

Sl.No3
June 2,
2022
Bpg & Sg

FMAT No.211 of 2022
With
CAN 1 of 2022

Asha Agarwal and others
Versus
Williamson Magor & Company
Limited and others

Mr. Anirban Ray,
Mr. Shuvasish Sengupta,
Mr. Orijit Chatterjee,
Mr. Indranil Karfa,
Ms. Sabarni Mukherjee.
...for the appellants.

Mr. Rajarshi Dutta,
Mr. Ritoban Sarkar,
Mr. Souradeep Banerjee,
Mr. Avishek Das.
...for the respondent no.1.

Mr. Kishore Dutta,
Mr. Dwaipayan Basu Mallick,
Mrs. Suchismita Ghosh Chatterjee,
Mr. Abhishek Kisku,
Mr. Arkaprava Sen.
...for the respondent no.2.

Mr. Subhankar Nag,
Mr. Subhankar Das.
...for the respondent no.3.

Mr. Rishad Medora,
Ms. Ramya Hariharan,
Ms. Asmita Rakhecha.
...for the respondent nos.4 & 5.

On consent of learned counsel for the parties, the appeal and application are taken up together for disposal, in view of the identity of the subject-matter of adjudication involved in the two. By virtue of the impugned order dated may 7, 2022 passed in Title Suit No.804 of 2019, the Civil Judge (Senior Division), 2nd Court at Alipore, District – South 24-Parganas rejected the injunction application of the plaintiffs/appellants under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure.

The plaintiffs/appellants filed a suit, *inter alia*, for declaration that the defendant/respondent no.1 does not have any right, title and interest in respect of the suit premises and could not have dealt with or created any mortgage or security interest in respect of the suit premises and for declaration that the declaration that the plaintiffs are absolute owners of the suit premises at 2, Dover Park, Police Station Ballygunj, Kollata-700 019 and for ancillary reliefs. The plinth of the plaint case was that although an agreement for sale of the suit premises was entered into by the borrower/owner that is respondent no.1, the same was not honoured and the possession of the property was not handed over to the Hindu Undivided Family (HUF) of the plaintiffs/petitioners. Accordingly, it is pleaded, the then members of the HUF, including the plaintiffs, had entered into actual

physical possession, immediately prior to September, 1973 and were in adverse possession thereof.

Learned counsel for the appellants contends that, in a previous appeal preferred against an application for injunction under Section 151 of the Code of Civil Procedure, a Division Bench of this Court had remanded the matter back for decision on the main application for temporary injunction under Order XXXIX Rules 1 and 2 in the light of the observations of the Division Bench. However, it is argued, the trial Court did not adhere strictly to the observations made by the Division Bench in the said order dated April 25, 2022, passed in FMA 252 of 2022, by failing to take into consideration the citations and provisions of law, which the Trial Court was to take into consideration as per the Division Bench order, in proper perspective.

Learned counsel relies on a Division Bench judgment reported at *2017 (4) CHN (Cal) 410 [Kaaizer Oils Private Limited and others Vs. Allahabad Bank and others]*, for the proposition that, under certain circumstances, there is no bar for the Civil Court to decide a suit for declaration as well as permanent injunction.

Learned counsel next contends that although it was observed in a cursory manner in a subsequent Division Bench judgment reported at *AIR 2018 Cal 8*

[Delta International Limited and others Vs. Smt. Nupur Mitra and others], that Section 34 of the SARFAESI Act has two limbs, the said observations in respect of injunction were *obiter dicta*, since the second limb, concerning the grant of injunction, had never fallen for consideration before the said Division Bench.

Learned counsel further places reliance in (2004) 4 SCC 311 *[Mardia Chemicals Ltd. and others Vs. Union of India and others]*, in support of the proposition that the jurisdiction of a Civil Court can be invoked to a limited extent in respect of matters outside the jurisdiction of the Debts Recovery Tribunals within the ambit of Section 13 of the SARFAESI Act.

One of such situations was where fraud has been alleged, as in the present case.

Learned counsel next places reliance on (2014) 1 SCCC 479 *[Jagdish Singh vs. Heeralal and others]* in support of the contention that the Civil Court has jurisdiction unless any “measure” was taken under Section 13 of the SARFAESI Act.

By relying next on (2019) 14 SCC 788 *[Sree Anandhakumar Mills Limited Vs. Indian Overseas Bank and others]*, it is contended that a remedy before the DRT lies only when an action under the SARFAESI Act stands initiated, as opposed in the

present case, where no such action had been taken at the time of institution of the suit.

Lastly, learned counsel cites *(2019) 8 SCC 729 [Ravinder Kaur Grewal and others Vs. Manjit Kaur and others]*, where it was held that a suit can be maintained for claiming title by virtue of adverse possession within the ambit of Article 65 of the Limitation Act, 1963.

