Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION No. 3283 OF 2017
IN
FIRST APPEAL NO. 21 of 2017

Satyajit Balasaheb Kadam & Anr, ... Applicants
Vs.
Balasaheb A. Kadam & Ors. ... Respondents

Mr. A.Y. Sakhare, Senior Advocate a/w. Mr. Rohan Mahadik, Shardul Pendee i/b. Juris Partners for the applicants.
Mr. Sanjiv Sawant i/b. Mr. Abhishek P. Deshmukh, Advocate for respondent nos. 1, 2, 3 and 5.
Mr. Rohit Gupta a/w. Ms. Anamika i/b. HSA, Advocate for respondent no. 4.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **1st November, 2017.**

P.C.:

The First Appeal is admitted on 14th February, 2017. In this Appeal, the order dated 2nd December, 2016 passed by the learned Judge of the City Civil Court in Notice of Motion No. 4504 of 2016 in S.C. Suit No. 2275 of 2016 thereby allowing the Notice of Motion and rejecting the plaint under Order 7 Rule 11(d) of Code of Civil Procedure is challenged. The plaintiff No. 1 along with his wife filed the suit against his father/defendant no.1, mother/defendant No. 2, a partnership firm/defendant No. 3 and bank/defendant No. 4 seeking relief that the notice for auction/sale dated 7th September, 2016 issued by the bank is to be declared as null and void and also sought injunction that no possession of the suit flats is to be taken by the bank. In the suit, relief of partition in respect of three suit flats which claimed to be property of HUF wherein the plaintiffs sought declaration of 12.92% shares is also sought. The trial Court rejected the plaint on the ground that the Civil Court has no jurisdiction to try and entertain this matter, as it is barred under section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (**SARFAESI**) **Act**, 2002 . The bank has given the loan on the mortgage of the three suit flats to defendant No. 1 who borrowed it in the capacity of karta of HUF. The said loan was not repaid, hence the proceedings under SARFAESI Act were initiated. Under section 13(4) the bank approached the Magistrate Court and notice of action was issued by the learned Magistrate. The order of rejection of the plaint is thus challenged before this Court in this Appeal.

2. The learned senior counsel Mr. Sakhare for the applicants has submitted that the Appeal is admitted, however, Civil Application seeking injunction against taking measures in respect of 12.95% share of the applicants and also seeking various relief in the present application which is not heard. He submitted that the plaintiff has sought not only the relief against the proceedings initiated under the

SARFAESI Act but seeks declaration in respect of his share in the ancestral property, i.e., three suit flats and such issue of title can only be decided by the Civil Court. He further submitted that the trial Court has erred in rejecting the plaint and the plaintiff cannot be non-suited and deprived of his right to seek remedy of declaration of his share in the ancestral property. The learned senior counsel read over the prayers made in the plaint so also the prayers in the Civil Application. He submitted that in the Civil Application, the applicant seeks that respondent/bank, while publishing the auction notice, is to be directed to mention the fact of pendency of the First Appeal No. 21 of 2017 and is admitted in the Court where the applicant is having a share to the extent of 12.92% in the suit property. He submitted that this publication be ordered and that the direction to publish this fact shall not come in the way of the Court under section 34 of SARFAESI Act. He submitted that Debt Recovery Tribunal is not a forum who can decide the issue of partition or give declaration about the share of the parties. Under such circumstances, if it is held that the Civil Court has no jurisdiction to try and entertain such suit for partition, the plaintiff will be non-suited and it will cause injustice to the plaintiff and he will be rendered without remedy.

3. Per contra, the learned counsel for the respondent/bank, who is

the main contesting party, while defending this Civil Application, has submitted that the view taken by the trial Court is correct, as the trial Court is barred from entertaining any suit and pass any order in respect of the measure taken under SARFAESI Act. In support of his submissions, he relied on the following judgments:

(i) Judgment of Single Judge of this Court of Nagpur Bench in Allahabad Bank vs. Hemantkumar in Civil Application No. 43 of 2016[1].

(ii) Judgment of Single Judge of this Court in Authorized Officer, Kotak Mahindra Bank, Pune vs. Brahmo Construction Pvt. Ltd., Pune[2].

(iii) Judgment of Division Bench of this Court in State Bank of India vs. Smt. Jigishaben B. Sanghavi & Ors.[3].

(iv) Judgment of Hon'ble Supreme Court in Jagdish Singh vs. Heeralal & Ors.[4].

4. On perusal of the plaint, reliefs sought in the suit so also the prayers made in the Civil Application, it is found that the plaintiff/applicant mainly wants to stop the action taken by the bank under SARFAESI Act. The plaintiff may be having a right in the suit

1 2017 SCC Online Bom 6602 (Civil Application No. 43 of 2016)
2 2015(4) MH.L.J. 699
3 Apoeal No. 244 of 2010 in Chamber Summons No. 907 of 2008 in Suit No.1076 of 2005 dated 8th December, 2010.
4 (2014) 1 SCC 479

property as it is an ancestral property, undoubtedly, if the plaintiffs want any declaration in respect of their right in the property and declaration of the apportionment of their shares, then it will be decided only by the Civil Court. However, this is not the suit simplictor for such declaration of the rights but the main purpose of asking the reliefs of injunction against the bank that it should not proceed with auction and take possession of the suit flats which were mortgaged with the bank. Thus, the plaintiff challenged the measures taken under section 13(4) of the SARFAESI Act. The jurisdiction of the Civil Court is barred under section 34 of the SARFAESI Act and the only remedy available to the aggrieved person is to challenge such action before the Debt Recovery Tribunal under section 17 of the Act. This issue is not resintegra.

5. In the case of **Jagdish Singh** *(supra)*, the Hon'ble Supreme Court has held that "Any person aggrieved by any of the "*measures"* referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "*in respect of any matter*" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine". SARFAESI Act is a resulted oriented

statute made by the legislation and DRT is a special forum created to give quick relief to banks to recover the loans.

6. In the case of **State Bank of India vs. Smt. Jigishaben B. Sanghavi** *(supra),* the Division Bench of the Bombay High Court has relied on the landmark judgment of Supreme Court in **Mardia Chemicals Ltd. vs. Union of India**[5] for explaining the scope of Section 13(4) and Section 17 of the SARFAESI Act. The Division Bench in unambiguous words has rejected the plan under section 34 of the SARFAESI Act.

7. In the case of **Allahabad Bank** *(supra)*, the single Judge of this Court dealt with number of cases and the relevant provisions of the Securitisation Act and held that the Civil Court has no jurisdiction to entertain the suit filed by the respondents in view of eh bar created by Section 34 of the SARFAESI Act.

8. Thus, the order passed by the learned trial Judge rejecting the plan under Order 7 Rule 11(d) of the Code of Civil Procedure is maintained. Civil Application is hereby rejected.

(MRIDULA BHATKAR, J.)

5 AIR 2004 SC 2371