

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO. 1005 OF 2022
WITH
INTERIM APPLICATION NO. 19277 OF 2022
(FOR STAY)**

The Gadhinglaj Urban Co-operative Bank ..Appellant
V/s.

Pooja Ravikumar Nidasoshi & Ors. ..Respondents

**ALONGWITH
APPEAL FROM ORDER NO. 1108 OF 2022
WITH
INTERIM APPLICATION NO. 20433 OF 2022
(FOR STAY)**

Yashoda Shreepatrao Magdum ..Appellant
V/s.

Pooja Ravikumar Nidasoshi & Ors. ..Respondents

Mr. Surel S. Shah, for the Appellant in AO-1005/2022 and IA.
Mr. S.S. Redekar, for the Appellant in AO-1108/2022 and IA.
Mr. Tejpal S. Ingale, for Respondents No.1 and 2 in both AOs.

CORAM : SANDEEP V. MARNE, J.

Resd. On : 28 August 2023.

Pron. On : 4 September 2023.

JUDGMENT:

1. By this appeal, the appellant challenges Order dated 11 August 2022 passed by the District Judge-I, Gadhinglaj setting aside the order passed by the Trial Court by which the Trial Court had rejected the plaint under the provisions of Order 7 Rule 11 of the Code of Civil Procedure (**Code**). The lower Appellate Court has restored the suit and has directed the Trial Court to frame issue about jurisdiction of Civil Court and decide the same.

2. For better understanding of the controversy involved in the present petition, it would be necessary to narrate few facts of the case. Appellant is a Bank, which had extended credit facilities to Respondents No. 3 to 5, who are Defendants No.1 to 3 in the suit. As a security to credit facilities advanced, Defendants No. 1 to 3 offered flats owned by Defendants No.1 and 2. This is how the suit properties came to be mortgaged in favour of the Appellant-Bank. Plaintiffs in the suit - Pooja and Vandana - are wives of Defendants No.2 and 3 respectively, who in turn are the partners of Defendant No.1-Firm. It appears that Plaintiffs consented to the flats being mortgaged with the Appellant Bank.

3. Defendants No.1 to 3-Borrowers did not repay the loan advanced by the Appellant-Bank, which led to initiation of proceedings by the Bank under the provisions of the Securitisation

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI Act**). Symbolic possession of secured assets was obtained by Appellant-Bank, which was in the process of auctioning the same. It appears that the Plaintiffs and the borrowers agreed to sell the suit properties in favour of Defendant No. 5-Purchaser and therefore Securitisation Application No.43/2018 was jointly filed by them along with the Purchaser for redemption of security assets by offering to pay the outstanding amount. They offered to deposit amount of Rs. Rs.70,19,675/-. Upon deposit of the said amount, the Debt Recovery Tribunal (**Tribunal**) passed interlocutory order dated 21 March 2018 directing the Appellant-Bank not to proceed with the auction sale of the suit property till finalisation of the Securitisation Application. The Appellant-Bank was granted opportunity to withdraw the amount of Rs.70,19,675/-. Accordingly, the Appellant withdrew the amount of Rs.70,19,675/- on 5 April 2018.

4. It is Plaintiff's case that despite they along with borrowers depositing almost the entire amount due, the Appellant-Bank continued with the auction proceedings and issued Sale Certificate dated 12 June 2018 in respect of the suit properties in favour of Defendant No. 5. It appears that the Securitisation Application No.43/2018 was thereafter withdrawn at the instance of the Purchaser.

5. Plaintiffs felt aggrieved by the action of the Appellant-Bank in selling the suit properties to Purchaser despite deposit of substantial amount by them before the Tribunal. They therefore instituted Regular Civil Suit No.132/2018 before the Civil Judge Senior Division, Gadhinglaj challenging the sale notice dated 24 February 2018 as well as the sales proceedings initiated by Appellant-Bank. All the steps taken in pursuance of the sales proceedings were also challenged in the suit. A relief for restoration of possession of the suit property was also sought in the suit. Plaintiffs also claimed damages and compensation for the loss suffered by them.

6. Appellant-Bank appeared in the suit after receipt of the suit summons and filed application dated 21 October 2018 under the provisions of Order 7 Rule 11(d) of the Code seeking rejection of plaint on the ground of the suit being barred under Section 34 of SARFAESI Act, as well as under Section 164 of the Maharashtra Co-operative Societies Act, 1960 (**Act of 1960**). Plaintiffs filed reply to the application. The Trial Court proceeded to pass order dated 2 December 2019 rejecting the Plaint under the provisions of Order 7 Rule 11(d) of the Code upholding both the grounds put forth by the Appellant.

7. Plaintiffs filed Regular Civil Appeal No.47/2019 under Section 96 of the Code before the District Court, Gadhinglaj

challenging the order dated 2 December 2019. The lower Appellate Court has allowed the Appeal by its judgment and order dated 11 August 2022 and has set aside Trial Court's Order by restoring the Suit. Appellant Bank is aggrieved by decision of the District Court and has filed Appeal from Order No.1005/2022. Defendant No.5-Purchaser is also aggrieved by the judgment and order dated 11 August 2022 and has instituted her own Appeal from Order No.1108/2022. Both the Appeals are being heard together and decided by the present judgment.