Learned counsel appearing for the respondent no.1 cites *(2022) 2 SCC 573 [Electrosteel Castings Limited Vs. UV Asset Reconstruction Company limited and others]*, wherein it was held that mere mentioning and using the word “fraud”/”fraudulent” is not sufficient to satisfy the test of “fraud” when material particulars, as required in terms of Order VI Rule 4 of the Code of Civil Procedure, are not disclosed, for bringing the suit within the purview of the Civil Court by overriding the jurisdiction of the DRT.

As regards *Kaaiser Oils* (supra), learned counsel contends that it was clearly discussed by the Division Bench that the Tribunal had refused to interfere in the said case whereafter it was relegated to the Civil Court. Since the judgment was delivered in such context, it is argued that, in the absence of similar criteria, the ratio laid down therein cannot be applicable in terms to the present case.

Insofar as the judgment of the Division Bench in *Delta International* (supra) is concerned, it is contended that the question of jurisdiction of the Civil Court vis-à-vis Section 34 of the SARFAESI Act was considered therein and, as such, it cannot be said that the judgment rendered in respect of the second limb of the said section was *obiter dictum*.

The learned Senior Advocate appearing for the respondent no.2 elaborates the scheme of the SARFAESI Act in general, with particular reference to Sections 13, 17 and 34 thereof, and submits that the said Act provides sufficient jurisdiction to the DRT to adjudicate disputes which are covered by the SARFAESI Act.

Moreover, it is argued that no declaration of title perfected by adverse possession has been claimed by the plaintiffs in the suit.

It is further argued that the plaintiffs failed to plead wrongful entry to the suit property, to render their possession adverse.

Further, it is contended that no particulars in respect of adverse possession have been pleaded in the plaint.

Lastly, it is submitted that Section 35 of the SARFAESI Act confers overriding effect on the provisions of Section 34 of the SARFAESI Act, thereby

taking away the jurisdiction of the Civil Court to decide matters falling within the ambit of the said Act.

Respondent no.3, on the other hand, points out that the Trial Court adhered to the order of remand passed by the Division Bench by referring to all the judgments and provisions indicated therein.

That apart, learned counsel adopts the submissions of respondent nos.1 and 2 and adds that in the written objection filed by respondent no.1 to the injunction application of the plaintiffs in the court below, it was specifically pleaded that the plaintiffs are in permissive occupation, belying the case of adverse possession sought to be made out by the plaintiffs.

Learned counsel for the respondent nos. 4 and 5, in unison with learned counsel for respondent no.3, argue that the appeal and the suit are collusive between the respondent no.1 and the appellant.

Respondent nos. 4 and 5, that is the creditors, argue that there was no question of any remand at any point of time, since the Division Bench order merely directed the Trial Court to decide the temporary injunction application under Order XXXIX Rules 1 and 2 on the basis of the observations made therein.

Upon considering the submissions of learned counsel for the parties, it is evident at first glance

that the plaintiffs/appellants, in paragraph no.10 of the plaint, have pleaded that though the entire consideration for purchase of suit premises was paid and the defendant no.1 manifested its clear intention to divest itself of its right in the property, the possession of the property was not handed over to the plaintiffs' HUF and no conveyance was executed. It has been further pleaded that, in such circumstances, the then members of the HUF, without having any other recourse, had entered into actual physical possession of the suit property, which was adverse from the inception.

However, it is worth nothing that, in the previous paragraphs, the plaintiffs have unambiguously relied on a purported agreement allegedly entered into between the defendant no.1 and the plaintiffs for sale of the suit property. It has also been indicated in the plaint that the possession of the property was taken by the plaintiffs in pursuance of the agreement, although possession of the property was not handed over voluntarily by the defendant no.1, nor had any conveyance been executed pursuant thereto.

Thus, the tenor of the plaint is that the possession was taken by the plaintiffs themselves, in terms of the agreement between the parties, which was not acted upon by the defendant no.1. Hence, there arises patent contradiction between such

mutually exclusive averments, claiming the possession to be adverse on the one hand and, on the other, that the same was taken pursuant to an agreement between the parties. If such possession was taken on the basis of the agreement, it cannot be termed as 'adverse'.

In any event, the plaintiffs have admitted the title of the defendant no.1 at the inception of the alleged chain of events, which was the basis of the purported agreement between the parties.

It follows, upon considering the judgment in (1990) 4 SCC 706 [*Achal Reddy Vs. Ramakrishna Reddiar and others*] cited by the respondent no.2, that adverse possession implies that it "commenced in wrong and is maintained against right". Since possession has been claimed in the present case in terms of the purported agreement between the parties, it cannot be said that the entry point of possession was illegal or 'wrong'.

Such ambiguity hits the *prima facie* case pleaded by the plaintiffs for getting injunction.

On a considered view of *Kaaiser Oils* (supra), it is seen that it was rendered in the context of the circumstances in the said case.

It has been clearly iterated by the Division Bench in several paragraphs of the said judgment that, previously, a proceeding had been taken out under

the SARFAESI Act, which was found to be amenable to the jurisdiction of the Civil Court by the DRT.

