

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

APPEAL FROM ORDER NO.404 OF 2021
IN
NOTICE OF MOTION NO.2484 OF 2021
IN
S.C.SUIT (ST) NO.8637 OF 2021

Mr. Venkateshwaran J. Tirunillai
& Anr.

...Appellants

Vs

Mr. Pradeep Mansukhani & Ors.

...Respondents

...

Mr. Aloukik R. Pai with Mr. Akshay R. Pai, Ms. Prajakta Shrinagarpure i/by Ms. Bina R. Pai for the Appellants.

Mr. Sumanth Anchan with Mr. Abhijit Devkhile for Respondent Nos.1 and 2.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON : FEBRUARY 28, 2022.
PRONOUNCED ON: MARCH 9, 2022.

P.C. :

Section 13 of the SARFAESI Act deals with enforcement of security interest without intervention of the Court or Tribunal but in accordance with the provisions of the said Act. In the case of **Jagdish Singh v. Hiralal 2014 1 SCC 479**, the Apex Court has held that, when the secured creditors proposed to proceed against 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 borrower including the right to transfer by way of lease, assignment for realising secured assets. Any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 has got the statutory right to Debts Recovery Tribunal ('DRT' for short) under Section 17. Therefore, if any aggrieved person has got any grievance against any "measure" taken by the borrower under Sub-section (4) of Section 13, remedy is to approach the DRT and not the Civil Court. The Civil Court in such circumstances has no jurisdiction to entertain any suit or proceeding in respect of those matters, which fall under sub-section (4) of Section 13 of the Securitisation Act. Taking note of this settled law, trial Court declined to restrain Secured Creditors, from enforcing, security interest in the suit property. That order is challenged herein under Order 43 Rule 1(r) read with 104 of the Civil Procedure Code, 1908 passed by the learned Judge, City Civil Court at Greater Bombay.

2 Briefly stated, undisputed facts of the case are as under;

Plaintiffs are borrowers within the meaning of Section 2(f) of the SARFAESI Act ('Act' for short). They created a 'security interest' in the suit property, in favour of State Bank of India ('Bank' for short), by executing security agreement. Whereupon, bank had sanctioned and disbursed loan to them. Plaintiffs' account was, categorised, under stressed asset and transferred to asset recovery branch at Thane. Thereafter, on 15th May, 2019, notice under Section 13(2) under SARFAESI Act was issued, by which plaintiffs were called upon to pay Rs.1,69,00,299/-. Despite, several reminders, plaintiffs failed and neglected to pay the dues to the bank. Thus, to enforce security interest, the bank (Secured Creditor) after complying with the mandatory provisions and rules of the SARFAESI, E-auctioned the suit property, on 25th October, 2021. Before auctioning, bank had published sale notices, in five newspapers, in various places. That apart, notice was also uploaded on NSTCE web-site. E-Auction was conducted through Government agency. As such, bank was not aware, about bidders, who had participated in auction before confirmation of sale. Respondent nos. 1 and 2--"Defendant Nos.1 and

2”, were successful bidders. Whereafter on 27th October, 2021, sale certificate was issued in favour of defendant nos.1 and 2, in terms of Rule 9(6) of the Security Interest (Enforcement) Rules, 2002.

As against, these undisputed facts, Plaintiffs’ case is:

3 Plaintiffs instituted suit on 12th October, 2021 in the City Civil Court at Greater Bombay. They pleaded, the defendant nos.1 and 2 approached them and offered to purchase the suit property, although, they were informed about outstanding loan on the said property and ongoing One Time Settlement talks (OTS) with the Bank. Whereafter, on 11th February, 2021, Memorandum of Understanding (‘MOU’ for short) was executed between plaintiffs and defendant nos.1 and 2. In terms of the MOU, defendant nos.1 and 2 agreed to purchase suit property for Rs.2,72,00,000/- (Rupees Two Crores and Seventy-two Lacs Only). Out of which Rs.13 Lakhs were paid by defendant nos.1 and 2 to the plaintiffs to initiate settlement process with the bank. It was agreed that the settlement amount payable by the plaintiffs to the bank for settlement of their dues was to be paid by the defendant nos.1 and 2 and finally, the balance

amount out of 2,72,00,000/- minus monies already paid (to bank and the plaintiff) would be paid to the plaintiffs. Under the MOU, it was plaintiffs' obligation to reach the settlement, with bank and once, the settlement was reached, defendant nos.1 and 2 were required to pay settlement amount to the State Bank of India on behalf of the plaintiffs and all the obligations were to be met with by the respective parties on or before 11th April, 2021. Pursuant to the MOU, the plaintiffs made five to six, OTS proposals to the bank and last one was on 30th July, 2021. Plaintiffs pleaded, that, in response to proposals, once bank had offered to, settle the dues, for Rs.1,31,00,000/- (Rupees One Crore and Thirty-one Lacs Only). Plaintiffs would plead that on 30th July, 2021, they offered to pay 1,22,00,000/- (Rupees One Crore and Twenty-two Lacs Only) to the bank on the suggestion of officer of defendant-Bank. However, it was not responded. Plaintiffs pleaded, that, defendant nos.1 and 2 began to establish contacts with officers of the bank, to discuss the settlement of loan, although they were instructed not to contact the bank since same would jeopardise the settlement talks. Plaintiffs would thus, allege, in spite of the same, defendant nos.1 and 2

