Nikita

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.686 OF 2023
WITH
INTERIM APPLICATION NO.17721 OF 2023

Automotive Services, through partner
Vilas Prabhakar Gavankar … Appellant

V/s.

The COSMOS Cooperative Bank Limited
Thr. Chief General Manager … Respondents

Mr. Chetan G. Patil, for the Appellant-Applicant.

CORAM : AMIT BORKAR, J.

DATED : DECEMBER 19, 2023

P.C.:

1. By the impugned orders, the Courts below have rejected appellant's plaint in exercise of power under Order 7 Rule 11 of the Code of Civil Procedure, 1908.

2. The appellant is original plaintiff who filed Special Civil Suit No.556 of 2022 seeking relief of declaration that mortgage deed executed by defendant Nos. 2 and 3 in favour of defendant No.1 (Secured Creditor) is not binding on the plaintiff and consequential injunction restraining the defendants from disturbing plaintiff's possession over the suit property and further injunction restraining defendants from selling or dealing with suit property or from creating third party interest in the suit property. Further injunction restraining defendants from obstructing plaintiffs while carrying out business in the suit property and relief of damages is also sought.

3. The right sought to be enforced in the suit is right of independent ownership based on suit property being asset of plaintiff- partnership firm. According to the plaintiff, original owner Ramchandra Harihar Pandit was partner of plaintiff - firm and converted suit property into asset of partnership firm. According to plaintiff despite suit property being property of plaintiff partnership firm, defendant No.3 which is company availed huge loan from secured creditor and illegally mortgaged the suit property by mortgage deed dated 18th September 2015. According to plaintiff, neither Ramchandra Pandit nor proprietary firm was the owner of the suit property and plaintiff partnership firm is the exclusive owner of the suit property. According to the plaintiff, pleadings of fraud is made in paragraph 21of the plaint alleging that defendant No.1 (secured creditor) in spite of knowledge that defendant No.2 and 3 were not concerned with the title of suit property, in collusion accepted mortgage of the suit property resulting in fraud.

4. During pendency of the said suit, defendant No.1 (Secured Creditor) filed an application under Order 7 Rule 11 of the Code of Civil Procedure, 1908. According to secured Creditor, they took possession of the suit property by possession notice dated 12th January 2018, under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) and affixed possession notice on the suit property and published such notice in two newspapers. Moreover, possession notice was served on defendant

No.3 and its directors. It is also averred that such possession notice was also served on the partner of erstwhile partnership firm and the plaintiff firm was aware of the fact that possession was taken by the Secured Creditor under the provisions of the SARFAESI Act, 2002.

5. The Trial Court by order dated 16 January 2023 allowed the application on the ground of limitation and bar contained under Section 34 of the SARFAESI Act, 2002. The Trial Court recorded a finding that the plaintiff had failed to make out a case of fraud and, therefore, relying on the judgment in the case of **Jagdish Singh Vs. Heeralal and Ors.** reported in (2014) 1 SCC 479 dismissed the suit. The Appellate Court confirmed the Trial Court's order placing reliance on Section 34 of the SARFAESI Act, 2002.

6. It is submitted on behalf of the appellant that the plaintiff is claiming independent right. The reliefs claimed in the suit are beyond powers of Tribunal under Section 17 and, therefore, the plaintiffs case is clearly covered by Division Bench judgment of this Court in the case of **Bank of Baroda, Through its Branch Manager Vs. Gopal Shriram Panda and Anr.** reported in (2021) SCC Online Bom 466.

7. For the purpose of adjudication of issue involved, it is necessary to set out relevant provisions of statute which are Section 34, Section 17(1), Section 13(4) of SARFAESI Act, 2002 as under:

> "34. Civil court not to have jurisdiction.—No civil court shall have 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 (51 of 1993).

17. Application against measures to recover secured debts

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section *(4)* of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may 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 measure had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]
Explanation.--For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]
[(1A) An application under sub-section *(1)* shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction--
(a) the cause of action, wholly or in part, arises;
(b) where the secured asset is located; or
(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

Section 13 (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section *(2)*, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

> (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
> [(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:
> Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured deb"

8. The scheme of SARFAESI Act, 2002 in the context of maintainability of civil suit came up for consideration before the Apex Court in the case of **Jagdish Singh** (supra). The Apex Court considered the scheme of SARFAESI Act, 2002 *vis-a-vis* maintainability of civil suit held that the expression "any person" used in Section 17 of the SARFAESI Act, 2002 is of wide import and context, within it includes not only the borrower but also guarantor or any other person who may be affected by the action under Section 13(4) of the SARFAESI Act, 2002. The expression "any person" referred to in Section 17 would include the plaintiff in the said suit who was claiming his right as co-sharer of the property and relief of partition was sought. The Apex Court while considering Section 34 of the SARFAESI Act, 2002 held that opening portion of the Section 34 clearly states that no Civil Court has jurisdiction to entertain any suit or proceedings "in respect of any matter" which Debt Recovery Tribunal or Appellate Tribunal is import by or under the SARFAESI Act, 2002 to determine.

