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

WRIT PETITION (L) NO.2239 OF 2017

Prithvi Bricks and Mortar Pvt. Ltd. ..Petitioner
Versus
Board of Directors of Vijaya Bank and others ..Respondents

Mr. Mathew Nedumpara i/by Mr. Joveson Jose Veronica Cheruvathur
for the Petitioner.

Mr. Madhur Rai a/w Mr. Sachin Kanse for Respondent No.3.

**CORAM: B. R. GAVAI &
SANDEEP K. SHINDE, JJ.**

DATE: 8th November, 2017

P.C.:-

1] The present Petition is nothing else but an abuse of process of law.

2] When the matter was called out, we were of the view that in view of the order passed by Division Bench of this Court dated 02/5/2017 in WP (L) No.763 of 2017, the present Petition was not tenable.

3] However, Mr. Nedumpara, learned Counsel for the Petitioner, submitted that he has an arguable point and therefore he should be

granted 10 seconds to argue the case. However, thereafter, he submitted that the words “ten second, was a slip of tongue and he should be granted 10 minutes to argue the case.

4] We have granted Mr. Nedumpara 10 minutes and heard him for 10 minutes without interruption on a single occasion. However, after 10 minutes, when we had informed that his time was over, he submitted that his arguments were not yet over and he should be allowed to argue for further 10 minutes. We however refused the said request. At this point of time, he submitted that he would like to withdraw his appearance from the case and time should be granted, so that the Petitioner engages some other lawyer to represent its case. He also informed us that it may be his last appearance before this Bench.

5] With time constraints and pendency of matters for more than decades, we cannot permit luxury to lawyers of arguing the matter endlessly till they are satisfied. As such, we refused the request of Mr. Nedumpara to grant him further time and also to withdraw his appearance from the matter, so as to enable the Petitioner to engage the services of another lawyer.

6] The present Petition is a classic case as to how the borrowers make every attempt to see to it that provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (For short, “the SARFAESI Act”) are defeated and

secured creditors i.e. the Banks are deprived of their legitimate dues. Needless to state that money which is borrowed by the borrowers and lent by the Banks, is money belonging to the public exchequer and, as such, a public money.

7] The Petitioner herein claims to be the tenant of Respondent No.2, who has borrowed substantial amounts from Respondent No.1 – Vijaya Bank.

8] It appears that Vijaya Bank had initiated proceedings against Respondent No.2 for recovery of dues which were more than Rs 200 crores. The present Petitioner filed a suit before the Small Causes Court at Mumbai, claiming to be the tenant and seeking injunction against the Respondent – Bank from enforcing measures taken by it for possession of secured assets.

9] Needless to state that one of the secured assets, is the property in respect of which tenancy is claimed by the Petitioner. It appears that Respondent – Bank raised a preliminary objection with regard to tenancy of the Petitioner and therefore the learned Judge of the Small Causes Court framed a preliminary issue below Exhibit-1 in R.A.D. Suit No.453 of 2015 with regard to jurisdiction of the Court. Vide Judgment and Order dated 20/03/2017, the preliminary objection was upheld and it was held that in view of the provisions of Section 17(4-A) of the SARFAESI Act, it is the DRT, which will have jurisdiction to enter the said dispute.

10] After the said order was passed, the Petitioner filed Writ Petition (L) No.763 of 2017. It will be relevant to refer to the reliefs claimed in the said Petition, which read as under:-

"(a) Declare that the forum invested with the jurisdiction of determination of the controversy, namely, whether the petitioner's assertion that he is a tenant of the said property and the denial thereof by the Respondent Bank has to be determined by a Civil Court/Rent Control Court before which the Petitioner has already instituted a suit, which is pending for adjudication and final disposal;

(b) declare that the question as to whether or not the Petitioner is entitled to enforce his rights as a tenant, which is the subject matter of suit R.A.D. SUIT NO.453 OF 2015 instituted by the petitioner in the court of small causes Mumbai at Bandra which is pending as of the date, even upon the promulgation of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act 2016, is liable to be continued and decided by the said Court since the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act 2016 will only have prospective effect, which is manifest from the fact that the said Act does not provide for transfer of such pending suits or other proceedings to the Debts Recovery Tribunals;

(c) declare that the estate, right, property, ownership, title, possession and enjoyment invested in the petitioner as a tenant of the said property which is the subject matter of the suit R.A.D. SUIT NO.453 OF 2015 instituted by the petitioner and pending in the court of small causes Mumbai at Bandra is not liable to be in any manner, abrogated or interfered with by the respondent bank / advocate commissioner / Ld.CJM/ police in exercise of the powers invested in them under section 13(4) and 14 of the

SARFAESI Act, 2002;