8. Mr. Surel Shah would appear on behalf of the Appellant in Appeal from Order No. 1005/2022 and would contend that the Plaintiffs' suit is expressly barred under the provisions of Section 34 of the SARFAESI Act. He would submit that the relief with regard to the challenge to the auction sale can be sought under the provisions of sub-section 3 of Section 17 of the SARFAESI Act, under which the Tribunal is empowered to restore possession of secured assets to the Borrowers in the event it arrives at a conclusion that measures taken under Section 13(4) of the Act by the secured creditors are not in accordance with the provisions of the Act or the Rules made thereunder. He would further submit that the only exception where a Civil Court can entertain a suit related to cause of action referable to the provisions of the SARFAESI Act is where the Plaintiffs plead and demonstrate commission of fraud. In this connection, he would invite my

attention to the Division Bench judgment of this Court in **Bank of Baroda V/s. Gopal Shriram Panda and Another (2021)**, 4 AIR Bom.64. He would also rely upon the judgments of the Apex Court in **Kamala and Ors. V/s. K.T. Eshwara SA and Others (2008)** 12 SCC 661 and **Electrosteel Castings Limited V/s. UV Asset Reconstruction Company Ltd. and Ors. (2022)** 2 SCC 573.

9. Mr. Shah would also refer to the provisions of Section 164 of the Act of 1960 in support of his contention that the suit filed by the Plaintiffs undoubtedly touches upon the business of the Appellant-Bank, which is a Co-operative Society and that therefore in absence of issuance of notice under Section 164 of the Act of 1960, suit filed by the Plaintiffs was not maintainable. He would rely upon the judgments of this Court in **Devgiri Nagari Sahakari Bank Ltd. V/s. Zubidabegum w/o. Asadulla Khan and Ors. 2012 (6) Mh.L.J. 457** and **The West Nagpur Cooperative Housing Society Ltd Vs. Dr. Satyanarayn Ramjilal Mehadia & Ors. 2014 SCC Online Bom. 3377**.

10. He would submit that the Trial Court had correctly rejected the plaint under the provisions of Order 7 Rule 11(d) of the Code. He would take me through the findings recorded by the lower Appellate Court to demonstrate that it has travelled beyond the pleadings raised in the plaint for the purpose of holding that there is violation of Rules or SARFAESI Act. That the lower

Appellate Court failed to take into consideration complete absence of pleadings in the suit to demonstrate commission of fraud in conduct of auction sale. That since the Plaintiffs have efficacious remedy under the provisions of the SARFAESI Act, no prejudice would be caused to them on rejection of plaint under Order 7 Rule 11(d) of the Code. He would pray for setting aside the order passed by the lower Appellate Court.

11. Mr. Redekar, the learned Counsel appearing for the Appellants in Appeal from Order No.1108/2008 would adopt the submissions of Mr. Shah. In addition, he would submit there is no fraud in conduct of sale proceedings. That the amount of Rs.70,19,675/- is infact paid by Defendant No.5 in pursuance of an agreement between the Borrowers, Bank and purchasers whereunder the purchaser agreed to purchase the suit properties for a fixed consideration. That after deposit of amount of Rs.70,19,675/- by purchasers on behalf of Borrowers, the Borrowers set up their wives (Plaintiffs) to file civil suit to wriggle out of obligations arising out of agreement between the parties. That the Securitisation Application No.43/2018 has been closed after purchase of the secured assets by Defendant No.5.

12. *Per-contra*, Mr. Ingale the learned Counsel appearing for Respondents No.1 to 2 (Plaintiffs) would oppose the Appeals. He would submit that bar of Civil Court's jurisdiction is not

applicable to a case where action of the secured creditor is alleged to be fraudulent and also absurd and untenable to such an extent that it does not even require a probe. In support of his contention, he would place reliance on the judgment of the Apex Court in **Mardia Chemicals Ltd. And Ors. V/s. Union of India and Ors.** (2004) 4 SCC 311. He would take me through para-14 of the plaint to demonstrate as to how despite the deposit of almost the entire amount due under the credit facilities and despite withdrawal of the said amount by the Appellant-Bank, the property was illegally sold to Defendant No.5 by issuance of Sale Certificate dated 12 June 2018. That there was a settlement between the parties under which the Plaintiffs agreed to pay loan amount of Rs.73,00,000/- as full and final settlement, out of which amount of Rs.70,19,675/- was deposited by way of Demand Draft and that the outstanding amount was less than Rs.3,00,000/- That for such insignificant amount, the Appellant-Bank illegally sold the suit properties in favour of Defendant No.5. That Plaintiffs have filed an application for amendment of the plaint to give better particulars of the fraudulent action on the part of the Appellant-Bank which is pending. He would invite my attention to the order dated 21 March 2018 passed by the Tribunal and would submit that the Appellant-Bank withdrew the amount on 5 April 2018 and immediately effected sale on 12 June 2018. That the Sale Certificate erroneously records consent on the part of the Plaintiffs. He would submit that the sale is null and void and that the order of

the Appellate Court would only enable the Trial Court to go into the issue of validity of the sale proceedings conducted by the Appellant-Bank. That doors of the Civil Court cannot be shut on the Plaintiffs who genuinely wish to prove the illegalities and fraud committed by the Appellant-Bank in conduct of auction proceedings. He would further submit that pleadings in the plaint were sufficient to sustain the suit and that the Trial Court rejected the plaint by recording vague findings in just one paragraph of its order. So far as the provisions of Section 164 of the Act of 1960 is concerned, Mr. Ingale would submit that the Appellant-Bank has not initiated any proceedings under the provisions of the Act of 1960 and that therefore the said bar under Section 164 would not apply. That the entire action of the Appellant-Bank is under the provisions of the SARFAESI Act and that therefore there is no question of application of bar under Section 164 of the Act of 1960.

13. Rival contentions of the parties now fall for my consideration.

14. The issue that I am tasked upon to decide in these appeals is whether Plaintiffs' suit is barred by law so as to attract rejection of plaint under the provisions of Order 7 Rule 11(d) of the Code. Before I proceed further, a quick reference to the provisions of Order 7 Rule 11 may be useful:

“11. Rejection of plaint.