In the said case, the Division Bench clearly held that, since the legality of such order of the Tribunal was not challenged, it was binding upon the parties. Hence, in paragraphs 49 and 50 of the judgment, it was observed that if the Bank was permitted to recover its dues by selling the mortgaged property and/or to part with the title deeds which was deposited by the plaintiffs for securing its loan by creating equitable mortgage, then the plaintiff, even if it succeeded in the suit, would not be able to get back its title deeds but would lose title in its property. In such circumstances, it was held that the plaintiff would lose title over its property and the relief of mandatory injunction for delivery of the title deeds could not be given in the suit.

Thus, it was held that the balance of convenience and inconvenience was in favour of grant of injunction by the Civil Court.

Hence, the argument of the appellants as regards *Kaaiser Oil* (supra) being a precedent on the proposition that even where permanent injunction was sought as consequential relief, a civil court had jurisdiction in precedence over the DRT, cannot be accepted.

Insofar as the *Delta International Limited* (supra) is concerned, the question which fell for consideration there was whether the court had jurisdiction to entertain the suit in view of the express prohibition of civil courts by a statute.

The background was regarding the grant of leave under Clause 12 of the Letters Patent, which was itself a limited question. However, upon considering the respective contentions of the parties and a detailed consideration of Section 34 of the SARFAESI Act, it was held that, whereas the bar to a civil court entertaining a suit or proceeding in respect of any matter which a Tribunal is empowered under the Act to determine was restricted to the inception of the suit, the power to grant injunction was circumscribed at any stage of the suit.

Hence, it cannot be said that the ratio laid down in *Delta International Limited* (supra) was *obiter dictum* insofar as the present consideration goes.

Mardia Chemicals (supra), which was considered by the Division Bench in *Kaaiser Oil* (supra), clearly lays down the contours of the bar to the jurisdiction of the Civil Courts vis-à-vis the jurisdiction of the Tribunals. The only exception carved out to the bar of jurisdiction was where allegations of fraud were brought.

In *Mardia Chemicals* (supra), the Supreme Court interpreted Section 34 of the SARFAESI Act and subsequently laid down that the jurisdiction of the Tribunal envisaged not only any action taken under Section 13 of the SARFAESI Act but also in respect of any power under the Act which could be exercised by the Tribunal.

Hence, it cannot be argued that Section 34, insofar as the bar to jurisdiction of civil courts is concerned in respect of the injunctions, is restricted to matters in which measures have already been taken under Section 13 of the SARFAESI Act.

Section 34, as pointed out in *Delta International Limited* (supra), clearly has two limbs – as regards the bar to entertain any suit or proceeding is concerned, the same was held to be restricted to the inception of the suit. It was held that once the suit was entertained and taken on board, there was no scope for dismissing the same on the first limb of Section 34.

However, insofar as the bar to grant of injunction is concerned, the same is covered by the second limb of Section 34, which prevents Civil Courts from “granting” injunction, which can be at any stage of the litigation.

Hence, the Trial Court did not commit any jurisdictional error in observing that, although the

suit may be maintainable, the injunction as sought by the plaintiffs cannot be granted.

The respondent nos. 4 and 5 are justified in contending that there was no remand in the present case, at any point of time. The previous Division Bench judgment only indicated the yardsticks on which the injunction application had to be finally decided.

In any event, the Trial Court has taken into consideration all the judgments and provisions of law in the light of the observations of the Division Bench and cannot be faulted on such score.

In view of the disjunctive conjunction “and”, as used in Section 34 of the SARFAESI Act to segregate its two limbs, there is clear distinction between the entertainability of a suit at the inception and the grant of injunction at any stage of the proceeding, both of which are debarred in respect of a civil court.

Hence, in the present case, even if we assume that the suit was maintainable at the juncture when it was first instituted, as on the date of passing of the impugned order of injunction, measures under Section 13 of the SARFAESI Act had already been initiated, thereby precluding the civil court from granting any injunction. The injunction sought was a pre-emptive measure intended to restrain the DRT from exercising its powers conferred under the

SARFAESI Act and in particular Sections 13 and 17 of the said Act.

In view of the overriding effect of Section 35 of the SARFAESI Act, the said provisions of the DRT Act would prevail over any other law, including Section 9 of the Code of Civil Procedure.

Hence, as observed above, the Trial Court did not commit any jurisdictional error and/or illegality in passing the impugned order. In any event, it is well-settled that an appellate Court shall not reverse the findings of a trial Court merely since an alternative view is possible in the opinion of the appellate Court.

The Trial Court's views, in the light of the prevalent legal position, being apt and lawful, there is no scope of this Court interfering with the impugned order.

Accordingly, FMAT 211 of 2022 along with CAN 1 of 2022 are dismissed.

The subsequent prayer of learned counsel for the appellants for granting an interim protection to the appellants in the interregnum to enable the appellants to approach the appropriate forum i.e. the Debts Recovery Tribunal, is also refused, since we are of the opinion that in view of Section 34, read with Section 70 and 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, there is no scope for

grant of any injunction. Moreover, since we have categorically held that the appeal is dismissed and the order of the trial court refusing injunction is upheld, we do not find any scope of granting any further status quo or injunction order while doing so.

There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Krishna Rao, J.)