H. H. Sawant / Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1104 OF 2021

ICICI Bank Limited
A company incorporated under the Companies Act, 2013 and a bank licenced under the Banking Regulation Act, 1949 and having its registered office at ICICI Bank Limited, Chakli Circle, Near Old Padra Road, Vadodara 390007 it Corporate Office at, ICICI Bank Towers, Bandra Kurla Complex, Mumbai 400 051, and its Branch office amongst others at, ICICI Bank Ltd, at Rajwada Chowk, Sangli, Taluka : Miraj, District : Sangli – 416416.
through its Authorised Signatory Mr. Sourabh Deshpande .. **Petitioner**

Versus

Budhadeo Mukharji
Age : 67 years, Occupation-Service
Having its place of residence at : Devdatta Complex Flat No.F-2, First Floor, C.T.S. No.8368, Vishrambag, Tal. Muraj, Dist.Sangli-416415.
.. **Respondent No.1**

Central Bank of India
Branch Vakhar Bhag, P. B. No.20, C.T.S. No.183/1, Mahavirnagar, Tal. Miraj, Dist.Sangli-416416.
.. **Respondent No.2**

Shirishkumar Tatyaso Chavan
Age : 42 Years, Occupation :Service
Having its place of residence at:Sanmati Bungalow, Shantiban Colony, Dhamani Road, Vishrambag, Tal. Miraj, Dist.Sangli-416145 .. **Respondent No.3**

....

- Mr. Anshul Anjarlekar i/by. Raval Shah and Co. for Petitioner
- Mr. Kuldeep U. Nikam for Respondents

....

CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 07, 2022.

JUDGMENT:

1. By the present Writ Petition filed under Article 226 & 227 of Constitution of India, Petitioner has prayed for following reliefs :-

> *"a. That this Hon'ble Court may be pleased to issue a Writ of Certiorari or such other Writ in the nature of Certiorari or any other writ, order or direction of this Hon'ble Court thereby calling for the records and proceedings in respect of the said impugned order dated December, 12 2018 [annexed hereto as Exhibit A] and after verifying the legality and proprietary of the same, the said impugned order be quashed and set aside and thereafter allow the Misc. Civil Appeal No. 93 of 2018 of the Petitioner filed before the District Judge, Sangli.*
>
> *b. That this Hon'ble Court may be pleased to issue Writ of Mandamus or such other Writ in the nature of Mandamus or any other writ, order or direction thereby directing the Learned District Judge to restore the Misc. Civil Appeal No.93 of 2018 and thereafter hear the same on merits."*

2. Petitioner is a Private Bank licenced under the Banking Regulation Act, 1949 and carries on the business of banking. Petitioner is aggrieved by order dated 12.12.2018 passed in Miscellaneous Civil Appeal No.93 of 2018 by the District Judge, Sangli (hereinafter referred to as the '**impugned order**') whereby Misc. Civil Appeal No.93 of 2018 came to be dismissed and the impugned order passed below Exh. 5 dated 17.04.2018 in Regular Civil Suit No.394 of 2014 came to be confirmed. Petitioner is the original Defendant No.1 in Regular Civil Suit No. 394 of 2014. Regular Civil Suit No.394 of 2014 has been filed by Respondent No.1 (Plaintiff therein) for permanent injunction against the Petitioner Bank from disturbing his possession in respect of the suit flat i.e. Flat No. 2, First Floor, Devdatta Complex, admeasuring 70.61 sq. mtrs. situated within the local limits of Miraj and Kupwad Municipal Corporation, Vishrambag, Tal. Miraj, Dist. Sangli – 416 415. Exh. 5 Application was filed by Respondent No.1 which came to be allowed vide order dated 17.04.2018 by the Trial Court. Being aggrieved, Petitioner Bank filed Miscellaneous Civil Appeal No.93 of 2018 wherein the impugned order dated 12.12.2018 came to be passed.

3. The present Writ Petition has been filed on 22.01.2021.

4. To appreciate the controversy between the parties such of the relevant facts which are necessary for deciding the present Writ Petition are as under:

4.1. One Uttam Appaso Chavan purchased the suit flat from Meena Vinayak Godse and 3 others by a registered sale deed dated 27.10.2006. Uttam Chavan as principal borrower and his wife Vaishali Chavan as co-borrower executed a 'Facility Agreement' dated 12.10.2006 to avail home loan facility from Petitioner and sought disbursement of an amount of Rs.4,20,143/- which was disbursed on 17.10.2006.