The plaint shall be rejected in the following cases-

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

15. Thus, if it appears to the Court from statements made in the plaint that the Suit is barred by any law, the Plaint can be rejected. Ordinarily an inference of jurisdiction of a civil court under Section 9 of the Code is required to be drawn. Bar of jurisdiction is not to be readily inferred. While examining the plea of bar of jurisdiction created under a statute, the Court is required to examine whether the rights and liabilities are created under that

statute and whether the remedy created by that statute is effective. In *Dhulabhai v. State of Madhya Pradesh*, AIR 1969 SC 78 a Constitution Bench of the Apex Court laid down the law on ouster of jurisdiction of civil courts. It held :

“(1) Where the statute gives a finality to the orders of the special Tribunals the civil courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

...

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

(emphasis added)

16. In the present case, ouster of jurisdiction of civil court is sought by referring to provisions of Section 34 of the SARFAESI Act, which reads thus :

“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. Thus, under provisions of Section 34 of the SARFAESI Act, jurisdiction of a Civil Court is barred in respect of any action taken in exercise of any power conferred under that Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (**RDDBFI Act**). It is now well settled that the remedies provided under the SARFAESI Act with respect to any action taken under that Act or RDDBFI Act are adequate and complete. In their Suit, Plaintiffs are aggrieved by the action of Appellant Bank in selling the suit properties. Under Sub-section (3) of Section 17 of the SARFAESI Act, there is a remedy of filing appeal if any person is aggrieved by any measures taken under Section 13(4). Section 17 reads thus:

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 alongwith 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 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]

[(1-A) 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]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or

restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

[(4-A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (1), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt

Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

18. Thus Plaintiffs in the present case can adopt the remedy of filing an appeal under section 17 of the SARFAESI Act and if they convince the Tribunal that the measures taken by the Bank under Section 13(4) are in violations of the provisions of the Act or the Rules, the Tribunal can set aside the same. This is the exact remedy sought for by Plaintiffs in their suit.

19. An exception to the principle of bar of jurisdiction under Section 34 of the SARFAESI Act has been carved out by a three Judge Bench of the Apex Court in *Mardia Chemicals Ltd.* (supra) in which it has held in paras-50 and 51 as under:

“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.

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 his 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 recognized 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. Narasimhachariars, AIR at pp. 141 and 144, a judgment of the 9 learned Single Judge where it is observed as follows in para 22:

"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 a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or a irregularity on the basis of which relief is sought: *Adams v. Scott*. 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 *Ghose, Rashbehary: Law of Mortgages*, Vol. II, 4th Edn., p. 784.)"

20. Mr. Ingale has placed heavy reliance on the judgment of the Apex Court in *Mardia Chemicals* (supra) as, according to him, the present case involves fraudulent actions taken by the Appellant-Bank and therefore the element of fraud can only be established

before a Civil Court. Whether any case of fraudulent transaction is indeed made out by Plaintiffs in the plaint is something which I shall examine little later. Before doing so, I must first complete the discussion on scope of bar under Section 34 of the SARFAESI Act.

21. A reference was made to the Division Bench judgment of this Court in ***Bank of Baroda*** (supra) as to whether jurisdiction of a Civil Court to decide all matters of civil nature in relation to enforcement of security interest of a secured creditor is barred by Section 34 of the SARFAESI Act. After discussing the entire case law on the subject, the Division Bench answered the question in para-27 of its judgment as under :

“27. In view of what we have discussed above, our considered opinion 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 Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation 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 DRT.

(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.

22. Thus, it is now a well settled principle that if a fraud is established, jurisdiction of Civil Court is not barred. Also where civil rights of persons other than borrowers or guarantors are involved, the Civil Court will have jurisdiction especially, when the Court comes to the conclusion that the relief claim is incapable of being decided by the Tribunal under Section 70 of the RDDBFI Act.

23. After having considered the scope of bar under Section 34 of the SARFAESI Act, it would now be necessary to examine whether Plaintiffs made out any case which would fall within the exceptions as discussed above. The plaint has been placed on record at Exhibit-A to Interim Application No. 19277/2022. In the plaint, case of the Plaintiffs essentially is that the dispute between the borrowers, plaintiffs and the bank was settled, under which the borrowers were supposed to pay amount of Rs.73,00,000/- towards full and final settlement. That out of the said amount of Rs.73,00,000/-, amount of Rs.70,19,675/- was deposited by the Plaintiffs by way of Demand Draft and the remaining amount was to be paid within three months. However, before Plaintiffs could pay the remaining amount, the Appellant-Bank proceeded ahead with auction for recovery of insignificant amount of less than

Rs.3,00,000/- and issued Sale Certificate dated 12 June 2018 in favour of the purchaser-Defendant No.5. These pleadings are raised in para-14 of the judgment which read thus :

“14. The present Plaintiffs filed S.A. petition before Tribunal, Pune. In that petition, with the help of Director of the Defendant Bank, matter was settled. In that settlement, the present Plaintiffs agreed to pay loan amount of Rs. 73,00,000/- and as per the compromise, the present Plaintiffs have deposited Rs. 70,19,675/- by way of Demand Drafts. And that Demand Drafts was accepted by the Defendant Bank. After receiving Demand Draft, the Defendant Bank issued receipt in favour of the Plaintiffs as per direction of Tribunal and the Defendant Bank agreed with the Plaintiffs that the Plaintiffs can pay remaining loan amount to Defendant Bank with span of three months. But unfortunately, the present Defendant Bank hardly proceed for the auction in suit property and they completed the auction procedure and issued Sale Certificate dated 12/06/2018/ And as per the Sale Certificate, the Defendant Bank executed Sale Deed with respect to suit property in favour of the Defendant No. 5. As per the alleged Sale Deed, the Defendant No. 5 trying to take possession from the Defendant Bank. Not only that they are trying to sale the suit property to anybody else, and for that purpose, they issued Public Notice in Daily Newspaper like Dainik Pudhari, Dainik Tarun Bharat etc. The all acts of Defendant Nos. 4 and 5 are totally null and void. And hence, the present Plaintiffs filed this suit for declaration and perpetual injunction to avoid the further multiplicity of proceeding.”

