IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.13 OF 2018

Mr. Nilesh Sangodkar,
Major, Indian National,
Resident of H.No.1024,
Doswado, Socorro,
Bardez-Goa. …. Applicant

V/s

1 Mrs. Laxmi Rohidas Calangutkar (since deceased) major, w/o. late Rohidas Atmaram Calangutkar, through LR's

2 Mr. Atmaram Rohidas Calangutkar, Major, son of late Rohidas Atmaram Calangutkar

3 Mrs. Amita Atmaram Calangutkar, Major, daughter-in-law of late Rohidas Atmaram Calangutkar

4 Ms. Suvarna Rohidas Calangutkar, Major, daughter of late Rohidas Atmaram Calangutkar

5 Mrs. Sumita Ashok Goltekar,
Major, daughter of late Rohidas Atmaram Calangutkar

6 Mr. Ashok Goltekar

Major, son-in-law of late
Rohidas Atmaram
Calangutkar

All Indian Nationals,
Residents of H.No.353,
Troppa Waddo, Sodiem,
Siolim, Bardez-Goa.

7 Mrs. Indira alias Krutika
Krishnanath Narvekar,
Major, daughter of late
Rohidas Atmaram
Calangutkar

8 Mr. Krishnanath Narvekar,
Major, son in law of late
Rohidas Atmaram
Calangutkar

Both Indian Nationals and
residents of H.No.266/4B,
Oxel Bhati, Siolim,
Bardez-Goa.

9 The Goa State Co-
operative Bank Ltd.
A Co-operative Society
registered under the
Maharashtra Co-operative
Societies Act, 1960 and
now governed under the
Multistate Co-operative
Societies Act, 2002,
Having its registered office
at Shakar Sankul, EDC
Plaza, Patto, Panaji-Goa
and Branch Office at
Mapusa Market, Mapusa,
Bardez-Goa. Through is
Branch, Manager.

10 Mr. Ashok Mandrekar,
Major, son of Shri Satu G.
Mandrekar, Resident of
H.No.259, Nadorawadi,
P.O. Colvale, Bardez-Goa. …. Respondents

Shri Prasheen Lotlikar, Advocate for the Petitioner.

Shri Nigel Da Costa Frias, Advocate for the Respondents No.2 to 8.

Shri Rama Rivankar, Advocate for the respondent No.9.

Coram:- NUTAN D. SARDESSAI, J.

Reserved on :-17th October, 2018
Pronounced on :- 29th October, 2018

JUDGMENT :

The parties were put to notice that the matter would be finally heard at the admission stage. Rule. Learned Counsels appearing for the parties waive service.

2. The applicant has challenged in revision the legality and propriety of the order dated 13/12/2017 passed by the Civil Judge, Junior Division, 'F' Court, Mapusa pursuant to which she dismissed the application for the rejection of the plaint under Order VII Rule 11(b),(c) & (d) of the Civil Procedure Code. The impugned order was unjust, illegal and arbitrary and would cause gross miscarriage of justice if allowed to

stand. The learned Judge had failed to consider the case of the applicant that on the basis of the statements made in the plaint the same appeared to be barred by law and therefore ought to have rejected the plaint under Order VII Rule 11(d) of the Civil Procedure Code. The impugned order constitutes an illegal exercise of discretion/jurisdiction by the Trial Court inasmuch as the learned Trial Court failed to appreciate that in terms of the statements made in the plaint, the same appeared to be barred by law in view of the specific provisions contained in the Multi-State Co-operative Societies Act, 2002. The impugned order was illegal inasmuch as the learned Trial Judge failed to appreciate that on the basis of the statements made in the plaint, the same appeared to be barred by law although the prayers in the suit were styled in such a manner so as to camouflage the actual relief, which was otherwise barred by law. The impugned order had therefore to be quashed and set aside and the application for rejection of plaint under Order VII Rule 11(b),(c) & (d) had to be allowed.