began to speak directly with the officers of bank to the exclusion of the plaintiffs and due to that, chances of said loan being settled was getting bleak. It is Plaintiffs' case, that on 13th September, 2021, his last OTS proposal was rejected and five days later, the bank issued, sale notice dated 18th September, 2021. Thereafter, on 24th September, 2021, the plaintiff no.1 received termination notice dated 20th September, 2021 from Advocate of the defendant nos.1 and 2 inter-alia terminating MOU. Thus, according to the plaintiffs, defendant nos.1 and 2 in collusion with officers of the bank, bypassed the plaintiffs, firstly, by establishing contacts with the Bank Officers; thereafter terminated the MOU; Whereafter they managed to auction the suit property for Rs.1,90,50,000/- (Rupees One Crore Ninety Lacs and Fifty Thousand Only), which was much lower than the price for which they had agreed to purchase the Suit Property and further purchased the same in auction held by the Bank. Plaintiffs would, therefore, plead that defendant nos.1 and 2 in collusion with officers of the Bank managed to purchase the suit property at undervalued rate, which was just Rs.20 Lakhs above the cost of which purchased by the plaintiffs in November, 2010.

Therefore, it is plaintiff's case that conspiracy between the defendants was writ large in-as-much as they by their act by commission or omission, extinguished plaintiffs' right over the suit property by wrongfully bye-passing the plaintiffs and thereby caused unlawful losses to them and unjust and unlawful gains to the defendant nos.1 and 2. On these set of allegations, plaintiffs instituted a suit on 12th October, 2021 seeking following reliefs;

(i) Injunct defendant nos. 1 and 2 from purchasing/acquiring any right, title or interest in the suit property without consent of the plaintiffs for a monetary consideration lesser than sum agreed to be paid by defendant nos. 1 and 2 under the MOU dated 11th Feb. 21;

(ii) Decree of perpetual injunction restraining defendant nos.3 of 4 (Bank) from transferring, alienating or otherwise dealing with the suit property for the benefit of defendant nos.1 and 2;

(iii) In the alternative, bank, its officers be restrained from dealing with the suit property by taking measures under the SARFAESI Act;

. Pending suit, plaintiffs sought following reliefs; i.e.

(a) temporary injunction, restrain the defendant nos. 1 and 2 from participating in the auction published by the defendant nos. 3 or 4 in respect of the suit property without consent of the plaintiffs for monetary consideration lesser than the sum agreed to be paid by defendant nos. 1 and 2 under the contract contained in the MOU dated 11th February, 2021;

(b) mandatory order direct defendant nos.1 and 2 to deposit 1,06,89,229/- or Rs.1,40,03,091/- to the credit of the loan account of the plaintiffs;

(c) In the alternative, by temporary order of injunction, restrain the bank or its officers from conducting auctions or taking any measures under Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 in respect of the suit property.

3A. Question, that arises for consideration, is whether, evidence on record, prima-facie, establishes ‘the fraud’ practiced by the defendant nos.1 and 2 and Bank on plaintiffs to extinguish their title over the Suit Property.

-My answer is **‘No’** for the following reasons.

- 4 It may be noted that;
- 1 Notice under Section 13(2) of the SARFAESI Act was issued on 15th May, 2019.
 - 2 MOU, was executed on 11th February, 2021.
 - 3 Plaintiffs were to reach the settlement with Bank before 11th April, 2021.
 - 4 Time line was extended by defendant nos.1 and 2 from time to time; yet, plaintiffs postponed and/or avoided to settle Bank’s dues.
 - 5 On 20th September, 2021 defendants terminated MOU vide advocate’s notice.
 - 6 On 20th September, 2021 Bank issued sale notice.
 - 7 On 12th October, 2021 suit was filed.
 - 8 On 25th October, 2021, Suit Property was auctioned by the bank.
 - 9 It was purchased by defendant nos.1 and 2 in

e-auction for Rs.1,90,50,000/- (Rupees One Crore Ninety Lakhs and Fifty Thousand Only).

10 Sale certificate was issued on 27th October, 2021 under Rule 9(6) of the Security Interest (Enforcement) Rules, 2002.

. It may also be noted that although, the application for temporary reliefs, was moved along with the suit may be on 12th October, 2021, however, by the time, application was heard, the suit property was auctioned and purchased by the defendant nos.1 and 2. As a consequence, taking note of these events and facts of the case, learned trial Court declined the interim reliefs and rejected Notice of Motion No.2484 of 1981.

