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IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 62 OF 2015

The Mapusa Urban Co-operative Bank of Goa, By its General Manager ... Appellant

Versus

Mrs. Santana Eufeginia Baptista Dias & 5 Ors. ...Respondents

Mr. J. P. Mulgaonkar, Senior Advocate *with Ms. Rupa Banaulikar, Advocate for the Appellant.*
Mr. A. D. Bhobe, Advocate *with Ms. S. Shaikh, Advocate for the Respondents.*

CORAM: G. S. KULKARNI, J.
DATED: 6th December, 2022

ORAL ORDER

1. This is an appeal under Order XLIII Rule 1 of the Code of Civil Procedure (CPC), whereby the appellant-defendant no.1 in the Civil Suit filed by the respondent no.1-original plaintiffs (Special Civil Suit No. 66/2015/C), has been injuncted by an order of temporary injunction from holding the auction in terms of the notice published in English daily 'The Navhind Times" dated 3 July, 2015.

2. The appellant while contesting the injunction application on merits had also raised a specific ground that the Civil Court would not have jurisdiction to entertain the suit in question against the appellant in view of the bar created under Section 32 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for short, 'SARFAESI Act'), under which respondent no.1-original plaintiff if was to be aggrieved by any action of the bank adopting such measures under Section 13(4), the only remedy to respondent no.1-original plaintiff was to approach the Debts Recovery Tribunal, under Section 17 of the SARFAESI Act. Section 17 of the SARFAESI Act, provides that any person who is aggrieved by any of the measures referred to in sub-section (4) of Section 13, being taken by a secured bidder would have a remedy to move an application against such measures, before the Debt Recovery Tribunal. In support of such contention, the appellants also placed reliance on the decision of the Supreme Court in **Mardia Chemicals Ltd. vs. Union of India & Ors.**[1].

3. The learned Trial Judge, however, on a reasoning that the respondent no.1-plaintiff being not a borrower nor a guarantor, held that the respondent-plaintiff was not barred from approaching the Civil Court to remedy the wrong done to her by defendant nos. 2 and 3, who were executing a Deed of Mortgage, and by such reasoning

1 AIR 2004 SC 2371

rejected the contentions of the appellant by holding that the Civil Court would have jurisdiction to grant a relief of a temporary injunction against the appellant.

4. Mr. Mulgaonkar, learned Senior Counsel for the appellant has submitted that in passing the impugned order, there is a patent error in the view taken by the learned Trial Judge. He submits that the Civil Court had no jurisdiction to restrain the appellant from proceeding with the auction and which was an action purely under the provisions of the SARFAESI Act and governed by such Act. It is his submission that in these circumstances, the bar as created by Section 34 of the SARFAESI Act to seek any relief against the appellant clearly triggered and was applicable in precluding the Civil Court to exercise jurisdiction. He further submits that the only remedy to the respondent no.1-original plaintiff was to approach the Debt Recovery Tribunal, which being the only forum, which would have jurisdiction to pass appropriate orders in relation to any measures being resorted by the appellant-bank under the provisions of SARFAESI Act. In support of his submissions, Mr. Mulgaonkar has placed reliance on the decisions of the Hon'ble Supreme Court in **Jagdish Singh vs. Heeralal & Ors.**[2], **Sree Anandhakumar Mills Limited vs. Indian**

2 (2014) 1 SCC 479

Overseas Bank & Ors.[3] and a decision of coordinate Bench of this Court in **Mrs. Vishaya Abdulla vs. The Mapusa Urban Co-operative & Ors.**[4], which is in the appellants' own case.

5. Mr. Mulgaonkar, would thus submit that, considering the clear position in law and the observations of the Supreme Court and more particularly in **Sree Anandhakumar Mills Limited** (supra), the impugned order granting a relief of a temporary injunction to respondent no.1-plaintiff, cannot continue to operate and is required to be set aside.

6. Mr. A. D. Bhobe, learned Counsel for the respondent no.1-original plaintiff, would not dispute the position in law, that insofar as any measures being adopted by the appellant under the provisions of the SARFAESI Act, were concerned, the law would provide that the only remedy for an aggrieved party was to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act. He would also not be in a position to dispute that Section 34 would create a bar to the institution of a Civil Suit against any such measures being taken by a bank.