(d) declare that an Advocate is not an employee of or is subordinate to any authority/officer, nay, even of any Court or Tribunal, but is the *sentinel qui vivi* of the freedom and liberties of the citizen, the very fourth estate, till the dawn of the 20th century, is wholly independent and is not an officer subordinate to the Chief Metropolitan Magistrate within the meaning of Section 14(1)A of the SARFAESI Act and further that the appointment of the Respondent No.5 as Advocate Commissioner by the Metropolitan Magistrate Court, Mumbai to execute the Order passed by him under Section 14 of the SARFAESI Act is one without jurisdiction, *ultra vires* the Act and thus rendered *void ab initio*;"

11] The learned Judges of the Division Bench, vide Judgment and Order dated 02/05/2017, found that during pendency of the Petition, the appeal, challenging the order passed by the learned Single Judge of the Small Causes Court, was filed before the Division Bench of the same Court. The Division Bench in its order dated 02/5/2017 also noted that an application for injunction in the said appeal was also preferred and the same was argued but was to be decided. After considering the contentions raised by Mr. Nedumpara, the learned Judges observed in paras 6 and 7 of the said order as under:-

"6. On the other hand, on notice, the first respondent and the third respondent so also the fourth respondent - all officers of the Bank - have appeared and Mr. Rai, appearing on their behalf has raised a preliminary objection to the maintainability of the writ petition. He submits that there are remedies under the SARFAESI Act which the petitioner can avail of and in which if the claim of tenancy is successfully proved and established, then, the possession of the secured assets can

be restored to the petitioner/plaintiff. In any event and without prejudice the settled principles are that laws enacted by the Competent Legislature are constitutional unless held otherwise or declared to be so. The petitioner has approached the Appellate Bench of the Court of Small Causes and no injunction has been granted in favour of the petitioner/plaintiff till date. Therefore, this Court should not pass any further orders on this writ petition, but in the teeth of a huge sum, namely, to the extent of Rs.200 Crores to be recovered from the defaulter borrower, such tactics have been adopted to stall the inevitable.”

“7. After hearing both sides, we are of the view that this writ petition under Article 226 of the Constitution of India need not be entertained at this stage. However, by keeping open all legal contentions and to be raised before the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal, or in any pending proceedings, we dispose of this writ petition. We clarify that while disposing of this writ petition we do not, in any manner, restrain the Bank from exercising its powers under the SARFAESI Act. It is in these circumstances that it would be free to proceed and obtain the assistance of the learned Chief Metropolitan Magistrate and if any further order is passed in favour of the Bank, it is at liberty to enforce it in accordance with law. The writ petition accordingly stands disposed of.”

12] It further appears that another Writ Petition being Writ Petition (L) No.1490 of 2017 was filed by the very same Petitioner. By the said Petition, the Petitioner again challenged certain provisions of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016. The said Petition was withdrawn by the Petitioner, as could be evident from the order

passed by this Court dated 06/07/2017. It is pertinent to note that one of us (B.R. Gavai, J.) was a party to the said Division Bench, which has passed the said order. Now, the present Petitioner has filed this Petition almost for identical reliefs which were claimed in Writ Petition (L) No.763 of 2017.

13] It is the basic contention of Mr. Nedumpara, the learned Counsel for the Petitioner, that the order passed by Division Bench of this Court in Writ Petition (L) No.763 of 2017 does not operate as *res judicata* inasmuch as, no issues were decided in the said Petition. He further submitted that the Petition raises various constitutional issues. It is the contention of the learned Counsel for the Petitioner that the amendment to Section 17 which has brought sub-section (4-A) on the statute book, has been incorporated in 2016, whereas the suit was filed by the present Petitioner in 2015 and, therefore, the provisions of Amended Act, would not be applicable to the suit filed by the Petitioner. It is further submitted that since the important question with regard to constitutionality of the provisions of Order XXVII-A of the CPC was raised in the suit, the learned Judge of the Small Causes Court ought not to have decided the issue without issuing notice to the learned Attorney-General in view of the provisions of Order XXVII-A of the CPC read with section 117 of the CPC. He submitted that on conjoint reading of both the provisions, the suit ought to have been referred for adjudication to this Court.

14] No doubt the arguments raised by Mr. Nedumpara are very

attractive. At the same time, we may also take into consideration the requirement of judicial propriety. If a particular lis is not entertained by a particular Bench, the question is whether on a change of roster, Petition should be allowed by this Court or not. We may not go in the question as to whether the provisions of Order XXVII-A are applicable to the facts of the present case or not. However, we may not lose sight of the Order II Rule 2 of CPC, which reads thus :-

“ORDER II

1. Frame of suit.- Every suit shall as far as practicable be framed so as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them.

