IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.115 OF 2022
WITH
INTERIM APPLICATION NO. 643 OF 2022

Sou. Nilakshi Rajendra Paigude & Ors. ..Appellants

v/s.

State of Maharashtra & Ors. ..Respondents

Mr. P.S.Dani,l Sr. Advocate i/b. Shailesh Chavan for the Appellant
Mr. Y.B.Dabke, AGP for the Respondent Nos1 and 2.
Mr. Joel Carlos for the Respondent Nos.3 and 4.
Mr. Ranjeet Patel for the Respondent Nos.5 and 6.

CORAM : ANUJA PRABHUDESSAI, J.
DATED : 7th MARCH, 2022.

P.C.

1. With consent, heard finally at the stage of admission.

2. The Appellants herein have challenged the impugned order dated 27.01.2022 whereby the learned Civil Judge, Senior Division, Karad has dismissed the application for interim relief filed under Order 39 Rule 1 of the Civil Procedure Code.

3. The brief facts necessary to decided this appeal are as under.

4. The Respondent Nos.5 and 6 developed property under

Survey No.277/1/10 admeasuring 32R situated at Mauje Malkapur, Taluka Karad, District Satara and constructed a building named Kranti Building. Fourth and fifth floor of the said building is the subject matter of the suit and shall be hereinafter be referred to as the suit property.

5. The Appellants-Plaintiffs claim to have entered into an agreement dated 18.08.2017 for purchase of the suit property for sale consideration of Rs1,25,00,000/-. The Appellants paid Rs.1,00,000/- as earnest money. They further paid Rs.7,50,000/- by cheque and Rs.41,50,000/- in cash. The Appellants claim that they were always ready and willing to perform their part of contract, but the Respondent Nos.5 and 6 evaded executing the Sale Deed on one pretext or the other.

6. The Appellants learnt that Respondent Nos.5 and 6 had obtained loan from Respondent No.3 Bank against equitable mortgage created in respect of the suit property. They also learnt that the attachment process is in progress in accordance with the provisions of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). The Appellants therefore filed a suit for specific performance and permanent injunction and further sought interim relief to restrain the Respondent Nos.5 and 6 from alienating the suit property or creating third party rights.

7. The Respondent Nos.1 and 2 have claimed that the Agreement is bogus and unenforceable. It was alleged that the suit was filed in collision with Respondent Nos.5 and 6. The Respondent Nos.3 and 4 contested the Application mainly on the ground that they had sanctioned term loan to Respondent Nos.5 and 6 against equitable mortgage. The Respondent Nos.5 and 6 failed to repay the dues and as such, on 31.03.2019 the loan account was declared as Non Performing Asset (NPA). It is further stated that despite receipt of the demand notice under Section 13(2), the Respondent Nos.5 and 6 did not repay the loan amount. The public notice of constructive possession was given on 31.08.2019 and order of possession under Section 14 was passed on 1.2.2021. It is stated that the order could not be executed because of the situation arising due to outbreak of

COVID 19 pandemic. The Respondent Nos.3 and 4 claim that being the Secured Creditors, the Respondent Nos.3 and 4 have statutory right to recover the dues and that the suit is not maintainable in view of specific bar under Section 34 of the SARFAESI Act.

8. The trial Court, upon considering the material on record and the submissions of the learned Counsel for the respective parties, held that the Agreement for Sale is not registered and is not duly stamped, and hence dismissed the Application filed by the Appellants herein. Being aggrieved by this Order, the Appellants have preferred this Appeal.

9. Shri Dani, learned Senior Counsel for the Appellants submits that the trial Court has erred in rejecting the interim relief for want of registration of the Agreement and on the ground that the Agreement was not duly stamped. He submits that this issue could not have been decided at the interim stage. Relying upon the decision of the Apex Court in K. Mallesh v. K. Narendra 2016(4) Mh.L.J. 193 and the decision of the learned Single Judge

of this Court in ***Hilton Builders & Textiles Pvt. Ltd. vs. Special Paints Limited & Anr. 2014(7) ALL MR 188*** , he contends that the question of admissibility of document must be considered independently only at the time of trial and not prior thereto. Reliance is also placed on the decisions of the Apex Court in ***S. Kaladevi vs. V.R.Somasundaram & Ors. AIR 2010 SC 1654;*** to contend that unregistered sale deed is admissible in evidence as evidence of contract in suit for specific performance of contract. He further submits that the Appellants have filed Suit for specific performance and have not sought any specific relief as against Respondent Nos.3 and 4 and as such the Appellants could not have filed any application under Section 17 of the SARFAESI Act.