24. Thus, in para-14 of pleadings, there is no allegation that there is any fraud played by the Appellant-Bank. Infact, the word ‘fraud’ is not even used in para-14 of the plaint. The word ‘fraud’ is however to be found at few places in para-13 of the plaint, but the same appears in relation to an altogether different context of the

manner in which the credit facilities were extended by the Bank. It is alleged that the mortgage deed was executed by fraud since the cash credit of Rs.40,00,000/- had no nexus with the earlier mortgage for Rs.30,00,000/-. It would be appropriate to reproduce the relevant pleadings in para-13 of the plaint.

“13. Therefore it is clear that the alleged Cash Credit of Rs.40 Lakhs has no nexus with the earlier mortgage for Rs.30 Lakhs whatsoever. This is another fraud played by the Defendant No.4 Bank upon the DM and everybody and as already stated, any order obtained by fraud and material suppression amounts to nullity. The alleged mortgage dated 30.08.2011 could not have been used to recover the alleged dues of Rs.40 Lakhs which are admittedly not secured by the same as the fresh mortgage of Rs.40 Lakhs was very much essential to be executed and registered on 31.03.2015 or there about to comply the alleged sanction dated 31.03.2015 for cash credit of Rs.40 Lakhs. The alleged demand promissory note dated 31.03.2011 is not place on record. In fact demand promissory note for a sum of Rs.40 Lakhs dated 31.03.2015 is placed on record and it is pleaded falsely that there a demand promissory note and same is also affirmed by the Defendant No.4 Bank. Thus the Defendant No.4 Bank has by submitting false pleadings and by filing false evidence has ventured to obtain fraudulently the impugned order under Section 14 which is null and void ab-initio. Further, the Defendant No.4 Bank has pleaded about the alleged demand notice however no proof thereof about the service is placed on the record therefore bare statement of the Defendant No.4 Bank could not have been taken cognizance of it. It is clear that alleged demand notice dated 13.05.2016 could not been issued as the date of NPA claimed under the said notice is 29.06.2015 and even presuming without admitting for declaring any account to be NPA at least 3 months were necessary and no where the said notice is within the legal parameters and the said notice is pre-mature. So also there is patent defect as in the alleged notice there is much more claim of book balance and interest

beyond the 15% interest which is absolutely fraud upon the everybody including DM. The Defendant No.4 Bank has further placed on record a office copy of the notice of intimation of possession dated 01.12.2016 which refers to 13(2) notice.”

25. Though the word ‘fraud’ appears at some places at para-13 of the plaint, the same is in relation to the manner in which the loan was advanced to the borrowers. However the Suit of Plaintiffs is premised not on the manner of disbursement of credit facilities to the borrowers, it is filed on the cause of action of the Bank selling the suit properties despite deposit of almost the entire outstanding amount. The transactions and dealings of the contesting parties had travelled much beyond the stage of disbursement of credit facilities and the main grouse of Plaintiffs was sale of their properties despite settlement arrived at. It appears that the Bank and borrowers decided to settle the account at Rs. 73,00,000 and a purchaser-Defendant No. 5 was arranged to purchase the suit properties for satisfying the settled amount. In pursuance of the settlement so arrived at, Securitisation Application No. 43/2018 was filed jointly by borrowers, Plaintiffs and purchaser for seeking redemption of secured assets. Plaintiffs were Applicants No.4 and 5 to Securitisation Application No.43/2018. Even Defendant No.5-purchaser was impleaded to the Securitisation Application as Applicant No.6. It does appear that the Securitisation Application was filed with the aim of ensuring transfer of the suit properties in

favour of the purchaser after satisfying the outstanding loan balance of the Appellant-Bank.

26. In the light of the above background, use of the word 'fraud' in para-13 of the plaint is required to be appreciated in the light of the frame of suit by Plaintiffs. The main grievance of Plaintiffs is to be found in para-14 of the plaint as indicated above which does not raise any allegation of fraud. The allegations of fraud are with respect to the sanction of the loan in favour of borrowers and the said allegation are relating to the period prior to the year 2016. Those allegations have nothing to do with the current grievance of the Plaintiffs with Appellant-Bank in selling the suit properties in favour of the Purchaser despite repayment of substantial portion of loan by them.

27. The Apex Court in *Electrosteel Castings Limited* (supra) has considered the effect of mere use of the word 'fraud' or 'fraudulent' in absence of particulars. In paras-7-7.2 and 11, the Apex Court has held as under :

“7. We have heard the learned senior counsel appearing on behalf of the respective parties at length.

7.1 It is the case on behalf of the plaintiff – appellant herein that in the plaint there are allegations of the 'fraud' with respect to the assignment agreement dated 30.06.2018 and it is the case on behalf of the plaintiff – appellant herein that assignment

agreement is 'fraudulent' in as much as after the full payment as per the approved resolution plan under the IBC and the original corporate debtor is discharged, there shall not be any debt by the plaintiff – appellant herein as a guarantor and therefore Assignment deed is fraudulent. Therefore, it is the case on behalf of the plaintiff – appellant herein that the suit in which there are allegations of 'fraud' with respect to the assignment deed shall be maintainable and the bar under Section 34 of SARFAESI Act shall not be applicable.

7.2 However, it is required to be noted that except the words used 'fraud'/'fraudulent' there are no specific particulars pleaded with respect to the 'fraud'. It appears that by a clever drafting and using the words 'fraud'/'fraudulent' without any specific particulars with respect to the 'fraud', the plaintiff – appellant herein intends to get out of the bar under Section 34 of the SARFAESI Act and wants the suit to be maintainable. As per the settled proposition of law mere mentioning and using the word 'fraud'/'fraudulent' is not sufficient to satisfy the test of 'fraud'. As per the settled proposition of law such a pleading/using the word 'fraud'/'fraudulent' without any material particulars would not tantamount to pleading of 'fraud'.