3. Heard Shri P. Lotlikar, learned Advocate for the applicant who submitted that the suit filed by the respondents no.1 to 8 for declaration and injunction was barred by the Multi-State

Co-operative Societies Act and in that context invited attention to Rule 37 sub-rule (14) thereof. He further invited attention to the pleadings in the plaint and submitted that there was no question of any fraud being played on the respondents no.1 to 8. They were duly served as evident from the pleadings in the plaint but had not participated thereafter. In case there was any objection to the same, the remedy lay by recourse to Rule 37 of the Multi-State Co-operative Societies Act, 2002 and the Rules framed thereunder ('The Act' and 'the Rules' for short) and therefore the impugned order as passed was liable to be quashed and set aside. He placed reliance in **Madanuri Sri Rama Chandra Murthy V/s. Syed Jalal [AIR 2017 SC 2653]** and that in **State Bank of India V/s. Mr. Aurelia Jose Da Costa & Ors. [CRA No.13/2013]** and submitted that the plaint was liable to be rejected.

4. Shri Rama Rivankar, learned Advocate for the respondent no.9 supported the case of the petitioner and wrapped up his arguments. Shri Nigel Da Costa Frias, learned Advocate for the respondents no.2 to 8 being the contesting respondents submitted at the outset that the petitioner was

the defendant no.3 in the suit filed by the respondents and who had been duly served with the notice. He had not filed any written statement in defence and the proceedings were ordered ex-parte against him. It was another matter that the suit was belatedly stayed. He next adverted to the pleadings in the plaint, distinguished the judgment in **Madanuri Sri Rama Chandra Murthy** (supra) relied upon by Shri P. Lotlikar, learned Advocate for the petitioner and on his part placed reliance in **P.V. Guru Raj Reddy rep. GPA Laxmi Narayan Reddy & Anr. V/s. P. Neerabha Reddy & Ors. [2015 8 SCC 331]**. It was next the contention of Shri Nigel Da Costa Frias, learned Advocate for the respondents no.2 to 8 that Rule 37(14)(i) did not apply and in any event the Recovery Officer had no jurisdiction to deal with an issue on the validity of the mortgage deed.

5. Shri Nigel Da Costa Frias, learned Advocate for the respondents no.2 to 8 further placed reliance in **The Deputy Custodian V/s. Nathilal [1956 0 Supreme (Raj) 75, Shrimati Shanti Devi V/s. Ram Chandra Ram [1995 0 Supreme (Pat) 251]** and by referring to Section 17 of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) submitted that the judgment in **State Bank of India** (supra) was clearly distinguishable and did not substantiate the case of the petitioner. It was next his contention that the application for rejection of the plaint for want of a cause of action was not maintainable and had to be dismissed and pressed for the dismissal of the petition.

6. Shri P. Lotlikar, learned Advocate for the applicant once again invited attention to the relevant pleadings in the plaint and submitted that there was no question of any fraud. He also adverted to Rule 37(14)(vi) and the judgment in **State Bank of India** (supra) and submitted that the petition had to be allowed.

7. Shri Nigel Da Costa Frias, learned Advocate for the respondents no.2 to 8 in further reply submitted that Rule 14(i) of the Act did not apply to the case of the respondents when there was a challenge not to the sale but to the mortgage deed and it was not open to the Recovery Officer to go into the merits of the same. Further reliance was placed by him in **Bhau Ram V/s. Janak Singh & Ors. [(2012) 8**

SCC 701], **Mr. Gopal Dhrinivasan V/s. National Spot Exchange Limited & Ors. [2018 (5) ALL MR 217]**, **Popat and Kotecha Property V/s. State Bank of India Staff Association [2005 (6) Supreme 7]**, **C. Natarajan V/s. Ashim Bai & Anr. [2007 (7) Supreme 532]**, **M/s. Candolim Developers Pvt. Ltd. & Anr. V/s. Mr. Pravin Grover [First Appeal No.62/2016]** and lastly in that of **Ramesh Gobindram (dead) through LR's V/s. Sugra Humayun Mirza Wakf [(2010) AIR (SC) 2897]** while pressing for the dismissal of the application.

8. i would consider their submissions, the judgments relied upon supra, the pleadings in the plaint and consider whether any interference is called for with the order under challenge being beyond the jurisdiction of the Trial Court.

