

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (ST.) NO.22616 OF 2019
WITH
CIVIL APPLICATION (ST.) NO.22619 OF 2019 IN AOST/22616/19

Mangal Dayanand Khopkar ... Appellant
Vs.
The Board of Directors of Dena Bank and others ... Respondents

Mr. Mathews Nedumpara a/w. Mr. R. R. Nair and Mr. Amritpal Singh
for Appellant.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 9, 2019

P.C. :

Heard Mr. Nedumpara, learned Counsel for the appellant at length.

2. By this Appeal from Order under Order XLIII, Rule 1 (r) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), the appellant, hereinafter referred to as 'plaintiff', has challenged the order dated 06.08.2019 passed by the learned trial Judge in unregistered Notice of Motion in Suit (St.) No.8688 of 2019. By that order, the learned trial Judge declined to grant ad-interim relief to the plaintiff and issued notice to the defendants and adjourned the Motion to 06.11.2019 for filing reply.

3. In support of this Appeal, Mr. Nadumpara has invited my attention to the news item appeared in the Times of India dated 27.07.2019 under the headline "Conman held in Rs.5 crore cheating case". He submitted that respondent No.5 / defendant No.5 had allegedly submitted a Lokhandwala resident's property documents to get mortgage loans and siphoned off the money. Dena Bank sold the flats to

Haryana resident Srnaik Jain. During the course of investigation, it transpired that the Economic Offences Wing (EOW), Versova Police, Amboli Police and Bandra Police were looking for defendant No.5 and his associates in several other similar cases of cheating and forgery.

4. He invited my attention to the order dated 18.12.2017 passed by the learned Chief Metropolitan Magistrate, Mumbai in Case No.726/SA/2016. By that order, the learned Magistrate allowed the application made by the respondent No.2-Dena Bank under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short 'Act') for taking possession of plot No.42, Guru Gaurav Bungalow situate at RSC-16/22, Part-I, opposite IES School, Charkop, Sector No.2, S.No.149, MHADA, Kandivali (West), Mumbai 400 067 (for short 'suit premises') and appointed Advocate Ms Priya Baliga as Court Commissioner. He submitted that no notice was issued to the plaintiff, who was respondent No.3 therein. The plaintiff was not heard before passing that order. The said order is clearly in violation of the principles of natural justice and is a nullity. In support of his submissions, he relied upon decisions in-

- (a) ***A. R. Antulay Vs. R. S. Nayak, (1988) 2 SCC 602***, and in particular paragraph 94 thereof; and
- (b) ***Maneka Gandhi Vs. Union of India, AIR 1978 SC 597***.

4. He further submitted that in these decisions, the Apex Court has held that even if the authority is exercising administrative functions, which has result of entailing civil consequences, it has to act fairly and observe the principle of natural justice. The principle of natural justice is one of the basic structures of the Constitution of India. As the said order is passed in breach of violation of natural justice, it is void as also nullity. He submitted that plaintiff had not mortgaged the suit premises. She has not executed any mortgage deed in favour of the respondent

No.2 Bank. Respondent No.5 has practised fraud upon the plaintiff.

5. He invited my attention to the order dated 05.04.2019 passed by the learned I/C. Chief Metropolitan Magistrate, Esplanade, Mumbai below exhibit-1 in Case No.3317/Misc/2018 in C.C.No.726/SA/2016. The miscellaneous proceedings was filed by the respondent No.1-Dena Bank inter alia contending that in pursuance of order dated 18.12.2017 passed by the learned Magistrate, the Court Commissioner Advocate Priya Baliga handed over physical possession of the suit premises namely, the secured asset, on 04.09.2018. The possession of the secured asset was given to the respondent No.2 Bank who had put lock and seal on it. However, subsequently on 02.10.2018, the bank officials came to know that lock of the said secured asset was broken and the respondent No.4 therein (Pravin Dayanand Khopkar) is in possession of the secured asset. Respondent No.2, therefore, took out application for assistance of the Court for taking possession of the secured asset. He submitted that the order passed by the learned Magistrate is perverse as the learned Magistrate had become *functus officio*. Thus, the order passed by the learned Magistrate was without jurisdiction. The plaintiff had not taken loan from the respondent No.2-Bank. He further submitted that under Section 14 of the Act, the Tribunal is having limited jurisdiction. It is not a civil court.

6. He further submitted that D.R.T. has no jurisdiction to go into the plea of fraud raised by the plaintiff. The prayers made in the Suit by the plaintiff cannot be considered and granted by the Civil Court. In support of this proposition, he relied upon the decision of ***Mardia Chemicals Limited Vs. Union of India*, (2004) 4 SCC 313** and in particular paragraphs 51 and 80 as also decision of ***Dhannalal Vs. Kalawatibai*, (2002) 6 SCC 16**, and in particular paragraphs 21 to 25 to contend that the choice of forum is the right of the plaintiff.