11. It is required to be noted that as such in the present case the assignee has already initiated the proceedings under Section 13 which can be challenged by the plaintiff-appellant herein by way of application under Section 17 of the SARFAESI Act before the DRT on whatever the legally available defences which may be available to it. We are of the firm opinion that the suit filed by the plaintiff-appellant herein was absolutely not maintainable in view of the bar contained under Section 34 of the SARFAESI Act. Therefore, as such the courts below have not committed any error in rejecting the plaint/dismissing the suit in view of the bar under Section 34 of the SARFAESI Act.”

28. Thus it is now well settled law that by mere clever drafting of the suit using the words 'fraud' or 'fraudulent' without any specific particulars with regard to such an allegation, Plaintiff cannot get out of bar under Section 34 of the SARFAESI Act. In the present case, I do not find even such clever drafting on the part of the Plaintiffs in that the allegation of fraud is absent in para-14 of the plaint. As is observed earlier, use of the word 'fraud' at few places in para-13 is irrelevant as the said allegation is in respect of sanction of loan transaction. Therefore, use of the word 'fraud' at few places in para-13 of the plaint would not be sufficient to take the suit out of bar created under Section 34 of the SARFAESI Act.

29. Plaintiffs are shown as consenting parties to the mortgage deeds and thus are not strangers to the transaction of loan. Prayers in the Plaint would indicate that Plaintiffs are aggrieved by measures taken by the Appellant Bank under Section 13(4) of the SARFAESI Act. Plaintiffs filed Securitisation Application jointly with Borrowers and Purchaser before the Tribunal challenging the measures taken by the Bank under Section 13(4). This would indicate that the disputes sought to be raised by Plaintiffs are capable of being adjudicated by the Tribunal.

30. Now I proceed to examine how the application of Appellant Bank for rejection of Plaint has been dealt with by the Trial and the first appellate courts. Rejection of the plaint under

Order 7 Rule 11(d) of the Code was sought by the Appellant, on the ground of the Suit being barred by the provisions of Section 34 of the SARFAESI Act and Section 164 of the Act of 1960. The application was opposed by the Plaintiffs by filing following reply:

सविनय सादर,

यातील प्रतिवादी/अर्जदार यांचा अर्ज कायदयाने चालणेस पात्र नाही यातील वादी यांनी दावा मिळकतीसंदर्भात Security Interest Act, 2002 या तरतुदीअंतर्गत जी कारवाई चालू केलेली होती ती मुलतः बेकायदेशीर आहे. असे ठरवून मिळणेकरीता रिक्हीजन अर्ज दाखल केलेला होता. सदरचा रिक्हीजन अर्ज यातील वादी यांनी संबंधित अपेलंट कोर्टामध्ये दाखल केल्या नंतर सदरचे अपिलाचे कामी यातील वादी व प्रतिवादी नं. ४ यांचेमध्ये आपसांत झालेले नव्हते तर सदरचे अपीलामध्ये यातील प्रतिवादी नं. १ व ३ यांचे दरम्यान आपसांत झाले होते. सदरचे अपीलामध्ये प्र. वा. १ ते ४ दरम्यान आपसांत झाले होते. सदरचे अपील यातील वादी यांनी काढून घेतले. मात्र सदरचे अपीलामध्ये यापुर्वीच यातील प्र. वा. नं. ४ यांनी जी लिलावाची प्रक्रिया केली होती ती मुलतः बेकायदेशीर स्वरूपाची होती. ती बेकायदेशीर होती ही मे. कोर्टामध्ये प्रस्तुतचे दाव्यान्वये आव्हानित केलेली आहे. त्यामुळे प्र. वा. ४ चा प्रस्तुतचा अर्ज कायदयाने चालणेस पात्र नाही.

सबब, प्रस्तुत अर्ज नामंजुर करणेत यावा. अशी मे. कोर्टाना नम्र विनंती आहे. ता. ९/१/२०१९

मे. जा. व्हावे.

सही/—

(वादीतर्फे वकिल)

31. Thus, in the reply filed by the Plaintiffs opposing the application for rejection of plaint, no effort was made by them to

demonstrate as to how bar under the provisions of Section 34 of the SARFAESI Act or under Section 164 of the Act of 1960 was not attracted in the suit filed by them. There is no contention in the reply that a case of fraud is made out in the Plaint.

32. The Trial Court proceeded to allow Appellant's application by order dated 2 December 2019. The Trial Court recorded following findings while allowing the application :

“18. Though the plaintiffs have denied that, they are not borrower or guarantor, the plaintiff have produced certified copy of registered continuing guarantee mortgage deed dt. 30.08.2011. In the said deed the names of the plaintiffs have been shown as a consenting parties for the mortgage of the disputed land as well as the RCC construction on the land. Thereby it cannot be said that, all the transactions were conducted or executed without the knowledge of the plaintiffs or behind the back of the plaintiffs. Thereby whatever the cause of action given by the plaintiffs in the suit are devoid by merits and the reliefs which are claimed by the plaintiffs are not within the jurisdiction of this Court. The mortgage deed itself indicates that, the action will be taken as per the said act in case of default of payment and the plaintiffs have accepted the condition by signing upon this document. In the circumstances, I come to the conclusion that, the Order 7, Rule 11(d) is applicable here in the present suit and the suit is required to be rejected. Section 164 of the Maharashtra Co-operative Societies Act, 1960 and section 17 and 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 bars the present suit. I hold that, this court has no jurisdiction to entertain the suit.”