9. As indicated by the Secured Creditor in his application stated that it had already taken possession of the suit property (secured assets) in the year 2018. Notice of such action was issued to the plaintiff and its directors including partner of plaintiff firm. Moreover, such notice was published in two newspapers and affixed on the suit property. Suppressing these measures, the plaintiff filed present suit. The prayers sought in the plaint are of wide import. On meaningful reading of the plaint, it leads to only one conclusion that the plaintiff intends to restrain Secured Creditor from proceeding further with actions under Section 13 of the SARFAESI Act, 2002 by circuitous method. The prayers not only seek to restrain the Secured Creditor from disturbing possession of plaintiff over the suit property, but also seek to restrain secured creditor from "dealing with" of suit property. The expression dealing with has wide import . On meaningful reading of the plaint, it appears that without making specific prayer, challenging measures adopted by Secured Creditor, the plaintiff by clever drafting is seeking to restrain Secured Creditor from exercising their statutory rights conferred by the provisions of the SARFAESI Act, 2002.

10. Further a litigant like plaintiff seeks to ventilate his rights, he must approach the Court disclosing all material facts which are necessary for the purpose of effectual adjudication of reliefs. Suppression of fact that Secured Creditor in 2018 had taken possession of the suit property cannot place plaintiff in a better position. Such suppression would not entitle the plaintiff to claim alleged independent rights.

11. In so far as the independent rights claimed by the plaintiff are concerned, it is not in dispute that initially Mr. Ramchandra Harihar Pandit, a proprietary firm had purchased the suit property. The partnership firm was started in the year 1991 with Ramchandra having 80% of share in profit and loss; remaining 20% share was to be shared by Abhijit Deshpande and Hemant Karve. According to plaintiff, its partnership firm was reconstituted in the year 2008. According to plaintiff, even Abhijit Deshpande, Vijay Gokhale retired from the plaintiff firm, therefore, the plaintiffs, Hemant Karve and Vilas Gavankar are partners to the extent of 50%.

12. Reading of the plaint makes it evident that the purpose of filing such suit is to restrain Secured Creditor from taking further measures as per Section 13 of the SARFAESI Act, 2002. The defendant may be claiming independent right, however whether plaintiff has independent right or not needs to be adjudicated by a forum created under the statute. Such forum is Tribunal constituted under the provisions of the SARFAESI Act, 2002 having powers under Section 17 of the said Act.

13. The Supreme Court in **Dalip Singh v. State of Uttar Pradesh**, reported in (2010) 2 SCC 114 has this to say for methods adopted at the hands of litigants under similar circumstances. Paragraph nos. 1 and 2 as produced below:

> "*1. For many centuries, Indian society cherished two basic values of life i.e., 'Satya' (truth) and 'Ahimsa' (non-violence). Mahavir, Gautam Buddha and Mahatma Gandhi guided the*

people to ingrain these values in their daily life. Truth constituted an integral part of justice delivery system which was in vogue in pre-independence era and the people used to feel proud to tell truth in the courts irrespective of the consequences. However, post-independence period has seen drastic changes in our value system. The materialism has over-shadowed the old ethos and the quest for personal gain has become so intense that those involved in litigation do not hesitate to take shelter of falsehood, misrepresentation and suppression of facts in the court proceedings.

2. In the last 40 years, a new creed of litigants has cropped up. Those who belong to this creed do not have any respect for truth. They shamelessly resort to falsehood and unethical means for achieving their goals. In order to meet the challenge posed by this new creed of litigants, the courts have, from time to time, evolved new rules and it is now well established that a litigant, who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands, is not entitled to any relief, interim or final."

14. In view of series of judgments of Apex Court, it is now well settled that any person aggrieved by the measures taken by the Secured Creditor has only one remedy that is to approach Tribunal under Section 17 of the said Act. In the present case the plaintiff has created the illusory cause of action as if he is unaware of the actions taken by the Secured Creditor and by adopting clever drafting seeks to enforce alleged independent right. Such attempt on the part of person who has failed to approach the Court with unclean hands need to be discouraged.