2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim.- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for all such relief so omitted.

Explanation.- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

15] It could thus be seen that under the provisions of Order II Rule 2, Plaintiff is required to include all the claims which he is making in respect of the cause of action. Not only that, Mr. Nedumpara fairly states that it was done not only once but twice. If a challenge which is sought to be raised now, was already raised on two earlier occasions and on the first occasion when the Court did not find it appropriate to entertain the challenge and on second occasion the Petitioner himself has withdrawn the Petition raising the very same challenge, we find that public policy behind the provisions of Order II Rule 2 of the CPC would prohibit the Court from entertaining the present Petition. At the cost of repetition, we may say that if the present Petition is permitted to be entertained, it would permit Bench hunting by the Petitioner inasmuch as, if a particular Bench refuses to entertain the challenge and at that stage Petitioner withdraws the Petition, subsequently the Petitioner may again file another Petition after withdrawal of the first Petition with the change in assignment. We are of the considered view that in view of non-entertaining of the first Petition and withdrawal of the second Petition, the judicial propriety and public policy requires that we should stay our hands away from the present Petition.

16] It would appear from the record that the Petitioner in Writ Petition (L) No.763 2017, had approached the Hon'ble Supreme Court being aggrieved by the order of Division Bench of this Court dated 02/05/2017. It will be relevant to refer to the order passed by the Hon'ble Supreme Court in Diary No.24654/2017 on 30/10/2017, which reads as under:-

“UPON hearing the counsel the Court made the following

O R D E R

Delay condoned.

The petitioner in the first case i.e. Diary No.24654/2017 is before this Court, aggrieved by the order dated 2.5.2017 in Writ Petition No.763/2017 passed by the High Court of Judicature at Bombay.

During the course of hearing the Petitioner in SLP(C) No.27638/2017 has brought to the notice of this Court that the petitioner in special leave petition @ Diary No.24654/2017 has already filed a Writ Petition (L) No.2239/2017 and the same is pending before the High Court wherein also the prayers are identical. We also found that there is an interim order of status quo operating in the said case.

Therefore, we request the High Court to dispose of the Writ Petition (L) No.2239/2017 expeditiously, preferably within two weeks from the date of next date of listing. It is open to the parties to take all available contentions before the High Court.

Undertaking by the learned counsel on both the sides that they will not ask for adjournment is also recorded.

Subject to the above, both the special leave petitions are dismissed.

Pending application(s), if any, shall stand disposed of.”

It could thus be seen that the Petitioner, when the matter was listed before the Hon'ble Supreme Court on 30/10/2017, challenged the order dated 02/05/2017 in Writ Petition (L) No.763 of 2017 and only brought to the notice of Their Lordships the fact regarding pendency of the present Petition. However, perusal of the order passed by the Hon'ble Supreme Court, would reveal that the Petitioner has not brought to the notice of Their Lordship the fact regarding filing of the second Petition being Writ Petition (L) No. 1490 of 2017, which was listed on 06/07/2017 before Division Bench of this Court to which, one of us (B.R. Gavai, J.) was a party. The reliefs sought in the said Petition were almost identical with the reliefs which were sought in Writ Petition (L) No.763 of 2017 and the present Petition. In the said Petition, learned Counsel for the Petitioner, after arguing for considerable period, sought liberty to withdraw the said Petition. The said Writ Petition (L) No.1490 of 2017 was allowed to be withdrawn by the Division Bench vide Order dated 06/07/2017, which reads thus:-

“1. Shri Nedumpara, the learned Counsel for the Petitioner, after arguing at length, seeks liberty to withdraw the Writ Petition. Writ Petition is allowed to be withdrawn.”

It is pertinent to note that the said matter was argued before this Court by the same Counsel, who had argued the matter before the Hon'ble Supreme Court. Perusal of the order passed by Their Lordships of the Supreme Court would reveal that the fact regarding withdrawal of Writ Petition (L) No. 1490 of 2017 was suppressed from Their Lordships of the Supreme Court. In our considered view, suppression of material fact would disentitle a party from invoking equitable jurisdiction of this Court.

16] Petition is therefore found to be without any merit and dismissed as such with costs which is quantified at Rs 1 lakh. Costs to be paid by the Petitioner to the Maharashtra Legal Services Authority within a period of two weeks from today.

17] Insofar as statement of Mr. Nedumpara that it may be his last appearance in this court is concerned, we do not possess any advisory jurisdiction to advise a lawyer. If Mr. Nedumpara choses, he may appear before us in any other case and we would always welcome him to address the Court but if he choses not to appear and refuses brief, in this Court, it is his sweet will to do so.

(SANDEEP K. SHINDE, J.)

(B. R. GAVAI, J.)