33. Perusal of the findings recorded by the Trial Court would indicate that, one of the reasons recorded for rejecting the Plaint is the cause of action pleaded by Plaintiffs being devoid of merits. The other reason is relief falling outside the jurisdiction of the Court and bar under Section 34 of the SARFAESI Act and under Section 164 of the Act of 1960. While first ground could not have been a valid reason for rejection of the plaint, the second ground of bar of suit is something which would fall within the realm of powers of the Civil Court under Order 7 Rule 11 (d) of the Code. Again, with regard to the finding of lack of jurisdiction and bar of suit, it must be observed that the Trial Court has not made any elaborate discussion as to why it lacked jurisdiction to entertain the suit. There is no discussion about Section 34 of the SARFAESI Act. The Section is not reproduced nor discussed. Even while referring to Section 164 of the Act of 1960, there appears to be no discussion by the Trial Court while holding that its jurisdiction is barred under Section 164 of the Act of 1960.

34. The Trial Court has thereafter proceeded to list six judgments on which it has relied upon for arriving at a conclusion that it lacked jurisdiction to entertain the suit. There is however no discussion as to what exactly the ratio of those judgments is and how those judgments are applicable to the present case. The Trial Court was deciding application for rejection of Plaint and ought to have recorded elaborate reasons by discussing provisions containing

bar of suit under the two enactments as well as the judgments on the subject. Be that as it may, Order passed by the Trial Court has been a subject matter of scrutiny by the lower appellate court and therefore it will be necessary to examine the manner in which the lower appellate court has considered the issue.

35. When the order of the Trial Court was carried in Appeal before the District Judge, it was required to decide only the issue whether Civil Court's jurisdiction was barred under Section 34 of the SARFAESI Act and under Section 164 of the Act of 1960. The Appellate Court has recorded following findings in para-16 of its judgment for reversing the decision of the Trial Court.

"16. In case in hand, it is the case of appellants that the Hon'ble Debt Recovery Tribunal stayed the auction process initiated by respondent No.4. In spite of it, the sale deed was executed in favour of respondent No.5. It means said sale deed was executed without following the auction process. As per Rule 9 of Security Interest (Enforcement) Rules, 2002, the sale by any method other than public auction or public tender shall bid on such terms as may be settled between the parties in writing. It means property can be sale only on the basis of terms which were settled between the parties in writing. In case in hand, defendant No.4 or 5 did not give evidence to show that terms were settled between them and the appellants or respondent Nos. 1 to 3 in writing. No doubt, defendant No.4 relied on one letter given by respondent Nos.1 and 2. In said letter, it was mentioned that they had given a bank compromise proposal of Rs.92,00,000/- and they had not objection, if respondent No.5 is ready to give more amount than 92,00,000/- to sell the property to her. But said letter is just copy, it is not yet proved in the Court. Also defendant No.4 did not admit that there was compromise between them. Whether there was any agreement between

defendant Nos. 4, 5 and defendant Nos.1 to 3 and appellant it would be decided after considering the evidence. Merely, on the basis that the jurisdiction of Civil Court is barred as per Section 34 of SARFASI Act, plaint cannot be rejected. As there is no agreement in writing, it can be said that it may be fraud. The Civil Court is required to consider whether there was any fraud committed by respondent Nos. 4 and 5 or not. No doubt, in **Electrosteel Castings Limited Vs. UV Asset Reconstruction Company Limited and Ors. (Supra)**. Hon'ble Supreme Court held that, having considered the pleadings and averments in the suit more particularly use of word in pleading even considering the case on behalf of plaintiff, we found that the allegations of pleadings are made without any particulars and only that a view to get out the bar u/s. 34 of SARFAESI Act and by such clever drafting, the plaintiff intends to bring the suit maintainable despite the bar u/s. 34 of SARFAESI Act, which is not permissible at all and which cannot be approved. But in case in hand, prima facie, there is violation of rules of SARFAESI Act. Without making any settlement agreement in writing, the sale deed was executed in favour of respondent No.5 by respondent No.4. There is no dispute that it is the case of respondent Nos.4 and 5 that amount was deposited by respondent No.5, but it is also a matter of fact, whether amount was deposited on the settlement that the sale deed would be executed in favour of respondent No.5. In order to prove said agreement, certain evidence is required and after considering those evidence, the learned Civil Court could decide whether Civil Court is having jurisdiction or not. Therefore, merely on the basis of provision of Section 34 of SARFAESI Act, the plaint is not liable to be rejected. There is no dispute that respondent No.4 is Co-operative Bank and therefore, Co-operative Court is also having jurisdiction to decide the dispute between the appellants and respondent No.4. The civil court is required to decide whether the dispute between the appellants and defendant No.4 is dispute as defined under the Maharashtra Co-operative Societies Act and therefore the suit is barred as per Section 164 of the Maharashtra Co-operative Societies Act. In order to decide all these fact, proper evidence is necessary. Thereafter the civil court consider whether civil court is having jurisdiction. It is therefore held that the plaint is not liable to be rejected. Hence, Point No.1 answered in the negative.”

36. Before I proceed to decide the correctness of findings recorded by the lower Appellate Court, it would be necessary to first examine the grounds raised in Regular Civil Appeal No.47/2019. The Appeal Memo has been placed on record at Exhibit-E to Interim Application No.19277/2022. After going through the grounds raised in the Appeal Memo, it is seen that case of fraud was not pleaded in the same. The grounds raised in the Appeal are reproduced below:

“1. That, the Judgment and Order is against the law, evidence on record and against the good conscience.

2. That, the impugned Judgment and Order seems to be passed in mechanical fashion by the learned Civil Judge without giving any attention to the factual matrix of the case and without assessing the technicalities involved in the matter in hand.

3. That, the approach of the learned Civil Judge towards the case in hand is totally prejudicial one.

4. That, the impugned Judgment and Order is incorrect, illegal and unjustifiable in the eyes of law.

5. That, the learned Civil Judge relied upon the false and vexatious averments narrated in Exhibit 19 of Respondent No. 4.