9. The respondents no.2 to 8 had filed the suit in respect of the property known as "Oddi" bearing distinct Survey No.266/1-A of village Salvador do Mundo being 'the suit property' for brevity's sake through their predecessor late Rohidas Atmaram Calangutkar, husband/father of the plaintiffs purchased by a Deed of Sale dated 13/12/1983 and inherited

by them upon his death. They had carved a case that the defendant no.2 Ashok Mandrekar who is the respondent no.10 in this petition had availed a loan from the respondent no.9 in the sum of ₹15,00,000/- for which the respondent no.1 alongwith her late husband had stood as sureties and he assured to pay the loan within the stipulated time. There was no dispute at their instance that the plaintiff no.1 and her late husband had signed various documents at the instance of the Bank and the borrower i.e. the respondent no.10 for the purpose of guaranteeing the repayment of the loan and had signed the same blindly at the instance of the Bank and the borrower-respondent no.10. There was a default in making the repayment of the loan within the stipulated period giving rise to a dispute raised by the Bank against the borrower as also against the plaintiff and her late husband and an amount of ₹16,71,228/- was claimed by the Bank from the borrower as also the plaintiff no.1-respondent no.1 and her late husband with interest till full and final settlement of the loan. The judgment and order was passed by the Assistant Registrar of Co-operative Societies under Section 84 of the Act directing the borrower as well as the respondent no.1 and her late husband to pay the amount of ₹16,71,228/- to the Bank

with interest till final settlement.

10. It was further the case of the respondents no.2 to 8 as set out in the plaint that they were unaware of the order passed by the Assistant Registrar and did not take steps to challenge by filing an appeal under the Act nor any steps were taken by the borrower to challenge the order giving rise to its execution at the instance of the Bank before the Recovery Officer. It was also their case that the deed of mortgage was executed in favour of the Bank dated 20/03/2004 being an equitable mortgage whereby the suit property was mortgaged to the Bank to guarantee the repayment of the loan dues of the borrower and to which the plaintiff and her late husband were parties. The plaintiffs had otherwise set out in their plaint that a notice was published dated 25/09/2006 by the Bank in the daily Tarun Bharat dated 26/09/2006 inviting sealed quotations in respect of two properties, one being the suit property "Oddi" and in the auction proceedings, the suit property came to be sold to the defendant no.3. It was the case of the plaintiffs that it is only on 27/05/2010 upon the death of their mother and on going through the records did they learn that the property was sold by the Bank to the

defendant no.3 and thus maintained the suit alleging fraud in 2009 seeking a declaration that the deed of mortgage executed by the plaintiff no.1 and her late husband and the borrower in favour of the Bank was illegal, null and void and the sale in favour of the respondent no.10 was also illegal, null and void and permanent injunction.

11. The petitioner who was the original defendant no.3 moved an application for rejection of the plaint under Order VII Rule 11(b), (c) & (d) of the Civil Procedure Code on the premise that looking to the very tenor of the pleadings in the plaint and as there was a sale of the property in public auction duly confirmed by the Recovery Officer within the meaning of sub-clause (3) of sub-rule 14 of Rule 37 of the Rules confirming the sale of the suit property, the suit questioning such sale was not tenable. The Civil Court had no jurisdiction to declare the Sale Certificate and confirmation order null and void and therefore the plaint was liable to be rejected as being barred by law. The learned Trial Judge considered the application moved on behalf of the petitioner for the rejection of the plaint as also the written synopsis filed by the contesting parties and on a reading of clause (vi) of sub-rule

14 of Rule 37 of the Rules concluded that the Civil Court had the jurisdiction to entertain the relief clause (a) and the plaint could not be rejected even otherwise on the premise that relief (b) was barred under the provisions of clause (vi) of sub-rule 14 of Rule 37 of the Rules and dismissed the application. In that context, it would be relevant to advert to the judgments relied upon on behalf of the learned Advocates and to see whether the suit as filed was tenable or otherwise or liable for rejection of the plaint by taking recourse to Order VII Rule 11(b), (c) & (d) of the Civil Procedure Code.