15. The scope of Section 34 came up for consideration before this Court in ***Mardia Chemicals Ltd. [Mardia Chemicals Ltd. v. Union of India*,** reported in (2004) 4 SCC 311 and Apex Court held as follows: (SCC p. 349, para 50)

> "*50.* It has also been submitted that an appeal is entertainable before the Debts 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 Debts 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 the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that 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 Debts Recovery Tribunal or an 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 Debts 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 Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13."

16. In the facts of the case reliefs claimed in the suit are also in relation to the measures to be taken by secured creditor under the provisions of securitisation act. The pleading made in paragraph 21 of the plaint alleging that defendant No.1 (secured creditor) in spite of knowledge that defendant No.2 and 3 were not concerned with the title of suit property, in collusion accepted mortgage of the suit property is not sufficient to raise plea of fraud. Therefore courts below have rightly held that suit is barred by section 34 of the said Act.

17. Reliance is placed on the Division Bench's judgment of this Court in the case of Bank of Baroda (supra). The Division Bench summing up the position of law in paragraph 27 passing the questions framed by it as under:

> "27. In view of what we have discussed above, our considered opinion to the question as referred to is as under:-
>
> Question:
>
> "Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitization Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitization Act?
>
> Answer:
>
> The answer, looking to the nature of the question, in our view,is in parts:—
>
> (A) Jurisdiction of the Debts Recovery Tribunal to decide all matters relating to Sections 13 and 17 of the SARFAESI Act, is exclusive.
>
> (B) In all cases, where the title to the property, in respect of which a 'security interest', has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters, to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the Debts Recovery Tribunal.
>
> (C) The jurisdiction of the Civil Court to decide all the

matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Sections 13 and 17 of the SARFAESI Act, in relation to enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.

(D) Where civil rights of persons other than the borrower(s) or guarantor (s) are involved, the Civil Court would have jurisdiction, that too, when it is prima facie apparent from the face of record that the relief claimed, is incapable of being decided by the DRT, under Section 17 of the DRT Act, 1993 read with Sections 13 and 17 of the SARFAESI Act.

(E) Even in cases where the enforcement of a security interest involves issues as indicated in Mardia Chemicals (supra) of fraud as established within the parameters laid down in A. Ayyasamy (supra); a claim of discharge by a guarantor under Sections 133 and 135 of the Contract Act [Mardia Chemicals (supra)]; a claim of discharge by a guarantor under Sections 139, 142 and 143 of the Contract Act; Marshaling under Section 56 of the Transfer of property Act [J.P. Builders (supra)]; the Civil Court shall have jurisdiction.

(F) Examples as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.

(G) The principles laid down in para 33 (i) to (ix) of Sagar Pramod Deshmukh (supra) are in accordance with what we have discussed and held above."

18. Reading of answer B makes it clear that the Division Bench held that in all cases, where the title to the property in respect of security interest has been created in favour of the Bank and it stands in the name of borrower and/or guarantor and the borrower has sought financial assistance, it would be only Debts Recovery Tribunal which would have exclusive jurisdiction to try such matter to the exclusion of the Civil Court. On behalf of appellant, clause (d) of the said judgment is emphasized to submit that the plaintiff is enforcing civil rights and plaintiff is a person other than borrower or guarantor, therefore Civil Court would have jurisdiction. When it is prima facie apparent on the face of record, plaintiff is aggrieved person by the measures taken by the secured creditor in my considered opinion the essential relief sought by the plaintiff is to thwart measures to be adopted by Secured Creditor in furtherance of taking over possession of suit property. The Tribunal under Section 17 is empowered to grant reliefs in favour of aggrieved person under Clause 3 of Section 17. If such person proves to the satisfaction of the Tribunal that the action taken by the Secured Creditor is not in accordance with law The Tribunal has power to restore management and/or possession of secured assets to the aggrieved person and has also power to declare that the measures adopted by Secured Creditor to be invalid. Under sub-section (c) of Section 3, the Tribunal has power to pass such directions as the Tribunal considers it appropriate.

19. Therefore, in my opinion, the rights claimed by the plaintiff can be adjudicated by the Tribunal under Section 17 of the Act. Therefore, the Division Bench judgment has no application in the facts of the case as the facts of the present case are squarely covered by the judgment in the case of **Jagdish Singh** (supra).

20. No substantial question of law arises of consideration.

21. The second appeal is, therefore, dismissed. No cost.

22. In view of dismissal of second appeal, the interim application stands disposed of as infructuous.

23. It is made clear that if the plaintiff approaches the Debts Recovery Tribunal, such appeal shall be decided on its own merits.

(AMIT BORKAR, J.)