Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (St.) No. 36597 OF 2017
WITH
CIVIL APPLICATION (St.) No. 36599 OF 2017

Pravin Wipers and Ancillaries Pvt. Ltd. ... Appellant/Applicant
Vs.
Vibgyor Texotech Ltd. & Ors. ... Respondents

Mr. Mathews J. Nedumpara i/b. Mr R.R. Nair, Advocate for the appellant/applicant.
Mr. Rohit Gupta with Mr. Akbar Rizvi i/b. AKS Legal Consultant, Advocate for respondent nos. 2 to 4.

CORAM: **MRS.MRIDULA BHATKAR, J.**
DATE: **16th January, 2018.**

P.C.:

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

2. In this Appeal from Order, the order dated 22nd December, 2017 passed by the Joint Civil Judge Senior Division, Vasai below Exhibit 5 in Regular Civil Suit No. 33 of 2017 is under challenge. In the Civil Suit, the appellant/plaintiff has filed an Application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure that the defendants should not dispossess the plaintiff and should not obstruct and disturb his peaceful possession in respect of suit premises which is an industrial premises at Village Valiv, Tal. Vasai, District Palghar. The appellant also prayed for injunction against the

respondents from proceeding further under section 13(4) and 14 of **The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002** (hereinafter referred to as “the Act”) pursuant to the order dated 16^{th} March, 2017 passed by the District Magistrate. The learned trial Judge has rejected the Application on the ground that the plaintiff has to claim his right before the Debt Recovery Tribunal under section 17(4A) of the Act and cannot grant any protection, as jurisdiction of Civil Court is expressly barred by provisions under section 34 of the Act.

3. The learned counsel for the appellant argued that a question of law is involved in this matter. The jurisdiction of the Civil Court is not ousted entirely though there is bar under section 34 of the Act. In support of his submissions, the learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of **Dhulabhai etc. vs. State of Madhya Pradesh and Anr., reported in AIR 1969 SC 78**. He submitted that the trial Court should not have decided the issue of jurisdiction in such a manner but should have adopted the recourse under section 113 of the Code of Civil Procedure by referring the matter to the High Court on the point of jurisdiction. By creating Debt Recovery Tribunal, the legislature has created alternative forum, which is a medium to replace the Civil Courts,

however, the right of the party to approach the Civil Court and address the issue in respect of his civil rights is not taken away under section 34 of the Act especially when the issue of property is involved. The property is a bundle of rights and tenancy or mortgage is a superior authority, as the appellant/plaintiff is in actual possession of the suit premises. He submitted that Section 31 of the Act is amended and hence it is made applicable from January 2016. Section 17(4A) cannot have retrospective effect but it is prospectively applicable. The tenancy has taken place much earlier to the amendment and hence cannot be attracted. Section 31E was not applicable to the lease or contract because it is a lease under contract and the appellant/plaintiff is a lessee. As it involves the constitutional issue, i.e., whether Section 9A supersede Order 27A or not, it is necessary to give notice to the Attorney General or Advocate General.

4. The learned counsel for the respondent has submitted that the order passed by the learned trial Judge is correct and legal and this Appeal from Order is to be dismissed. He has submitted that on 7th June, 2007 respondent no. 1 created mortgage in favour of State Bank of India, who is the main contesting party and on 3rd August, 2011 State Bank of India issued notice under section 13(2) of the Act.

He submitted that the appellant has tried to establish the right of tenancy by stating that in 2007 there was an oral tenancy created by respondent in favour of the appellant. Thereafter, on 10th December, 2012 there was unregistered leave and licence Agreement and on 22nd July, 2015 there was registered leave and licence agreement. The learned counsel submitted that these documents are deliberate attempt to frustrate the proceedings before the Debt Recovery Tribunal taken out by the respondent/bank. He further argued that such leave and licence is not binding on the respondent/bank. The suit is barred under section 34 r/w. section 17(4A) of the Act. The learned counsel placed reliance on the order passed by this Court dated 1st November, 2017 in the case of **Satyajit Balasaheb Kadam & Anr. vs. Balasaheb A. Kadam & Ors.** wherein the order passed by the learned trial Judge rejecting the plaint under Order 7 Rule 11(d) of the Code of Civil Procedure for want of jurisdiction is upheld.

5. Considered the submissions and the documents produced herein. The record shows that in the year 2007, respondent no.1 has created mortgage in favour of State Bank of India. The claim of alleged oral tenancy of the appellant cannot be accepted, as no document, no rent receipts were produced to show that tenancy was

created. Other two Leave and Licence Agreements are of 10th December, 2012 and 22nd July, 2015 which are entered into after 3rd August, 2011. However, respondent no. 2/State Bank of India issued notice under section 13(2) of the Act. The issuance of notice itself creates statutory injunction barring the defaulters to create any transfer or any transaction on the property with any other person. The submissions of the learned counsel Mr. Nedumpara that the licence is to be considered as lease is absurd and without any foundation. It is true that Section 17(4A) is incorporated in the Act in the year 2016, however, the suit itself is filed in 2017 and therefore the said section along with Section 34 is to be considered and it covers the case of the appellant. Thus, the claim of tenancy is sham, bogus and artificial and the two Leave and Licence Agreements are not binding, as they are after creation of the mortgage in 2007. The bank has first right over the property in view of Transfer of Property Act. The submissions of learned counsel Mr. Nedumpara that it involves question of law and notice is required to be given to the Advocate General are not at all convincing.

6. In the case of **Dhulabhai** *(supra),* the issue was in respect of the declaration that the provisions of law relating to assessment were ultra vires and for refund of tax illegally collected and hence, the

Court held that in view of the facts and circumstances of the case, the jurisdiction of the Civil Court is not ousted. In the said matter, the Hon'ble Supreme Court laid down certain directions. After going through those directions laid down in the case of **Dhulabhai** *(supra)*, and considering the facts of this case and the issue raised herein, the Civil Court has no jurisdiction under the Act when the notice is issued and action is taken under section 13(4) of the Act. An adequate remedy is available to the appellant/plaintiff to approach the Debt Recovery Tribunal under section 17 of the Act. Thus, the ratio laid down in the case of **Dhulabhai** *(supra)*, is not useful to the appellant.

7. The finding given by the learned trial Court and the view taken by it that the trial Court has no jurisdiction to try and entertain the suit in view of Section 34 r/w. 17(4A) of the Act is correct. Nothing can be faulted with the order rejecting the plaint under Order 7 Rule 11(d) of the Code of Civil Procedure. Hence, Appeal from Order is rejected.

8. In view of dismissal of Appeal from Order, Civil Application does not survive and the same is accordingly disposed of.

(MRIDULA BHATKAR, J.)