IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 26 OF 2019

Authorized Officer, EDC Ltd., Thr. Sandra Mascarenhas .... Applicant

Versus

Domrine Shipping Company Pvt. Ltd., Thr. its Directors & 2 Others .... Respondents

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Mr. Ashwin D. Bhobe, Advocate for the Applicant.

Mr. Balkrishna Sardessai, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.

DATE : 19th July, 2019

ORAL ORDER:

By this Civil Revision Application, the applicant is challenging order dated 06.03.2019, passed by the Senior Civil Judge at Vasco-da-Gama, in Regular Civil Suit No. 93/2018/A. By the impugned order, the application for rejection of the plaint under Order VII Rule 11(d) of the Civil Procedure Code (CPC, for short) has been dismissed.

2. The brief facts are that the applicant had advanced a loan to the respondents for purchase of a barge. There was a default in the matter of repayment of the loan. The applicant initiated proceedings under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act, for short), before the District Judge, South Goa, Margao, for attachment and sale of the barge.

3. The respondents filed Regular Civil Suit No. 93/2018/A, against the applicant, challenging the said action mainly on the ground that the action initiated under the SARFAESI Act was not competent, in view of the exemption granted under Section 31(d) read with Section 2(zf) of the SARFAESI Act. It is contended that the vessel is exempt from attachment or sell under the SARFAESI Act.

4. The learned Trial Court by an order dated 12.12.2018 allowed the application, which was challenged by the respondents before the learned District Judge in Regular Civil Appeal No. 128/2018. The learned District Judge, by judgment and order dated 31.01.2019, allowed the appeal and the suit was remanded to the Trial Court and the Trial Court was directed to decide the application afresh. After the remand, the learned Trial Court has refused to reject the plaint. Hence, this petition.

5. I have heard Mr. Bhobe, the learned Counsel for the applicant and Mr. Sardessai, the learned Counsel for the respondents. Perused record.

6. It is submitted by Mr. Bhobe, the learned Counsel for the applicant that there is enough material on record to show that the vessel is registered under the Inland Vessels Act, 1917 and not under the Merchant Shipping Act. It is submitted that registration Certificate would indicate that the vessel is registered under the Inland Vessels Act, 1917 and therefore, the exemption under Section 31(d) of the SARFAESI Act was not applicable. Secondly, it is contended that even assuming that the vessel is covered by the exemption under Section 31(d) of the SARFAESI Act, the respondents have not alleged or demonstrated any fraud in the matter of execution of the mortgage deed. It is pointed out that the execution of the mortgage deed in respect of the vessel is not disputed. It is submitted that the Civil Court lacked jurisdiction under Section 34 of the SARFAESI Act.

7. Mr. Sardessai, the learned Counsel for the respondents submitted that Section 31 of the SARFAESI Act, in effect, imports the definition of a 'vessel', as contained under

the Merchant Shipping Act, which definition is wide enough to cover all vessels, which are navigable. It is thus submitted that the barge, which is subject matter of the mortgage in this case, was clearly exempted from attachment or sell under the provisions of the SARFAESI Act and therefore, the jurisdiction of the Civil Court could not be said to be barred.

Mr. Sardessai, the learned Counsel for the respondents, however, in all fairness, did not dispute that there was no fraud in the execution of the mortgage deed.

8. I have carefully considered the rival circumstances and the submissions made. Section 34 of the SARFAESI Act creates a bar on the jurisdiction of the Civil Court to entertain a suit in respect of any matter which, a Debt Recovery Tribunal or the Appellate Tribunal is empowered by or under the said Act to determine and no injunction can be granted by the Civil Court in respect of any action undertaken or to be undertaken in pursuance of any power conferred by or under the Act or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The nature and scope of the bar of jurisdiction of the Civil Court, under Section 34 of the SARFAESI Act fell for consideration of the Hon'ble Supreme Court in the case of **Mardia Chemicals Vs. Union of India (2004) 4 SCC 311**.

One of the exceptions carved out is where, there is fraud alleged or demonstrated. This is what is held in para 51 of the judgment:

> *51. However, to a very limited extent jurisdiction of the Civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil Court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court, which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, V. Narasimhachariar Vs. Egmore Benefit Society, AIR 1955 Madras 135, a judgment of the learned single Judge (V.P. Padmavati Vs. P.S. Swaminathan Iyer 1955 Madras 343), where it is observed as follows in para 22:*
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> > *"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances*

> *mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edition page 784).”*

It can thus be seen that the jurisdiction of the Civil Court can be invoked only to certain extent, when the action of the second creditor is alleged to be fraudulent or their claim is so absurd and untenable, which may not require any probe whatsoever.

9. In the present case, it is not even the case made out that there is any fraud or misrepresentation, insofar as the creation of mortgage is concerned. The question whether the vessel can be attached or is exempted from attachment under the SARFAESI Act is the one which can be gone into by the Debt Recovery Tribunal. In any event, in this case, the jurisdiction of the Civil Court was clearly barred under Section 34 of the SARFAESI Act.

10. The learned Trial Court appears to be influenced by the observations of the learned District Judge in the order of remand dated 31.01.2019. I have carefully gone through the

impugned order and I find that the same cannot be sustained. The Civil Revision Application is accordingly allowed. The impugned order is hereby set aside. The application for rejection of the plaint is hereby allowed. The plaint in Regular Civil Suit No. 93/2018/A stands rejected. In the circumstances, there shall be no order as to costs.

In the event, the applicant approaches the Debt Recovery Tribunal, the Debt Recovery Tribunal shall have due regard to Sections 5 and 14 of the Limitation Act. Rival contentions of the parties are left open.

C. V. BHADANG, J.

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