12. In **Madanuri Sri Rama Chandra Murthy** (supra), the Hon'ble Apex Court observed at para 8 as follows:

> "8. The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and merit less in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order VII Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments

> of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order VII Rule 11 of CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

13. It further held at para 15 which reads as follows :

> "15. Section 6 and Section 7 of Waqf Act 1995 bars jurisdiction of the Civil Court to try the civil suit in respect of questions specifically enumerated under those provisions. Section 85 of Waqf Act, 1995 further clarifies that no suit or other legal proceeding shall lie in any civil court, revenue court and any other authority in respect of any dispute, question or other matter relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal."

14. **State Bank of India** (supra), challenged in revision under Section 115 of the Civil Procedure Code the order passed by the Trial Court by which it dismissed the application under Order VII Rule 11 of the Civil Procedure Code filed by

the petitioner who was before a learned Single Judge of this Court questioning the same in revision. In the brief facts, the first respondent filed a Regular Civil Suit No.4/2012 against the petitioner and others seeking a declaration that the deed of mortgage dated 29/09/2008 executed by the original defendants no.3 to 7 in their favour was null and void and not binding on him and besides also sought the relief of permanent injunction to restrain the petitioner from attaching or taking over the possession of the suit property. The original defendant no.2 had obtained financial assistance from the petitioner for which the defendants no.3 to 7 had furnished security by executing the mortgage deed in respect of the suit property. The case made out in the plaint was that the plaintiff was married to the defendant no.6 at Baroda which was subsequently registered in the office of the Civil Registrar at Salcete in 2011 and both being Goans, there was no ante-nuptial agreement between them due to which their marriage would be governed by the regime of Communion of Assets. It was therefore claimed that the marriage between the plaintiff and the defendant no.6 being solemnised in 2005, the consequent mortgage deed executed in 2008 without the plaintiff being a party would be null and void and not binding

on the plaintiff and that the defendant no.3 who is the brother of the defendant no.6 fraudulently represented the status of the defendant no.6 as a spinster at the time of execution of the mortgage deed knowing that she was married to the plaintiff. The petitioner filed an application under Order VII Rule 11 of the Civil Procedure Code claiming that the suit was barred by the provisions of the SARFAESI Act which was opposed by the plaintiff and the Trial Court by the impugned order dismissed the application on the ground that the validity of the mortgage Deed could only be decided by the Civil Court and therefore the suit was not barred under the provisions of the SARFAESI Act giving rise to the challenge in revision before the High Court.

15. In **State Bank of India** (supra), a learned Single Judge (C.V. Bhadang, J.) referred to the judgment of the Delhi High Court in **Golf Technologies Pvt. Ltd. and another V/s. Axis Bank Ltd. and Anr. [2015 Law Suit (Del) 2693]** where it was held as below at para 22 :

> "22. ....
> 9. A Court is obliged to see if the allegations of fraud and collusion made in the Plaint, are themselves a product of "fraud and collusion" between the family members of the borrowers, so as to escape liabiltiy and save the secured

> assets, somehow or the other. In the recent past, there is a sudden spurt in the number of Civil case filed against the actions initiated by Banks and Fianancial Insitutitions, either under the 1993 Act or under the SARFAESI Act, 2002. All these cases fall under 3 or 4 categories viz.:
>
> (i) Cases filed by strangers claiming that their proeprties are brought to sale on the basis of forged documents or cerified copies of documents submitted by borrowers to Banks.
>
> (ii) Cases filed by guarantors claiming that they never signed letters of guarantee or offered their properties as securities.
>
> (iii) Cases filed by close elatives of borrowers such as spouses, children, brothers and sisters, claiming that they have a share in the properties mortgaged by the borrowers and that they were never aware of and they never gave consent to the properties being offered as securities, and
>
> (iv) Cases filed by thied parties claiming that the properties were sold to them by the borrowers or guarantors by supressing the creation of the morgage and that they are bona fide purchasers for value without notice of the encumberances."