7. He submitted that right to rebel is derived from natural law. In support of this submission, he relied upon Lecture 3 (Right to Rebellion and Obedience to Superior Orders) of a Book, namely, Three Lectures by Justice K. K. Mathew.

8. Mr. Nadumpara further submitted that before the Tribunal in proceedings under Section 17 of the Act, evidence cannot be adduced. He also invited my attention to the impugned order to contend that the impugned order shows total non-application of mind on the part of the learned trial Judge. By declining to grant ad-interim relief, plaintiff will lose possession which has serious and drastic consequences. As the plaintiff has not obtained any loan from respondent No.2 Bank and respondent No.5 had practised fraud upon the plaintiff, this is an eminent case for granting ad-interim relief. He, therefore, submitted that Appeal requires consideration.

9. I have considered the submissions advanced by Mr. Nadumpara. I have also perused the material on record. A perusal of the order dated 18.12.2017 shows that the learned Magistrate had allowed the application made by the respondent No.2 Bank. The learned trial Judge observed that respondent No.2 Bank had sanctioned the Cash Credit Facility of Rs.200 lakhs to the respondents No.1 to 4, namely, (1) M/s. Siddhi Enterprises, (2) Mr. Mohnish Anil Karnik, (3) Mrs. Mangal Dayanand Khopkar (appellant herein) and (4) Mr. Pravin Dayanand Khopkar, vide sanction letter dated 19.03.2014. In pursuance thereof, the respondents executed Agreement of Hypothecation dated 22.03.2014. They also executed the Deed of Mortgage dated 18.03.2014 of the secured asset, namely, suit premises in order to secure repayment of the loan. On 08.01.2016, notice under Section 13(2) of the Act was issued and the same was served on the respondents. The learned

Magistrate allowed the application and appointed Advocate Priya Baliga as Court Commissioner for taking possession.

10. A perusal of the order dated 05.04.2019 passed by the learned Magistrate shows that in pursuance of order dated 18.12.2017, the Court Commissioner handed over possession on 04.09.2018 to the respondent No.2 Bank, who had put lock and seal on it. Respondent No.4 - Pravin Khopkar had broken the lock on 02.10.2018 and thereafter, they move application. By order dated 05.04.2019, the learned Magistrate allowed the application and appointed Advocate Shyam Dhar for taking possession of the suit premises. Aggrieved by that decision, plaintiff and respondent No.4 Pravin Khopkar preferred Criminal Revision Application No.531 of 2019 before the Court of Sessions for Greater Mumbai. In paragraph 11 of that order, submission advanced on behalf of the respondent No.2 Bank that the borrower as also guarantors have executed registered agreement by tendering the original title deed of the suit premises to the bank was recorded. The learned Sessions Judge dismissed the revision application with compensatory costs of Rs.10,000/- each from appellant and respondent No.4 - Pravin Khopkar.

11. Aggrieved by these decision, plaintiff and respondent No.4 - Pravin Khopkar instituted Criminal Writ Petition No.3894 of 2019 in this Court. By order dated 31.07.2019, this Court dismissed the Revision Application.

12. It is evident from record that possession was in fact taken by the Court Commissioner Advocate Priya Baliga and the same was handed over to the respondent No.2 Bank on 04.09.2018. Subsequently, the lock put up by the respondent No.2 Bank was broken. In these circumstances, application was made seeking assistance of the Court of the learned Chief Metropolitan Magistrate for taking possession of the suit

premises. The contention of appellant that the learned Magistrate became *functus officio* was raised before this Court in Criminal Writ Petition No.3894 of 2019. The said Writ Petition was dismissed on 31.07.2019.

13. By the impugned order, the learned trial Judge has declined to grant ad-interim relief. It is settled principle of law that relief of injunction is an equitable relief. The person who claims equity has to do equity. He has to come to the Court with clean hands. As it is evident from the facts stated hereinabove despite respondent No.2 obtaining possession on 04.09.2018, the lock put up on the suit premises was broken. Thus, no case is made out for invoking equitable jurisdiction in favour of the plaintiff.

14. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

15. Applying the tests laid down by the Apex Court to the facts of the present case, I do not find that the learned trial Judge has committed any error while declining to grant ad-interim relief. It cannot be said that the learned trial Judge has exercised discretion arbitrarily, capriciously or perversely or that the learned trial Judge has ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. This Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. Hence, Appeal fails and the same is dismissed. It is made clear that the observations made herein are tentative and *prima facie* for testing the correctness of the impugned order dated 06.08.2019 passed by the learned trial Judge. All contentions of the parties before the trial Court are expressly kept open. I have not dealt with the various contentions raised by Mr. Nedumpara, lest, this may influence the learned trial Judge while deciding the Motion. The learned trial Judge will decide the Motion on its own merits and in accordance with law. Order accordingly.

16. In view of the dismissal of the Appeal, nothing survives in Civil Application (St.) No.22619 of 2019 and the same is disposed of accordingly.

17. At this stage, Mr. Nedumpara orally applies for stay of this order.

18. Oral application is rejected.

(R. G. KETKAR, J.)

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