used sparingly and strictly in accordance with the Rule. The purpose of Order 38 Rule 5 is not to convert an unsecured debt into a secured debt. Any attempt by a plaintiff to utilize the provisions of Order 38 Rule 5 as a leverage for coercing the defendant to settle the suit calm should be discouraged. Instances are not wanting where bloated and doubtful claim are realised by unscrupulous plaintiffs, by obtaining orders of attachment before Judgment and forcing the defendants for out of court settlements, under threat of attachment."*

12. Learned Counsel for the appellant has pressed into service a judgment of this Court in ***Appeal from Order No.256 of 2013*** in the case of ***Prakash Ahuja Vs Ganesh Pandharinath Dhone and others.*** After going through the entire judgment, I am of the view that the Hon'ble Single Judge of this Court has elaborately discussed the scope of precedent and judgment delivered by co-ordinate Benches of same High Court vis-a-vis the view of the Supreme Court on the same. This judgment infact would not be of any assistance to the appellant.

13. Thus, in the light of the aforesaid discussions, I do not find any substance in the present appeal. Impugned order dated 15.10.2016 does not warrant interference and therefore appeal requires to be dismissed, as such appeal stands dismissed with costs.

PRITHVIRAJ K. CHAVAN,J.

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