16. In **State Bank of India** (supra), the learned Judge went on to hold that the Courts have a duty to see whether genuine grounds have been made out to attract the jurisdiction of the Civil Court. There cannot be any generalisation in respect as to when the suit is maintainable or when the jurisdiction of the Civil Court is ousted and it would depend upon the facts and circumstances of each case. It has to be examined

whether there is genuine grievance to be redressed in the Civil Court. In that case, the ground of fraud raised by the plaintiff could be gone into in an appeal under Section 17 of the SARFAESI Act. The learned Judge also did not find favour with the finding of the Trial Court that the validity of the mortgage deed could not be examined by the DRT in the appeal under Section 17 of the SARFAESI Act. It is only when a genuine and triable case of fraud is made out which was not the position at large before him that the Civil Court could entertain a suit of such a nature and as such held that the impugned order could not be sustained and allowed the revision application.

17. Shri P. Lotlikar, learned Advocate for the applicant had also relied in **Savita Bhagwantrao Patil & Ors. V/s. Shyam Pukhraj Asopa & Ors. [2014 (4) Bom.C.R. 825]**. **Savita Bhagwantrao Patil** (supra), was an appeal by the original plaintiff against the judgment and order passed by the District Judge -1, Amravati dismissing the appeal which arose from the judgment and order of the Civil Judge, Junior Division, Amravati whereby the suit was dismissed for want of jurisdiction under Section 9A of the Civil Procedure Code. The

appellant had purchased an open plot in the field bearing Survey No.31/1A admeasuring 1150 square feet in which a house was constructed by her late husband. He had abandoned her and thereafter he was not heard as alive leaving her without any source of income. The defendant as a friend of her husband had assisted the plaintiff no.1/Savita and sought help from her to purchase a truck by asking her to execute the nominal Sale Deed in his favour so that he could obtain a loan from the Bank.

18. In **Savita Bhagwantrao Patil** (supra), the Bank initiated proceedings for the realisation of the loan and a notice of attachment was issued under the SARFAESI Act. The reliefs claimed in the suit were; (i) declaration that the Sale deed executed by the plaintiff in favour of the defendant no.1 was void and (ii) to restrain the defendants from dispossessing the plaintiff on the basis of the Sale Deed and also (ii) to restrain the Bank from realising its non-performing assets under the SARFAESI Act. A preliminary issue was raised before the Trial Court objecting to the jurisdiction of the Court to entertain and try the suit. The Trial Court refused to entertain the suit for seeking the relief of injunction for want

of jurisdiction but directed the parties to proceed further in view of the prayer clause (i) regarding declaration sought and as the Bank had already initiated proceedings under the SARFAESI Act, the Civil Court refused to entertain the prayer for injunction by a well reasoned order.

19. In **Savita Bhagwantrao Patil** (supra), the learned Single Judge considered the object of the SARFAESI Act vis-a-vis Section 9 of the Code of Civil Procedure and ultimately held that if a remedy is made available statutorily, it must be exhausted first before the Civil Court of ordinary jurisdiction can be proceeded upon the afore-emphasized grounds. Conclusion is that when the remedy is specifically made available and specific remedy of injunction is carved out of the ordinary jurisdiction of the Civil Court under the special statute, such statutory remedy has to be exhausted first by the parties in accordance with the special statutory provisions and then only the aggrieved party may approach the Civil Court if there was a violation of the fundamental judicial procedure or if the process of law was abused by the statutory forum/Tribunal or that it acted in violation of the provisions of the statute. This being the position, if in view of the

averment in the plaint, plaintiffs have statutory remedy, the plaintiffs must first approach the statutory forum for an order of injunctive reliefs available under the statute against the respondents including the Bank concerned. The scheme and object/purport of the SARFAESI Act leads us to the above conclusion. Hence, no interference is required in the impugned judgment and order in the facts and circumstances of the case.