6. That, the learned Civil Judge ought to have seen that the Respondent No. 4 have started the illegal auction procedure with respect to the suit property and the said illegal auction procedure is challenged by the Appellants.

7. That, the learned Civil Judge has not at all followed guiding principles of law and judicial discretion is not applied properly. Hence, findings are incorrect.

8. That, the findings and conclusion of the learned Civil Judge are totally baseless and contrary to the law and evidence.

9. That, the Order under appeal is bad in law, having no correct assessment and evaluation of the documentary and oral evidence on record. Hence, interference by this Court is necessary in the interest of justice.

10. That, the learned Civil Judge ought to have considered the reliable evidence on record. Hence, order under appeal is capricious one.

11. That, the learned Civil Judge has committed a grave mistake in allowing an application below Exhibit 19 of Respondent No. 4. The judicial discretion is not properly exercised by the Learned Civil Judge.

12. The entire Judgment and Order of the learned Civil Judge is one sided and without considering the legal aspects.

13. The impugned Judgment and Order under appeal is passed on the surmises and on the wrong conclusions drawn relying on unnecessary documents, hence deserves to be set aside.

14. All the conclusion drawn by the learned Civil Judge are erroneous and cannot be justified, hence deserves to be set aside.

15. That, the Judgment and Order suffers from illegality and requires interference at the hands of this Hon'ble Court.

16. That, the appeal is valued as per the suit valuation and proper court fee is paid.

17. That, the Judgment and Order is passed on 02/12/2019, the Appellants applied for certified copies on 03/12/2019, which they received the same on 11/12/2019. So, the present appeal is well within time limit.

18. The Appellants have not filed any other appeal in any other Court of India against the impugned Judgment and Order under appeal.

19. As the Order and Judgment under appeal is passed by the Civil Judge, Senior Division, Gadhinglaj. Hence, this Court has jurisdiction to entertain this appeal.”

37. The Appellate Court has held that ‘merely on the basis that jurisdiction of Civil Court is barred as per Section 34 of the SARFAESI Act, the plaint cannot be rejected.’ This finding clearly appears to be erroneous in that bar of suit is recognized as a ground for rejection of plaint under Order 7 Rule 11(d) of the Code.

38. The Appellate Court has thereafter gone into the issue as to whether any fraud was committed by both the Appellants. It has referred to the judgment of the Apex Court in *Electrosteel Castings Limited* (supra) for holding that mere clever drafting by use of the word ‘fraud’ in absence of any material on record, cannot be a ground for saving a suit from bar of jurisdiction under Section 34 of the SARFAESI Act. The Appellate Court has thereafter held that in the present case there is violation of rules of SARAFESI as

the sale-deed was executed in favour of Defendant No.5 by the Bank without making any reference to any settlement agreement with Plaintiffs. The Appellate Court has thereafter held that though Defendants No.4 and 5 (appellants) came up with a case that the amount was deposited by the purchaser-Defendant No.5, whether such deposit was in the light of any settlement is something which needs to be established by evidence. It is by recording these findings that the Appellate Court has arrived at the conclusion that the plaint could not be rejected under Order 7 Rule 11 of the Code.

39. It is well settled law that whether the suit is barred under any law is to be inferred from averments made in the plaint and no amount of evidence can be looked into. In **Kamala (supra)**, the Apex Court held in para-25 as under :

“25. The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact or law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject-matter thereof, the application for rejection of plaint should be entertained.”

40. However, perusal of the order passed by the Appellate Court would indicate that it has travelled beyond the pleadings raised in the plaint. It has held “*There is no dispute that it is the*

case of respondent Nos.4 and 5 that amount was deposited by respondent No.5, but it is also a matter of fact, whether amount was deposited on the settlement that the sale deed would be executed in favour of respondent No.5. In order to prove said agreement, certain evidence is required ...” Perusal of the plaint indicates that the issue of deposit of amount by purchaser-Defendant No.5 is not pleaded therein. Settlement for execution of sale deed is also not pleaded in the plaint. Therefore, it appears that the Appellate Court has looked into material other than plaint for holding that leading of evidence is necessary. Since this is impermissible, the findings recorded by the lower Appellate Court about non-applicability of bar under Section 34 of the SARFAESI Act are unsustainable.

41. Another ground pleaded for seeking rejection of plaint, was Section 164 of the Act of 1960. The Appellate Court has held that issue whether the dispute between the Plaintiffs and the Bank are covered by the Act of 1960 is something which is required to be decided by leading evidence. It is difficult to comprehend as to why evidence would be necessary to decide whether the dispute is covered by the provisions of Act of 1960. Section 164 of the Act of 1960 reads thus :

“164. Notice necessary in suits- No suit shall be instituted against a society, or any of its officers, in respect of any act touching the business of the society, until the expiration of two

months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

42. It is contended by Mr. Shah that the dispute raised in the suit touches the business of the Appellant-Bank which is a Co-operative Society and therefore in absence of issuance of a notice under Section 164 of the Act of 1960, the suit is clearly barred. He has placed reliance on the judgment of this Court in ***Devgiri Nagari Sahakari Bank Ltd.*** (supra) in paras-9 and 10 this Court has held as under :

“9. In the instant matter also, the business of the petitioner-society is to advance loan and to effect recovery of the amount. The property allegedly attached and sold in execution of the recovery certificate issued by the Registrar under the provisions of section 101 of the M.C.S. Act. The subject matter of the suit touches to business of the society. The objection raised by the petitioners to the maintainability of the suit therefore needs to be upheld. The Civil Revision Application deserves to be allowed and the same is accordingly allowed. The order passed by 4th Joint Civil Judge Senior Division, Aurangabad on 02.12.2011 is set aside.

