

ORDER SHEET

APOT 110 of 2021
With
CS No. 121 of 2021
IA No. GA/1/2021

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
ORIGINAL SIDE
[COMMERCIAL DIVISION]

AXIS FINANCE LTD.
VERSUS
SUNIL KEDIA AND ANR.

BEFORE:
The Hon'ble JUSTICE I. P. MUKERJI
The Hon'ble JUSTICE ANIRUDDHA ROY
Date: 5th August, 2021.
(Via Video Conference)

Appearance:
Mr. S. N. Mookherjee, Sr. Adv.
Mr. Jishnu Chowdhury, Adv.
Mr. Shuvashish Sengupta, Adv.
Mr. Manoj Tiwari, Adv.
Mr. Sushomit Dutt Majumder, Adv.
Ms. Varsha Dudhwewala, Adv.
For the Appellant.

Mr. Jishnu Saha, Sr. Adv.
Mr. Shaunak Ghosh, Adv.
Ms. Saheli Sen, Adv.
Mr. Rajib Mullick, Adv.
Ms. Shreyashi Maity, Adv.
For the Respondents

The Court:- As the point involved is short and with a view to shorten the time of litigation we treat the appeal on the day's list and dispose of it by this order, after dispensing with all formalities.

The appellant before us is the lender bank. The respondents are borrowers. Against a loan in question, the respondents created mortgage of an immovable property, as security.

The outstanding, according to Mr. S. N. Mookherejee, learned senior advocate for the appellant, is about Rs.13 crores. He says that on 27th March, 2021, the respondent borrowers had admitted this liability.

The appellant has invoked the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) to enforce its security and realize its said outstanding.

This suit is on another cause of action. It is filed by the appellant, inter alia, alleging that the respondent borrowers in collusion with each other and some other person or persons are doing acts which would undermine the security and/or create such a legal hurdle for the appellant that they would be unable to enforce it against the respondent. Mr. Mookherjee refers to a suit filed by the mother of the respondent borrowers in a learned court at Alipore, claiming tenancy, possession of the subject property and so on.

The learned single judge in passing the impugned judgment and order dated 19th July, 2021 refusing the order of injunction sought by the appellant against some other properties of the respondent borrowers and also restraining them from disposing of 20% share in a partnership, applied the principles governing grant of an order of attachment that unless acts of or bordering on insolvency on the part of the defendant, are pleaded and proved, in an ordinary money suit, an order of injunction restraining disposition of the defendant's property is normally not granted, prior to the decree.

If a borrower has created security making some representations to the lender regarding the value and existence of encumbrance in relation to the secured asset, and thereafter wilfully takes measures to cause diminution of its value, or creates a situation where the security cannot be enforced by the lender, the court can compel the borrower, on strict proof of this fact by the lender, to make good the loss of security. In that event, a mandatory order of injunction can be granted by the court directing the borrower to make good the security. If the borrower does not make good the security, then in that event, to enforce the order of injunction, the court may look towards other

properties of the borrower to award compensation to the lender for breach of the order of injunction, under Order XXXIX Rule 2A of the Code of Civil Procedure.

Mr. Jishnu Saha, learned senior advocate appearing for the respondent borrowers, submits, in this particular case, the lender was perfectly aware of the status of the security i.e. a mortgaged property that was subject to the possessory rights of the family members of the borrowers. There was no suppression of any fact by the respondent borrowers at the time of creation of the mortgage. Now, in this situation the lender can only realize their outstanding from the secured assets and cannot restrain the respondent borrowers disposing of other properties.

These issues are likely to arise before the Debts Recovery Tribunal in the proceeding under the SARFAESI Act instituted by the appellant or before the learned single judge before whom the interim application is pending.

We observe and hold that the respondent borrowers have to satisfy the tribunal or the learned single judge before whom the interim application is pending that the respondent borrowers are not guilty of the said acts alleged against them by the appellant.

If such satisfaction is reached by the tribunal or by the learned single judge, there is no question of a restraint order on the right of the respondent borrowers to part with their other properties or shares in the partnership. Otherwise, the tribunal or the learned court might be compelled to pass whatever orders in relation to those properties or share in the partnership it thinks fit and proper.

Pending this adjudication by the tribunal or by the learned single judge, any disposition of the other properties by the respondent borrowers referred to in the prayers of the interim application or any disposition by them of their 20% share in the partnership would strictly abide by the determination to be made by the tribunal or by the learned single judge.

We modify the impugned judgement and order to this limited extent only.

With this observation, we dispose of this appeal and the connected application.

(I. P. MUKERJI, J.)

(ANIRUDDHA ROY, J)

cs.