20. In **P.V. Guru Raj Reddy** (supra), the Hon'ble Apex Court held at para 5 that the rejection of the plaint under Order VII Rule 11 of the Civil Procedure Code is a drastic power conferred in the Court to terminate a civil action at the threshold. The conditions precedent to the exercise of power under Order VII Rule 11, therefore are stringent and have been consistently held to be so by the Court. It is the averments in the plaint that has to be read as a whole to find out whether it discloses a cause of action or whether the suit is barred under any law. At the stage of exercise of power under Order VII Rule 11, the stand of the defendants in the written statement or in the application for rejection of the plaint is wholly immaterial. It is only if the averments in the

plaint exfacie do not disclose a cause of action or on a reading thereof the suit appears to be barred under any law the plaint can be rejected. In all other situations, the claims will have to be adjudicated in the course of the trial. It held at para 6 that in the present case, reading the plaint as a whole and proceeding on the basis that the averments made therein are correct, which is what the Court is required to do, it cannot be said that the said pleadings ex-facie discloses that the suit is barred by limitation or is barred under any other provision of law. The claim of the plaintiffs with regard to the knowledge of the essential facts giving rise to the cause of action as pleaded will have to be accepted as correct. At the stage of consideration of the application under Order VII Rule 11 the stand of the defendants in the written statement would be altogether irrelevant.

21. In **Shrimati Shanti Devi** (supra), a learned Single Judge while dealing with revision against the order of the sub-ordinate Judge-VII Patna held at para 6 that Section 9 of the Civil Procedure Code is very much explicit and unambiguous which says that a Civil Court shall have jurisdiction to try all suits of a civil nature, except the suit, of which cognizance is

either expressly or impliedly barred. Learned Counsel for the petitioner, after going through the provisions of the Act and the rules framed thereunder, was not able to lay his hands on any provision which empowers the authority or its officers to adjudicate the question of title, interest and possession of the parties. He was also not able to show any provision which bars the jurisdiction of a Civil Court for adjudication of such a right and claim of parties. It is a well established rule of law that if there is no provision under any statute, either expressly or impliedly, debarring taking cognizance by a Civil Court, the jurisdiction of a Civil Court cannot be held to have been ousted.

22. In **Bhau Ram** (supra), a two Judge Bench of the Apex Court held that the basis for rejection of a plaint under Order VII Rule 11 CPC is that only the averments in the plaint can be looked into while deciding the application for rejection of plaint. Pleas taken by the defendants in written statement are not at all relevant. In **Mr. Gopal Shrinivasan** (supra), a Division Bench of this Court held that while adjudicating upon an application under Order VII Rule 11 of the Civil Procedure Code, the averments in the plaint are required to be seen in

their entirety. No sentence or passage is to be considered in isolation. Tenor and sentence of pleadings is required to be seen as a whole. The pleadings should receive a liberal construction and there should be no pedantic approach adopted to defeat justice on hairsplitting technicalities.

23. In **Popat and Kotecha Property** (supra), a two Judge Bench of the Apex Court held that Order VII Rule 11 of the Civil Procedure Code lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Rather the word 'shall' used therein clearly implies thereby that it casts a duty on the Court to perform its obligation in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without the intervention of the defendant.

24. **M/s. Candolim Developers Pvt. Ltd.** (supra), was a First Appeal challenging the order passed by the learned

Senior Civil Judge, Panaji whereby the plaint filed by the appellants against the respondents came to be rejected in terms of Order VII Rule 11 (d) of the Civil Procedure Code. A Division Bench of this Court while dealing with the contentions on behalf of the learned Counsel held that while examining an application under Order VII Rule 11 of the Civil Procedure Code, the defence of the defendants in the written statement cannot be looked into but only the plaint.

25. Rule 37 of the Rules deals with the procedure in execution of the decrees, orders and decisions and prescribes that any decree holder requiring the provision of clause (c) of Section 94 to be applied shall apply to the Recovery Officer in whose jurisdiction the cause of action arose and shall deposit the necessary costs as fixed by the Central Registrar. If the judgment debtor resides or property to be proceeded against is situated, outside the jurisdiction of such Recovery Officer, the Recovery Officer shall transfer the application to the Recovery Officer in whose jurisdiction the judgment debtor resides or the property is situated.

26. Sub-rule 14(i) in particular provides that at any time

within thirty days from the date of sale of immovable property, the decree-holder or any person entitled to a share in the rateable distribution of the assets or whose interests are affected by the sale, may apply to the Recovery Officer to set aside the sale on the ground of a material irregularity or mistake or fraud in publishing or conducting it:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless the Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of such irregularity, mistake or fraud.

