IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.

Second Appeal No. 0725 of 2018

District : Jalgaon

Vinod Narayan Padole,
Age : 45 years,
Occupation : Service,
R/o. Plot No.1,
Nisarg Colony,
At Post Pimprala,
Taluka & District Jalgaon. .. Appellant (Original plaintiff)

versus

Chairman,
Housing Development Finance Corporation,
Registered House
H.T. Parekh Marg,
169, Backbey Reclamation at
Mumbai (M.S.) 400 020,

Through the Branch Manager,
Office at Kozi Cottage,
Onkareshwar Mandir Road,
Opp. Sagar Park,
At Post Taluka
& District Jalgaon (M.S.) .. Respondent (Original defendant)

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Mr. Santosh G. Chapalgaonkar, Advocate, for the appellant.

Mr. A.A. Yadkikar, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 28TH MARCH 2019

ORDER :

01. Present appeal has been filed by original plaintiff challenging the concurrent judgment and decree passed against him. He had filed Regular Civil Suit No. 314 of 2011 for declaration and permanent injunction. He had come with a case that his deceased wife was the owner of land Gut No. 190/1, plot No. 1 admeasuring 916 sq.ft. After her demise, plaintiff and his minor son are the owners and possessors of the same. He has constructed house on the said plot and resides there. His wife had obtained loan to the tune of Rs.3,80,000/- from defendant. The said loan was to be repaid in 240 installments from 01-02-2004. She was repaying the same as per schedule. However, she expired on 24-01-2008. The house, which has been constructed on the plot is not mortgaged with defendant. There is no contract between plaintiff, his son and defendant, after death of his wife. Defendants' officers are threatening plaintiff to take possession of the plot. Even his wife had not mortgaged the suit property to defendant. He told the said fact to officers, but they are not in a mood to listen. They told that they would take possession by December 2011. Hence, plaintiff has filed suit. (Parties are referred as per their nomenclature before trial Court.)

02. Defendant filed written statement. It was contended that wife of plaintiff was teacher. She had

obtained loan by mortgaging the suit plot from defendant. She had deposited the title-deeds with defendant, at that time. Plaintiff and his son are liable to repay the outstanding loan amount, after death of his wife.

03. Preliminary objection was raised by the defendants by filing separate application regarding maintainability of suit under Order VII, Rule 11 (d) of Code of Civil Procedure. Plea was also raised about bar of jurisdiction to the Trial Court in view of Section 34 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act).

04. Plaintiff resisted the application by filing say. It was contended that no objection has been raised regarding jurisdiction in the written statement therefore, it can not be taken as preliminary issue. The suit has been filed for declaration and injunction and therefore, it is maintainable before Civil Court.

05. Learned Trial Court thought it fit to try the said point of jurisdiction as preliminary issue. Submissions were advanced by both the parties. After hearing them and taking note of legal provisions, the learned Trial Court had come to conclusion that the suit is barred under Section 34 of SARFAESI Act. The plaint was rejected by learned Trial Court.

06. Original plaintiff had preferred Regular Civil Appeal No.45 of 2015 before District Court, Jalgaon. It was heard by learned District Judge-4, Jalgaon and dismissed the same on 17-12-2016. Hence, this Second Appeal.

07. Heard learned Advocate Mr. S. G. Chapalgaonkar for appellant and learned Advocate Mr. A. A. Yadkikar for respondent. Perused the record. It has been vehemently submitted on behalf of appellants that both the Courts below have not considered the legal points properly. The suit was filed by plaintiff for declaration and consequential relief of injunction under the provisions of Specific Relief Act. Only Civil Court will have jurisdiction to try and entertain the suit. The suit property was not mortgaged to defendant. There was no mortgage deed executed between the wife of plaintiff and defendant. Suit property was not 'secured asset' . No doubt, she had taken loan, but she had not mortgaged the property. Defendants had no right to ask plaintiff to vacate the premises and threaten to take possession thereof. Both the Courts below have erred in holding that there is bar under Section 34 of SARFAESI Act. Debt Recovery Tribunal can not grant relief prayed by the plaintiff under SARFAESI Act. Therefore, substantial questions of law are arising in this case, requiring admission of the second appeal.

08. Per contra, the learned Advocate for respondent / defendant supported the reasons given by both the Courts below and submitted that wife of the plaintiff was the borrower. She had given the documents of title with defendant. Therefore, there was relationship of debtor and creditor between her and defendant. The amount of loan was Rs.3,80,000/-. When she did not repay the loan, defendant has taken legal action against her. The loan amount was used by wife of plaintiff and plaintiff as well as his son are enjoying the said property. Therefore, after demise of wife, plaintiff is liable to repay the amount. Suit has been filed, just to avoid the repayment. There is other mode prescribed under SARFAESI Act to approach the appropriate authority and therefore, a clear bar has been provided under Section 34 of SARFAESI Act to entertain any suit or proceeding before other forum than Debts Recovery Tribunal. SARFAESI Act is a complete code in itself and hence, suit was not maintainable. The learned Trial Court has rightly rejected the plaint under Order VII, Rule 11 of Code of Civil Procedure.

09. Reliance has been placed by the learned Advocate on the decisions of Hon'ble Supreme Court in *Mardia Chemicals Ltd. And Ors v/s. Union of India (UOI) and Ors [AIR 2004 SC 2371]*, *State Bank Of India v/s. Jigishaben B Sanghavi and Ors [2011 (4) ALL MR 262]*, and *Axis Bank Ltd. V/s. Madhav Prasad Aggarwal and Ors [2018 (6) Bom C R 738]* to support his

contention that suit was barred under Section 34 of SARFAESI Act.

10. There is no dispute that wife of plaintiff had obtained loan from defendant financial institution to the tune of Rs.3,80,000/- and it has not been fully repaid till date. It is also not in dispute that she had executed documents in favour of defendant at the time of raising loan from defendant. She had given the title deed i.e. Sale-deed of the suit plot to defendant at that time. Though it has not been admitted by plaintiff that the documents were given by way of security, yet the said fact can be inferred. The relationship between wife of plaintiff and defendant was that of debtor and creditor. Under such circumstance, it can be seen that the transaction was that of 'mortgage' in a sense. Plaintiff can not deny repayment of loan amount after demise of his wife. He is enjoying the property left by her.

11. In all the cases referred by learned Advocate for defendant, Hon'ble Apex Court has held that in such cases jurisdiction of Civil Court is barred under Section 34 of SARFAESI Act. The Debt Recovery Tribunal has every power to deal with all the questions involved between the parties. A specific procedure is prescribed under Section 13 the said Act, which allows both the parties to raise contentions and defences as they can. In the decision of Axis Bank (supra), it has

been held that, *"Provisions of Securitisation Act bars filing of civil suit. No civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which the DRT or DRAT is empowered by or under Securitisation Act"*. In all those cases, the action of rejection of plaint under Order VII Rule 11 of Code of Civil Procedure was upheld. This case is also same and therefore, no fault can be found in the order and decree passed by the Courts below. No substantial question of law is arising in this case as contemplated under Section 100 of Code of Civil Procedure.

12. In the light of above, the appeal stands disposed of as **"Not Admitted"**.

(Smt. Vibha Kankanwadi)
JUDGE

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