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3 (2019) 14 SCC 788

4 Appeal From Order No. 68 of 2015 decided on 01.10.2020

7. Having heard the learned Counsel for the parties and having perused the impugned order, in my opinion, there is much substance in the contention as urged by Mr. Mulgaonkar, when he finds a legal fault in the impugned order as passed by the learned Civil Judge in injuncting the appellants to take measures under the SARFAESI Act against the respondents/plaintiffs. The reliance of Mr. Mulgaonkar in the decision on **Sree Anandhakumar Mills Limited vs. Indian Overseas Bank & Ors.** (supra) is apposite.

8. At the outset, it is required to be noted that Section 17 of the SARFAESI Act provides that an application can be filed before the Debt Recovery Tribunal against any measures to recover secured debts. Such remedy is available to "any person" who is aggrieved by any of the measures referred to in sub-section (4) of Section 13 being taken by a secured creditor or his authorised officer. Such aggrieved person can make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures have been taken. Sub-section (3) of Section 17 specifically provides that the Debts Recovery Tribunal after examining the facts and circumstances of the case and evidence produced by the parties, if comes to a conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by secured creditor are not in accordance with the provisions of the Act and the Rules made thereunder, and would require restoration of the management or restoration of possession of the secured assets, to the borrower or other aggrieved person, it may pass such appropriate orders as specified in clauses (a), (b) and (c) of sub-section (3). A perusal of Section 17 makes it clear that it not only provides for a remedy, but also provides for a complete procedure required to be adopted in adjudication of such application.

9. Apart from Section 17 of the SARFAESI Act providing for a complete remedy, to assail such actions of the secured creditor, another aspect which becomes crucial when a Civil Court is confronted to exercise a jurisdiction on the issues falling within the ambit of the SARFAESI Act, is the provision of Section 34, which ordains that the "*Civil Court not to have jurisdiction*", to stipulate that no Civil Court shall exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of

Debts Due to Banks and Financial Institutions Act, 1993. Thus there is a clear bar to the jurisdiction of the Civil Court to entertain any suit in respect of any matter which would be within the jurisdiction of the Debts Recovery Tribunal.

10. Insofar as the jurisdiction of the Debts Recovery Tribunal is concerned, the law appears to be well settled as can be seen from the decisions as noted above.

11. In **Mardia Chemicals Ltd. vs. Union of India & Ors.** (supra), the Supreme Court categorically held that the jurisdiction of the Civil Court would be barred however to a very limited extent the Civil Court could exercise jurisdiction or it can be so 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. The relevant of the observations are contained in paragraphs 50 and 51 which are required to be noted which reads thus :

> "50. It has also been submitted that an appeal is entertain-able before the Debt Recovery Tribunal only

after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve, one of the counsel for respondents that there would be no bar to approach the Civil Court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the Civil Court is barred in respect of matters which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has So far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the Civil Court shall have no jurisdiction to entertain any proceeding thereof. The bar of Civil Court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

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 recognised 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 (supra) at (AIR 1955 pp. 141 and 144, a judgment of Madras the learned single Judge where it 135) is observed as follows in para 22 :

> "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 manner contrary a fraudulent or improper 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 (249). 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 Edn., page 784)."

12. In **Jagdish Singh vs. Heeralal & Ors.** (supra), the Supreme Court referring to the provisions of Sections 13, 17 and 34 of the SARFAESI Act as also referring to the decision of the Supreme Court in

United Bank of India vs. Satyawati Tondon[5]**,** held that expression "*any person*" used in Section 17 of the Securitisation Act, is of wide import and takes within its fold not only the borrower but also the guarantor or "*any other person*" who may be affected by action taken under Section 13(4) of the SARFAESI Act, as held in ***Satyawati Tondon's*** *case.* The Supreme Court referring to the decision in **Mardia Chemicals Ltd. vs. Union of India & Ors.** (supra) held that the Civil Court's jurisdiction was completely barred insofar as the measures taken by the secured creditors under sub-section (4) of Section 13 of the SARFAESI Act were concerned, against which an aggrieved person had right to approach the Debts Recovery Tribunal or the Appellate Tribunal. It was thus held that the High Court was in error in holding that the Civil Court had jurisdiction to examine as to whether the measures taken by the secured creditors under sub-section (4) of Section 13 of the SARFAESI Act, were legal or not.