4.2. To secure the disbursed amount, Uttam Appaso Chavan created an equitable mortgage by deposit of the original title deeds of the suit flat with the Petitioner. Petitioner has pleaded that he deposited 7 documents which are stated in paragraph No.7 of the Petition with the Petitioner for securing the above loan facility. It needs to be mentioned here that admittedly Mortgage Deed in respect of suit flat was not executed and registered between Petitioner and Uttam Chavan.

4.3. There was a default by Uttam Chavan and the aforesaid home loan account was classified as a Non Performing Asset (for short '**NPA**') on 10.01.2014.

4.4. According to Petitioner, in order to recover the outstanding amount *qua* the suit flat from Uttam Chavan and Vaishali Chavan, steps were initiated for recovery under the provisions of Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (for short '**SARFAESI Act**') and Security Interest (Enforcement) Rules, 2002 in DRT. That symbolic possession notice was published in two newspapers as required under Rule 8 (2) of the said Rules on 19.10.2014. It is also pleaded that Petitioner affixed the said notice on the suit flat.

4.5. In the interregnum, on 07.07.2007, Uttam Chavan executed a Registered sale deed in respect of the suit flat in favour of his cousin brother Shirishkumar Tatyaso Chavan i.e. Respondent No. 3.

4.6. That on 21.02.2013 Respondent No.3 executed another registered sale deed in respect of the suit flat in favour of Respondent No.1 (Plaintiff). Respondent No.1 availed a loan amount of Rs.13,50,000/- from Respondent No.2 (Central Bank of India) for purchase of the suit flat. Respondent No.1 executed and registered a mortgage deed with Respondent No.2-Bank in respect of the suit flat. In the above background Respondent No.1 filed the original suit alongwith Interim application dated 29.10.2014 under Order XXXIX Rule 1 and Section 151 of Code of Civil Procedure, 1908 (for short '**CPC**') i.e. Exh. 5 seeking temporary injunction against Petitioner from disturbing his possession. Principal relief in the suit filed by Respondent No.1 is of perpetual injunction against the Petitioner-Bank.

4.7. In 2015 Petitioner filed Application under Order VII Rule 11 of CPC for rejection of Plaint in the Trial Court on the ground that the suit proceeding was barred by the provisions of Section 34 of the SARFAESI Act. Petitioner contended that since recovery proceedings under Section 13 were pending before the Debt Recovery Tribunal (for short '**DRT**'), Respondent No.1 ought to have moved the DRT in case he was aggrieved.

4.8. By order dated 01.07.2015, Application filed by Petitioner under Order VII Rule 11 was dismissed by the Trial Court. This order has admittedly not been challenged by the Petitioner.

4.9. Thereafter Interim Application under Exh. 5 was heard by the learned Trial Court and by order dated 17.04.2018, it was allowed. The learned Trial Court passed a detailed speaking order.

4.10. Being aggrieved Petitioner filed Miscellaneous Civil Appeal No.93 of 2018 under Order XLIII Rule 1 of CPC for setting aside the order dated 17.04.2018. By judgment dated 12.12.2018 Miscellaneous Civil Appeal No. 93 of 2018 was dismissed and order passed below Exh. 5 dated 17.04.2018 was confirmed. It is seen that Appellate Court has passed a reasoned order.

4.11. Hence the present Petition.

5. Mr. Anjarlekar, learned Advocate for Petitioner submitted that both orders dated 17.04.2018 and 12.12.2018 suffer from a jurisdictional error in as much as the learned Trial Court was barred from entertaining any plea of Respondent No.1 in respect of the suit flat in view of the express bar of Section 34 of the SARFAESI Act. He submitted that as held by the Supreme Court in a catena of judgments, no Civil Court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered to do so under the provisions of the SARFAESI Act and no injunction can be granted by any Court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act. He vehemently submitted that both the learned