5 The material on record, clearly demonstrates that after notice under Section 13(2) of the SARFAESI Act, MOU was executed between plaintiffs and defendant nos. 1 and 2, on 11th February, 2021. The entire case of the plaintiffs rests on 'MOU', which, on the face of it, was not enforceable. In the sense, the execution of the

MOU itself was in defiance of provisions of Section 13(13) of the SARFAESI Act. Section 13 contains a statutory prohibition, to say, that no borrower shall after receipt of notice under Sub-section (2) shall transfer by way of sale, lease or otherwise any of his secured assets without prior written consent of secured creditors. Therefore, at the first place, the plaintiffs couldn't have executed the MOU, with the defendant nos.1 and 2 in respect of secured asset. Moreover, the evidence on record clearly implies that the plaintiffs had not disclosed to the bank about the said MOU nor the evidence suggests that the plaintiffs had informed defendant nos.1 and 2, about the notice received by them, issued, under Section 13(2) of the SARFAESI Act in respect of the suit property. It is evident from, one of the e-mails, sent by defendant nos.1 and 2 to the plaintiffs. Primary evaluation of mails, show, that the defendant nos.1 and 2 came to know about the, measures taken by the bank under Section 13 of the SARFAESI Act for enforcement of security interest in the suit property, on 30th August, 2021. Thus, upon realising that the suit property was subjected to, measures under Section 13 of the SARFAESI Act on 20th September, 2021, defendant nos.1 and 2

terminated the MOU. Yet, there were other reasons, for terminating MOU, which are discernible from mails dated 30th August, 2021; 28th July, 2021; 24th July, 2021. In fact, evidence, shows, Bank had offered to settle the dues for Rs.1.33 Crores (Rupees One Crore Thirty-Three Lacs Only) but plaintiffs avoided the same. Therefore, overview of the facts, leads me to hold that, termination of MOU by the defendant nos.1 and 2 was not dishonest commission or omission of act, as alleged by the plaintiffs. Likewise, since, plaintiffs also neglected the Bank's offer of settlement, one cannot allege that the bank adopted the measures to enforce the security interest, in secret understanding with defendant nos.1 and 2 with an intention, to extinguish plaintiffs' title over the Suit Property. In fact, the bank was not aware of the MOU executed between the plaintiffs and defendant no.1. As a consequence, for want of knowledge of the MOU, it is inconceivable, and improbable, to accept the plaintiffs' case that the defendant nos.1 and 2 colluded with the bank officers and managed to purchase the suit property at undervalued price. Although in the plaint, plaintiffs alleged secret understanding between the officers of the bank and the defendant nos.1 and 2, the

allegations require no consideration for two simple reasons; first, is that, bank was not aware of the MOU and second, the officers against whom allegations of collusion, have been made, are not parties to the suit. Additionally, the allegations of the 'fraud' are vague and no better particulars have been pleaded. In that view of the matter, the plaintiffs have not made out prima-facie case that defendant no.1, in secret understanding with the bank officers by-passed plaintiff's interest and purchased the suit property with an intention to extinguish their title over suit property.

6 Assuming, the defendant nos.1 and 2 purchased the suit property in the public auction conducted by bank in defiance of terms of MOU, at the highest, plaintiffs' remedy was/is, to claim damages and pecuniary loss caused, if any, only against the defendant nos.1 and 2. Obviously, in view of the facts of the case and for the reasons stated, plaintiffs had no cause of action against the Secured Creditors, i.e., State Bank of India. Therefore, 'measures' taken by the Bank for enforcing Security Interest, were immune from challenge in the Civil Suit. In fact, material on record shows, that

the defendant nos.1 and 2 have invoked the alternative dispute resolution mechanism and called upon the plaintiffs to accept the nomination of either persons to act as sole arbitrator. As such, if at all plaintiffs had suffered any losses for the alleged breach of MOU by the defendant nos.1 and 2, they may claim the appropriate relief before the arbitrator. In the circumstances, the fact remains, the security measures adopted by the bank under Section 13 of the SARFAESI Act cannot be faulted with nor it was open to plaintiffs to challenge in Civil Suit. The reason being, there is no material at all, on record even to, remotely suggest that the bank and its officers in secret understanding with the defendant no.1, sold the property at the undervalued price to overreach title of plaintiffs in the Suit Property. In fact, affidavit-in-reply of the State Bank of India signify, that the measures to enforce the security interest were taken by complying with the provisions of the Act. Aside from that, here the plaintiffs have availed the remedy under Section 17 of the SARFAESI Act in Appeal (L) No.22 of 2020 before the DRT Mumbai, which is

pending for consideration. For all that reasons, impugned order requires no interference. It is dismissed.

(SANDEEP K. SHINDE, J.)

7 In consideration of the facts, it is not a fit case to continue the interim relief. The request is rejected.

(SANDEEP K. SHINDE, J.)