10. The plaintiff shall have liberty to avail of the remedy for protection of her interest, after complying with the mandatory requirements of the M.C.S. Act. It would also be open for the defendants, if the plaintiff proceeds to file appropriate (13) CRA-12-2012 proceedings, to raise all legally sustainable objections. Rule is accordingly made absolute.

43. Mr. Shah has also relied upon the judgment of this Court in *West Nagpur Co-operative Housing Society Ltd.* (supra) in which it has held in para-7 as under :

“7. Even otherwise, the application filed under Order VII Rule 11(b) & (d) of Civil Procedure Code, explains the business of the society and which fact has not been disputed by the society. By referring to the contentions in the application (Ex.154), I am not saying that averments made elsewhere can be considered while deciding application filed under Order VII Rule 11. I am only suggesting that these contentions in the application fortify the conclusions that can be drawn from the averments made in the plaint. These are the averments which would not require any consideration in details on merits of the case. From those averments, it can thus be very well seen that the provision of Section 164 of The Maharashtra Cooperative Societies Act would stand as bar for filing of suit against the cooperative society unless notice is served upon cooperative society. Admittedly, notice has not been served on the cooperative society and, therefore, I must say, the plaint as filed by respondent no. barred by law. In this regard, the view taken by the learned Single Judge of this Court appears to be In the case of Noor Mohd. Shami Shaikh v. Maharashtra Housing and Development Board reported in 2014 (1) Mh.L.J. 92 that when language of the provision is clear and unambiguous, it is duty of the Court to give effect to mandatory legal provisions..... commends to me and accordingly I find that Section 164 being mandatory in nature, must be given its due effect by applying the bar to the plaint filed by respondent no. 1 as against the appellants.

44. Thus this Court has consistently taken a view that any dispute touching the business of the Society cannot be entertained without issuance of a notice which is mandatory under Section 164 of the Act of 1960. It has also been held that Section 164 being

mandatory in nature, it must be given due effect by applying the bar to the plaint. The lower Appellate Court has not considered the purport of Section 164 of the Act. No finding is recorded as to how the suit is saved from the bar under Section 164 of the Act. Therefore the findings of the lower Appellate Court in this regard are clearly unsustainable.

45. Considering the overall conspectus of the Appeal, I have no hesitation in holding that the Appellate Court has clearly misdirected itself in allowing the Appeal. It has not recorded any cogent reasons for reversing the decision of the Trial Court. Despite there being specific bar under Section 34 of the SARFAESI Act, the Appellate Court has not even made an attempt to examine whether any case of fraud is made out in the plaint for saving the suit from bar under Section 34. It has travelled beyond the pleadings in the plaint for arriving at the conclusion that leading of evidence is necessary to establish as to whether the amount was indeed deposited by Defendant No.5-purchaser towards execution of sale deed. Even findings relating to Section 164 of the Act of 1960 recorded by the Appellate Court do not appear to be well founded.

46. With rejection of their Plaint, it is not that Plaintiffs are rendered remediless. If they can prove that the sale effected by the Appellant Bank is contrary to any of the provisions of the

SARFAESI Act or the Rules, they can file an appeal under Section 17 before the Tribunal. It appears that the Plaintiffs and the borrowers are not oblivious about this remedy available to them. In their Securitisation Application No.43/2018, following prayers were made:

“D) That this Hon’ble Tribunal be pleased to struck down and declare every that measures as may be taken by the Defendant Bank in respect of the secured asset as mentioned in Para 5.1 and schedule hereto annexed, without any notice without any publication or as may have been published or otherwise as may be and entire proceedings including proposed auction or nay kind of further post section 13(4) measures as illegal, arbitrary, unreasonable and unjustified and the same may be quashed and set aside by this Hon’ble Tribunal. The possession of suit properties be restored to Applicant.

E) That this Hon’ble Tribunal be pleased to declare that the measures taken by the Defendant purportedly under Section 13(4) or any further action of taking forcible possession or auction of the secured asset as mentioned in Para 5.1 and schedule hereto annexed at any time hereafter as may be fixed and any such further auction or proceedings or any further action as may be done or proposed to be done during the pendency of this S.A., as illegal, arbitrary, unreasonable and unjustified and the same may be quashed and set aside by this Hon’ble Tribunal.

47. It is contended that Defendant No.5-Purchaser has unilaterally withdrawn the Securitisation Application No.43/2018. It is for Plaintiffs and the borrowers to take necessary steps in that regard. Also, it appears that the purpose of filing Securitisation Application No.43/2018 was to ensure transfer of property in favor of Defendant No.5-Purchaser, who was impleaded as co-Applicant

along with the borrowers and Plaintiffs. It is unknown whether Plaintiffs now have a dispute with Defendant 5-Purchaser, since prayers in the plaint are directed essentially against Appellant Bank. Also, the Suit appears to have been filed in respect of properties in addition to the Flats purchased by Defendant 5. If Plaintiffs are aggrieved by the measures taken by Appellant Bank under Section 13(4), can institute appeal under Section 17 of the Act to prove illegality in the sale process.

48. The impugned judgment and order of the lower Appellate Court is thus indefensible and is liable to be set aside.

49. I accordingly proceed to pass the following order :

ORDER

(i) The Appeals are allowed.

(ii) The judgment and order dated 11 August 2022 passed by the District Judge-1 at Gadhinglaj, District-Kolhapur in Regular Civil Appeal No.47/2019 is set aside and the order passed by the Civil Judge Junior Division, Gadhinglaj in Regular Civil Suit No. 132/2018 is upheld.

(iii) There shall be no orders as to costs.

4 September 2023.

(iv) With disposal of the Appeals, Interim Applications taken out therein for stay become infurctuous and do not survive. The same are disposed of.

SANDEEP V. MARNE, J.