Courts below have passed orders in complete contravention of the provisions of Section 34 of the SARFAESI Act and the authoritative decisions of the Supreme Court. He has placed reliance on the decisions of Supreme Court in the case of **Authorised Officer, State of Bank, V/s. Alwyn Alloys Private Limited and Others**[1] and **Jagdish Singh Vs. Heeralal & Ors.**[2] and contended that both the Courts below fell into an error by entertaining the suit proceeding, as filing of a civil suit in respect of a secured asset is barred by law. That the concurrent finding returned by both the Courts below in rejecting the Petitioner's submission on the applicability of Section 34 are contrary to the facts in the present case. He submitted that the Petitioner granted loan to Uttam Chavan which was secured by creating an equitable mortgage by deposit of the title deeds of the suit flat. That the existence and validity of the equitable mortgage created by Uttam Chavan in favour of Petitioner was a legally enforceable mortgage under Section 58 (f) of the Transfer of Property Act, 1882. He submitted that the finding of both the Courts below, that the dispute between parties was outside the purview of SARFAESI Act was completely erroneous in view of the above facts. That Respondent No.1 had an equally efficacious and equitable remedy available to him to approach the DRT under the provision of Section 17 of the SARFAESI Act for redressal of grievance in respect of the suit flat. He finally submitted

1 (2018) 8 Supreme Court Cases 120
2 (2014) 1 Supreme Court Cases 479

that the suit flat was a secured asset being a mortgaged property with a secured creditor (Petitioner Bank) and considering that Uttam Chavan was in arrears of the outstanding loan amount in respect of the suit flat, it is the DRT alone who has jurisdiction to entertain disputes with respect to the suit flat (mortgaged property). He therefore submitted that both the impugned orders below were incorrectly passed and sought quashing and setting aside of the judgment in appeal dated 12.12.2018.

6. I have perused the order passed below Exh. 5 dated 17.04.2018 by the 4th Joint Civil Judge (J.D.), Sangli, the impugned judgment dated 12.12.2018 passed in Miscellaneous Civil Appeal No.93 of 2018 and the pleadings in the case carefully before me.

7. At the outset it needs to be stated that Petitioner's Application under Order VII Rule 11 of the CPC seeking rejection of Plaint was dismissed as far back on 01.07.2015 wherein Petitioner had pleaded the same ground i.e. bar of Section 34. Though Petitioner has mentioned the above fact in paragraph No.16 of the Petition, however copy of the order dated 01.07.2015 is not annexed to the Petition. Since the Petitioner has not pleaded anything further on this it is clear that Petitioner has not appealed against the above order and hence the said order has become final.

8. It is seen that Exh. 5 application was decided three years thereafter by the Trial Court on 17.04.2018. While opposing the said Application, Petitioner however once again pleaded the same ground i.e. bar of Section 34 which had already been decided by the learned Trial Court against the Petitioner. In that view of the matter Petitioner was barred from pleading the same ground since Petitioner had chosen not to appeal against the order dated 01.07.2015.

9. That apart, minute perusal of the record and pleadings of the case reveal the following notable facts which strongly revolt against the Petitioner's case:

(i) Admittedly Respondent No.1 and Respondent No.3 are not the borrowers of any loan amount from the Petitioner Bank;

(ii) That Petitioner has placed reliance on the fact that the suit flat was mortgaged (by equitable mortgage) by deposit of title deeds by Uttam Chavan. This fact according to Petitioner relates to the year 2006. Record indicates that admittedly there was a 'Facility Agreement' between Petitioner-Bank and Uttam Chavan whereby Petitioner agreed to provide a loan of Rs.4,20,143/- to Uttam Chavan for purchase of the suit flat. The learned Appellate Court has perused this Facility Agreement and recorded the contents of

Condition 34 of the said agreement which reads thus:

> "*Where any security in relation to any property(ties) is required to be registered under any law for the time being in force, the borrower/s shall within 10 days from the creation of such security have to get security registered with appropriate Registering Authority and sub original security document to ICICI Bank.*"

Thus it is seen that admittedly it was never the Petitioner's case that there was a mortgage document or any registered equitable mortgage deed entered into between the parties. It was the Petitioner's case that by virtue of the 'Facility Agreement' it had advanced the loan amount to Uttam Chavan for purchase of the suit flat and hence the suit flat became a secured asset on deposit of title deeds. Contents of the aforesaid Condition 34 are in succinct terms. It requires the borrower to get the security registered with the appropriate Registering Authority and submit the original security document to the Petitioner Bank within 10 days. Admittedly this has not being done by Uttam Chavan who had entered into the transaction i.e. 'Facility Agreement' with the Petitioner Bank. Nor has the Bank sought execution or registration of the mortgage deed.

