IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO.21 OF 2018

1. M/s Sea Shwar Ore Carreirs
and another. ... Appellants

V e r s u s

... Respondents
1. Suhas V. Ghotage & others

Mr. Vivek Rodrigues and Mr. V. Naik, Advocates for the Appellants.
Mr. Shivan Desai, Advocate for the Respondent no.1.
Mr. Gaurish Agni and Mr. T. Gawas, Advocates for the Respondent no.2.
Mr. Ajay Kumar, Advocate for the Respondent nos.3 and 5.
Mr. Aseem Naphde, Advocate for the Respondent no.4.

Coram :- C. V. BHADANG, J.

Date :- 6th March 2019.

ORDER

1. By this appeal, the appellants/plaintiffs are challenging the order dated 26.04.2018 (below exhibit D-3) passed by the learned Trial Court, by which an application for temporary injunction filed by the appellants has been dismissed.

2. The brief facts necessary for the disposal of the appeal may be stated thus :

That the plaintiff has filed a suit against the respondent for declaration, permanent and mandatory injunction and for consequential reliefs and damages. The appellant no.1 is a proprietorship concerned of the appellant no.2. The respondent no.1 was owning two barges M. V. Fomento Ashada and M. V. Vyjayanti. The present dispute pertains to the barge M. V. Fomento Ashada which the respondent no.1 wanted to sell. The appellant no.2 expressed his willingness and desire to purchase the said vessels/barge for a consideration of ₹95,00,000/-.

3. It appears that the respondents had obtained a loan for purchase of the said barge from the respondent no.4-Canara Bank and there was a lien of the Canara Bank over the said barge. The plaintiffs obtained financial assistance from the third respondent, Bank of Maharashtra, for purchase of the said barge and as per the sanction letter dated 10.05.2011, a term loan of ₹70,00,000/- was sanctioned to the appellant for purchase of the said barge/vessel M. V. Fomento Ashada. One of the conditions of the said sanction letter was that, the disbursement of the loan was to be made by issuance of a Demand Draft in favour of the Canara Bank-A/c Mr Suhas Ghotage. In other words, as per the terms of the sanction letter, the amount was to be disbursed by drawing a Demand Draft favouring the Canara Bank in the account of the respondent no.1. It further appears that the respondent no.4, Canara Bank, issued a Demand Draft in the name of respondent no.1 which he indeed deposited with the Canara Bank. However, as the first respondent was holding multiple loan accounts with the Canara Bank, the respondent no.4, upon deposit of the Demand Draft, the first respondent was sanctioned another loan. In short, according to the respondent no.4, the loan account against the said barge/vessel M. V. Fomento Ashada was not cleared as a result of which the No Objection Certificate (NOC) for release of the charge/lien on the vessel was not obtained and the lien continued. On account of this, the appellants could not get the barge transferred in their name as no dues certificate was not issued.

4. On account of default in payment of the loan, the respondent no.3-Bank of Maharashtra has initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, for short) in which the respondent no.3 is attempting to attach and put to sale a collateral security which is a house standing in the name of the appellant no.2.

It is in these circumstances, that the appellants filed the aforesaid suit against the respondents for declaration that the respondent nos.1, 2 and 3 have connived together and committed “a commercial fraud” on the appellant and for declaring the sanction letter dated 10.05.2011 not having been implemented in its true nature and spirit. The appellants are also seeking compensation/damages towards mental agony, etc.

5. The appellants filed an application for temporary injunction restraining the respondent no.3 from proceedings against the appellants under the SARFAESI Act on the ground that the respondent no.3 has committed a commercial fraud.

6. The application was opposed on behalf of the respondents on various grounds including the jurisdiction of the Civil Court to entertain the Civil Suit and the relief as claimed.

7. The learned Trial Court by the impugned Order has dismissed the application, inter alia, on the ground that the Civil Court has no jurisdiction to entertain the suit, as it is hit by Sections 34 and 35 of the SARFAESI Act. Hence, this appeal.

8. Heard learned Counsel for the parties. Perused record.

9. The only contention raised on behalf of the appellants is that the act of the respondent no.3 in disbursing the loan in the name of the respondent no.1 is against the terms and conditions of the sanction letter dated 10.05.2011 in view of the Memorandum of Understanding (MOU) dated 21.12.2010. It is submitted that the Branch Manager of the respondent no.3 has committed fraud by recording in the Bank account statement that the loan is disbursed to Canara Bank-A/c Mr Suhas Ghotage, which is not correct. It is submitted that if the appellants are, prima facie, able to make out a case of fraud, the suit would be maintainable as held by the Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd. & Ors. vs. Union of India & Ors. (2004) 4 SCC 311**.