Sub-clause (vi) clearly provides that an order made under this sub-rule shall be final and shall not be liable to be questioned in any suit or other legal proceedings.

27. It was the contention of Shri Lotlikar, learned Advocate for the applicant that in case the respondents no.2 to 8 i.e. the original plaintiffs had any objection to the same, mechanism provided to them was under Rule 37 sub-rule 14 and that such an order was final and could not be quashed in any suit or other legal proceedings and therefore the plaint was liable for rejection. Per contra, it was the contention of Shri Nigel Da Costa Frias, learned Advocate for the

respondents no.2 to 8 that Rule 37 Sub-rule (14)(i) did not apply. The Recovery Officer had no jurisdiction to deal with an issue on the validity of a mortgage deed. In that context and looking to the tenor of the pleadings in the plaint such a contention on his behalf is not at all tenable.

28. The contesting respondents no.2 to 8 i.e. the plaintiffs had clearly admitted that the respondent no.10 borrower had obtained a loan from the Bank, that she alongwith her late husband i.e. the plaintiff no.1 had stood surety for the said loan transaction and in that context had signed various documents at the instance of the Bank and the borrower for the purpose of guaranteeing the repayment of the loan by the borrower as his sureties. It was nowhere the case of the plaintiffs that there was any question of fraud when on their own saying they had duly signed the documents and had agreed to stand as sureties to the borrower for the repayment of the loan taken at his instance from the respondent no.9 Bank and who had thereafter not taken any steps despite the due service of notice on them and as per their showing, the proceedings were ex-parte for non participation. Therefore, it would not lie for the plaintiffs to canvass an illusory cause that

they were challenging the deed of mortgage executed by the borrower to which they were signatories and allowed time to pass by without any action on their part.

29. Rather, in fact, the respondent no.9 Bank had published a public notice in the local daily and in the auction proceedings sold the suit property to the petitioner as late as 09/10/2006. Therefore, in the absence of any pleading of fraud or of the plaintiffs being unaware of the transaction relating to the debt taken by the borrower and their role as the sureties, it would not lie in their mouth to maintain their suit for declaration that the deed of mortgage of 20/03/2004 was illegal, null and void only to see that the proceedings were pursued before the Court of Civil jurisdiction and not under the Act and the Rules framed thereunder. Therefore, the contention of Shri Nigel Da Costa Frias, learned Advocate for the contesting respondents no.2 to 8 to canvass that the remedy of declaration was not within the domain of the Recovery Officer under sub-rule 14(i) and for which the recourse to the respondents no.2 to 8 was only by way of a Civil Suit under an illusory cause of action cannot stand the test of scrutiny.

30. It was next the case of the said respondents that the plaint was liable for rejection for want of cause of action but precisely on the point that the suit appeared from the statement in the plaint to be barred by law. The judgment in **State Bank of India** (supra), though dealing with the SARFAESI Act would clearly apply to the case of the applicant unlike the contention of Shri Nigel Da Costa Frias, learned Advocate for the respondents no.2 to 8 to the contrary. The respondents no.2 to 8 by astute drafting and questioning the validity of the mortgage deed apparently beyond the period of limitation could not bring the proceedings beyond the pale of the Act when on the face of the pleadings it is apparent that the plaint was hit by Order VII Rule 11(d) of the Civil Procedure Code. The learned Trial Court in a very perfunctory manner proceeded to hold that the mortgage deed was signed under misrepresentation and undue influence and that the Civil Court had jurisdiction to entertain the prayer for declaring the said deed as null and void without in any manner considering the import of Rule 37 sub-rule 14(i) and (vi) thereof.

31. In the result therefore, there is every reason to interfere with the order under challenge and in view thereof, i pass the following :

O R D E R

(i) The revision application is allowed.

(ii) The impugned order is quashed and set aside holding that the plaint is liable for rejection also under Order VII Rule 11(d) of the Civil Procedure Code.

(iii) Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J.

NH