(iii) In so far as Respondent No.1 is concerned, he approached the Civil Court on the basis of his registered sale deed with Respondent No.3 which was mortgaged with the Respondent No.2-Bank. Respondent No. 1's Mortgaged Deed is registered in respect of the suit flat. On the basis of this registered Sale Deed, his name was entered into the *Malmatta Patrak* showing that he had purchased the suit flat on 14.08.2013. This is a very strong circumstance in view of the fact that Uttam Chavan did not take any steps whatsoever to execute and register his mortgage deed.

(iv) It is seen that Petitioner's case is only based upon the 'Facility Agreement' with Uttam Chavan and record reveals that there is no registered mortgage deed creating security of the suit flat in favour of the Petitioner-Bank. This is an exceptionally strong circumstance which militates against the Petitioner's case. Petitioner has been unable to show any registered mortgaged deed / document in its favour.

(v) Thus Respondent No.1 (Plaintiff) is found to be a *bonafide* purchaser of the suit flat and in possession thereof and thus entire balance of convenience lies in his favour.

(vi) Learned Appellate Court has clearly noted that the question of jurisdiction of the Civil Court is already decided by the learned Trial Court in a separate Application and it is not challenged by the Petitioner. Hence, the learned Appellate Court has concluded that it cannot be considered in Miscellaneous Civil Appeal No.93 of 2018.

10. Perusal of record indicates that Respondent No.1 has executed a registered mortgage deed bearing Serial No.2077-2013 dated 13.03.2013 which was registered in the office of Sub-Registrar Class-2, Miraj No.1, Sangli. Record further indicates that name of Respondent No.1 has been recorded in the Revenue Record and is appearing in the ownership column of the City Survey extract of C.T.S. NO.8368 by Mutation Entry No.5729 which was sanctioned on 14.08.2014. His name has also been recorded as owner in the assessment list of the Municipal Corporation i.e. Sangli, Miraj and Kupwad Municipal Corporation. That he has regularly paid all municipal taxes. He has obtained electricity connection from MSEDCL and the bills of the said connection are regularly being paid by him. Most importantly, he is permanently residing in the suit property with his family members.

11. Record further indicates that Respondent No.1 took diligent search of the suit flat prior to its purchase and there was no registered charge / encumbrance of the Petitioner – Bank or any bank or financial institution and its title was clear and marketable. That Respondent No.1 obtained a title search report of the suit flat from an Advocate certifying that title of the suit flat was clear and free from encumbrances. Thus it is *prima facie* clear that the suit flat is mortgaged with the Respondent No.2 Bank vide registered mortgage deed dated 21.02.2013 and it therefore, has prior charge over the suit flat.

12. I have also perused both the decisions of the Supreme Court relied upon by the Petitioner and find that the facts of the case before the Supreme Court were entirely different than the facts in the present case. Admittedly as seen in the present case Respondent No.1 and Respondent No.3 do not have any privity of contract whatsoever with the Petitioner Bank. Further, it is seen that the suit flat was not a secured asset of the Petitioner – Bank since no mortgage document was executed and registered.

13. In view of the above observations and findings, the Writ Petition filed by the Petitioner Bank fails. Both the Courts below i.e. the learned Trial Court by order below Exh. 5 dated 17.04.2018 and the learned Appellate Court by order dated 12.12.2018 (impugned herein) have considered the totality of the facts and circumstances and passed a reasoned and speaking order/judgment. The impugned order does not call for any interference whatsoever and is sustained.

14. Writ Petition is dismissed.

[MILIND N. JADHAV, J.]

RAVINDRA MOHAN AMBERKAR Digitally signed by RAVINDRA MOHAN AMBERKAR Date: 2022.12.31 14:58:23 +0530