10. The learned Counsel appearing for the respondent nos.3 and 5 has submitted that there is no case of fraud which is made out by the appellants. It is submitted that admittedly, prima facie, the amount of loan has been deposited by the respondent no.1 with the respondent no.4-Canara Bank. It is submitted that only on account of the respondent no.1 having multiple accounts with the respondent no.4 and the respondent no.4 appropriating the amount not towards loan account of the respondent no.1, that this entire dispute has arisen. It is submitted that in any event, there is no fraud which is attributable to the respondent nos.3 and 5 in this case.

11. The learned Counsel for the respondent no.4 has pointed out that there is no case of fraud even pleaded in the plaint as against the respondent no.4. It is submitted that there was a letter issued to the respondent no.1 on 23.12.2010 in pursuance of the request letter dated 20.12.2010 from the respondent no.1 by which permission for sale of the two vessels, M. V. Vyjayanti and M. V. Fomento Ashada was granted on certain conditions which are complied with by the respondent no.1. It is submitted that, in any event, the respondent no.4 has no privity of contract insofar as the security obtained by the appellants from the respondent no.3, Bank of Maharashtra, is concerned.

12. I have carefully considered the submissions made and I do not find that any case for interference is made out. The jurisdiction of the Civil Court to entertain a suit and to grant relief against the proceedings initiated by a secured creditor against a borrower under SARFAESI Act is barred under Sections 34 and 35 of the Act. The Hon'ble Supreme Court in the case of **Mardia Chemicals Ltd.** (supra) has held that only in a limited case where the borrower is able to make out a case of fraud that the Civil Court can entertain any such dispute. The question whether there is any case of fraud made out would evidently depend on the facts and circumstances of each case. It is further well settled that the circumstances on the basis of which a party claims or attributes fraud to the adversary has to be specifically pleaded and a case has to be made in that regard.

13. In the present case, according to the appellants, the respondent nos.1 to 3 have connived with each other and have committed a 'commercial fraud'. Insofar as the respondent no.3 is concerned, it is contended that the Branch Manager represented by recording in the bank statement that the loan is disbursed to Canara Bank-A/c Suhas Ghotage as stipulated in the sanction letter dated 10.05.2010 in view of the MOU dated 21.12.2010. The aforesaid MOU is entered into by the appellants and the respondent no.1 in which the appellants are second party and as per clause (2), the appellants had undertaken that an amount of ₹95,00,000/- shall be paid by them to Canara Bank-A/c Suhas Ghotage payable at Panaji Goa, by Pay Order or Demand Draft. It is contended on behalf of the appellants that in pursuance of the said recital, the appellants had requested the respondent no.3 bank to disburse the loan amount in favour of Canara Bank-A/c Suhas Ghotage. However, the respondent no.3 disbursed the amount in favour of the respondent no.1. Prima facie, at this stage, this is the only case made out in support of a plea of fraud against the respondent no.3.

14. Mr. Rodrigues, the learned Counsel for the appellants submitted that for the first time, the respondent no.4 has come on record by filing an affidavit in reply setting out circumstances under which the respondent no.4 was unable to release the lien/charge on the said vessel. The learned Counsel submitted that on the basis of the affidavit in reply by the respondent no.4, even the respondent no.4 has committed fraud in the matter.

15. I am afraid, no opinion can be expressed on any such contention at this stage inasmuch as the plaint as it stands today, does not even allege any fraud as against the respondent no.4. Even so far as the respondent no.3 is concerned, prima facie, it cannot be accepted that merely on account of the fact, that the respondent no.3 has issued the Demand Draft in favour of the respondent no.1, that the respondent no.3 has committed any fraud, as against the appellants. Thus, no exceptions can be taken to the impugned order by which the Trial Court has refused to grant any temporary injunction against the proceedings initiated by the respondent no.3 against the appellant under the SARFAESI Act.

16. At this stage, Mr. Rodrigues, the learned Counsel for the appellants submitted that the appellants would file an application for amendment of the plaint before the Trial Court. As noticed earlier, on the basis of the pleadings as they stand today, prima facie, no case of fraud is made out against the respondent no.3. Insofar as the respondent no.4 is concerned, at this stage, there are no allegations of fraud made in the plaint. However, this will not preclude the appellants from filing an application for amendment of the plaint, if so advised.

17. In the result, the following order is passed :

ORDER

(i) The appeal is hereby dismissed with no order as to costs.

(ii) The interim relief already operating stands vacated.

(iii) Needless to mention, that the dismissal of this appeal shall not come in the way of the appellant from filing an application for amendment of the plaint. However, if any such application for amendment is filed, the Trial Court shall decide the same on it own merits and in accordance with law. This Court has not expressed any opinion on the aspect of such proposed amendment.

C. V. BHADANG, J.

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