13. In **Sree Anandhakumar Mills Limited** (supra), following the decision in **Jagdish Singh vs. Heeralal** (supra), the Supreme Court held that the provisions of Section 17 of the SARFAESI Act and threafter under Section 18 of the SARFAESI Act, respondent no.2 therein, had an adequate and efficacious remedy and permitted such

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5 (2010) 8 SCC 110

respondent to take recourse to the said remedies and agitate contentions before the learned Debts Recovery Tribunal on all issues that may be open in law. However, what is important is as the proceedings were held to be maintainable under the provisions of Section 17 of the SARFAESI Act, the High Court observed that the maintainability of the suit, was an adequate reason to set aside the order of the High Court and maintain the sale and possession of the appellant (auction/purchaser). The following observations of the Supreme Court are required to be noted which read thus :

> "4. The matter need not engage the Court in any great detail as in view of the law laid down by this Court in *Jagdish Singh v. Heeralal*, it would be clear and evident that the suit filed by the second respondent (i.e. OS No. 106 of 2009) is not maintainable. In *Jagdish Singh* this Court after an elaborate consideration of the provisions of the SARFAESI Act, particularly, Sections 2(zf), 2(zc). 13(1), 17, 18 and 34, took the view, on almost similar. facts, that a suit for partition would not be maintainable in a situation where proceedings under the SARFAESI Act had been initiated. It was also held that the remedy of any person aggrieved by the initiation of proceedings under the SARFAESI Act lies under Section 17 which provides for an efficacious and adequate remedy to a party aggrieved. Para 24 of the Report in *Jagdish Singh* which makes the above position clear may be usefully extracted below: (SCC p. 489)
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> > "24. Statutory interest is being created in

favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the "*measures*" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "*in respect of any matter*" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "*in respect of any matter*" referred to in Section 34 would take in the "*measures*" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "*measures*" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well." (emphasis in original)

5. Beyond the above, we do not consider it expedient and prudent to record any findings in view of the final direction that we propose to pass. But for the purpose of the present controversy it would suffice to say that our view as recorded above with regard to the issue of maintainability of the suit would be an adequate reason to set aside the order of the High Court and maintain the sale and possession of the appellant auction-purchaser.

6. As we have held that under the provisions of Section 17 of the SARFAESI Act and thereafter under Section 18 of the SARFAESI Act, Respondent 2 has an adequate and efficacious remedy, we are inclined to permit Respondent 2 to have recourse to the said remedies and agitate before the learned Debts Recovery Tribunal all issues that may be open in law. All objections as may be available to the appellant may also be raised before the learned Debts Recovery Tribunal. The learned Debts Recovery Tribunal and thereafter the learned Debts Recovery Appellate Tribunal, if required to be approached by Respondent 2, will decide the matter with utmost expedition. Until the aforesaid proceedings are complete while confirming the auction-sale in favour of the appellant we direct the appellant not to encumber the property in question or to transfer it to any third party."

14. A coordinate Bench of this Court in **Mrs. Vishaya Abdulla** (supra), following the decision of the Supreme Court in **Jagdish Singh** (supra) and **Shree Anandhakumar Mills Limited** (supra), had come to a similar conclusion that an order which was passed by the learned Trial Judge in dismissing the appellant's application for interim reliefs on the ground that the application was not maintainable in view of the bar created by Section 34 of the SARFAESI Act, was held not requiring any interference.

15. As a result of the above discussion, in my view, in the facts of the present case, with certitude it is required to be observed that the observation of the learned trial Judge in paragraph 8 of the impugned order that merely because respondent no.1-plaintiff is not a borrower nor a guarantor and therefore she was not barred from approaching the Civil Court, is an untenable observation so as to exercise jurisdiction in the suit in question apart from being clearly in the teeth of what has been held by the Supreme Court in the decisions as referred above. The learned Trial Judge was certainly not correct in passing the impugned order to injunct the appellant, in holding the auction in terms of the notice which was published by the appellant in the newspaper dated 3 July, 2015.

16. For the above reasons, this appeal is required to be allowed. It is accordingly allowed by setting aside the impugned order dated 4

August 2015 passed by the learned Senior Civil Judge "C" Court Mapusa.

17. Needless to observe that all the contentions of the parties on facts and on law are expressly kept open, if asserted in appropriate proceedings.

18. Disposed of in the above terms. No costs.

G. S. KULKARNI, J

ANDREZA PEREIRA Digitally signed by ANDREZA PEREIRA Date: 2022.12.13 11:53:54 +05'30'