10. Per Contra, Mr. Carlos, learned Counsel for the Respondent Nos.3 and 4 submits that the notice under Section 13(2) was issued on 13.06.2019. Public notice of constructive possession was issued on 31.8.2019 and order of Possession was passed on 01.02.2020, despite which the Appellants did not file Application under Section 17 and did not seek any other relief but filed the suit and application for interim relief after considerable delay. He

has placed relied on the judgment of the Division Bench of this Court in ***Mridula P. Sharma vs. State Bank of India 2015 SCC Online Bom.525*** to contend that if Respondent Nos.5 and 6 had any tangible grievance against the notice issued under Section 13(4) the action taken under Section 14 of the SARFAESI Act, they ought to have availed the remedy under Section 17(1) of the SARFAESI Act. He submits that the conduct of the Appellants itself reveals that the Appellants are trying to delay the proceeding initiated by the Respondent Nos.3 and 4, a secured creditor. He submits that in terms of Section 26E of the SARFAESI Act the secured creditor has priority over all other creditors. He further submits that Section 34 of the SARFAESI Act specifically bars jurisdiction of Civil Court to entertain any suit or proceeding in respect of any matter in which the Debts Recovery Tribunal or Appellate Tribunal is empowered to determine. This Section mandates that no injuction shall be granted by any Court in respect of any action taken or to be taken in pursuance of any power conferred or under the Act. He submits that the Appellants are not in possession of the property, and that the Appellants are in fact trying to protect the possession of the Respondent Nos.5

and 6.

11. I have perused the records and considered the submissions advanced by the learned Counsel for the respective parties.

12. The Appellants have filed Application for temporary injunction seeking to restrain the Respondents from changing the nature of the suit property and to maintain status quo in respect of the suit property on the premise that they had entered into an agreement to purchase the suit property for sale consideration of Rs.1,25,00,000/-. The Appellants have placed on record the Agreement for Sale dated 18.08.2017, a perusal of which prima facie suggests that the Respondent Nos.5 and 6 had agreed to sell the suit property for sale consideration of Rs.1,25,00,000/-. The Agreement reveals that the Appellants had paid to the Respondent Nos.5 and 6 earnest money of Rs.1,00,000/-. In terms of the said agreement, the balance amount was to be paid and the transaction was to be completed within a period of three years. The Appellants have averred that in between the year 2017 to 2020 they have paid an amount of Rs.7,50,000/- by cheque and an

amount of Rs.41,50,000/- has been paid by cash. The details of the amount allegedly paid in cash have not been mentioned. Moreover, the entire amount was not paid within three years. The Appellants had not called upon the Respondent Nos.5 and 6 to execute the Sale Deed and the sale transaction was not concluded within three years as per the agreement. This is relevant as the material on record clearly indicates that the Respondent Nos.5 and 6 had availed loan and mortgaged the suit property in favour of the Respondent Nos.3 and 4. It is also not in dispute that the Respondent Nos.5 and 6 have defaulted in repaying the loan and the loan account was classified as NPA way back on 13.03.2019. The notice under Section 13(2) was also issued on 13.02.2019 and the public notice of constructive possession was issued on 13.08.2019 and order under Section 14 was passed on 1.2.2020. Even after issuance of public notice and passing of order under Section 14 the Appellants did not file application under Section 17 of the SARFAESI Act. In ***United Bank of India vs. Satyavati Tondon (2010) 8 SCC 110*** which is referred by the Division Bench of this Court in Mridula Sharma (supra) the Apex Court has held :

"*The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) of Section 14.*"

13. The Division Bench of this Court in Mridula Sharma (supra) has reiterated that :

" 22. Statutory interest is being created in favour of the secured creditor on the secured assets and then the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrowers 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 realizing 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 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 SARFAESI 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 SARFAESI 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 of the Appellate Tribunal and not the Civil Court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respct of those matters which fall under sub-section (4) of Section 13 of the SARFAESI Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the SARFAESI Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

23. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub-section (4) of Section 13 of the SARFAESI Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal, to determine as to whether there has been any illegality in the "measures" taken."

14. In the instant case, remedy under Section 17 was available to the Appellants who are claiming right to the suit property

through Respondent Nos.5 and 6 and who were likely to be affected by the action taken by the Respondent Nos.3 and 4 under Section 13(4) and Section 14 of the SARFAESI Act. The Appellants did not avail the remedy available under the statute, and preferred to file a suit for specific performance and have prayed for interim relief, which if granted, will certainly affect the statutory right of Respondent Nos.3 and 4 being a secured creditor to recover the dues by taking recourse to the provisions of law.

15. Furthermore, prima facie the jurisdiction of the Civil Court to entertain such suit and grant injunction is barred under Section 34 of the SARFAESI Act. Hence, the Appellants are not entitled for any interim relief in respect of action to be taken by the Respondent Nos.3 and 4 in exercise of the powers conferred under the Act.

16. Considering all the above facts and circumstances, in my considered view, the Appellants have not made out prima case. Granting the relief would amount to preventing the Respondent Nos.3 and 4 from availing the statutory remedy in recovering the

dues and this will frustrate the object of SARFAESI Act.

17. Under the circumstances and in view of above, the Appeal has no merits and is accordingly dismissed.

18. Interim Application stands dismissed in view of dismissal of the Appeal.

PRASANNA P SALGAONKAR Digitally signed by PRASANNA P SALGAONKAR Date: 2022.03.21 14:53:09 +0530

(ANUJA PRABHUDESSAI, J.)