IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION (WP) NO.5000 of 2022

Priyanka D/o Kirit Barcha,
Aged about 36 years, Occupation : Seld Employeed/*Freelance* *R/*o 304C, Bhadralok Towers, Next to Tube Company, Old Padra Road, Vadodara, (Gujarat).

.... Petitioner

// VERSUS //

1. Kirit S/o Gordhandas Barchha,
Aged about 74 years, Occ. Business
R/o 304C, Bhadralok Towers
Next to Tube Company, Old Padra Road, Vadodara (Gujarat)
2. Payal D/o Kirit Barchha,
Aged about 45 Years, Occ. Business
R/o 304 C, Bhadralok Towers
Next To Tube Company, Old Padra Road, Vadodara (Gujarat)
3. Smt. Meena W/o Mansukhlal Kotecha,
Aged about 79 years, Occ. Business
R/o Ramchandrakutir, near Ayurvedic Hospital, Opposite Reliance Mall, G.G.Hospital Road, Jamnagar
4. Jaydeo S/o Laxmidas Panchamatiya
Aged About 70 Years, Occ. Business
R/o 309E, Chithnavis Marg, Civil Lines, Nagpur.
5. Vijay S/o Laxmidas Panchamatiya
Aged about 71 years, Occ. Business,
R/o 309E, Chithnavis Marg, Civil Lines, Nagpur.

6. Sau. Nalini Wd/o Mahendra Panchamatiya,
Aged about 74 years, Occ. Business
R/o 51, Valencia, Juhu Tara Road, Juhu, Mumbai.

7. Sau. Bijal S/o Mahendra Panchamatiya
Aged about 47 years, Occ. Business
R/o 51, Valencia, Juhu Tara Road,
Juhu, Mumbai

8. Henna D/o Mahendra Panchamatiya,
Aged about 41 years, Occ. Business
R/o 51, Valencia, Juhu Tara Road,
Juhu, Mumbai

9. Union Bank of India,
through its Authorized Officer,
Gandhibagh, Nagpur 440 002. **... Respondent(s)**

Shri S.V. Manohar, Senior Advocate a/b Shri R.O. Sharma, Advocate for the Petitioner
Shri M.G. Bhangde, Senior Advocate a/b Shri S.D. Ingole, Advocate for the respondent No.9/Bank.

CORAM : ANIL S. KILOR, J.
DATED : 10.02.2023

ORAL JUDGMENT :

1. Heard.

2. **Rule**. Rule made returnable forthwith. Heard finally by consent of the parties.

3. This writ petition raises a question to the correctness and legality of the judgment and order dated 10.08.2022 passed by the Special

Judge, Special Court for Differently-Abled Persons, Senior Citizens and Marginalized Section of Society, Nagpur in Misc. Civil Appeal No.71 of 2022, dismissing the appeal preferred by the petitioner challenging the order dated 29.03.2022 passed below Exh. 53 in Special Civil Suit No.191 of 2021 by 15th Jt. Civil Judge Senior Division, Nagpur, rejecting the application for extension of *status quo* order dated 12.07.2021.

4. The brief facts of the present case, which are relevant for deciding the present writ petition, are as follows:

The petitioner filed a suit for declaration, partition and separate possession vide Special Civil Suit No.191 of 2021, claiming share in the suit property by way of partition.

It is the case of the plaintiff/petitioner that late Umaben w/o Laxmidas Panchamatia and defendant Nos.4 and 5 jointly owned and possessed the immovable property i.e. the suit property.

Late Smt. Umaben died on 17.04.2009 leaving behind her sons i.e. defendant Nos.4 and 5, two daughters i.e late Smt. Prafulla Barcha and defendant No.3/Meena Kotecha.

5. It is further pleaded that late Sau. Prafulla wife of Kirit Barcha died intestate on 25.12.2019 leaving behind her, the plaintiff and defendant Nos.1 and 2.

6. It is stated that late Umabai and defendant Nos.4 and 5 were having equal share in the suit property and after a sad demise of late Umaben, defendant Nos.3, 4 and 5 as well as deceased Mahendra Panchmatia and deceased Prafullla Barcha, were having 1/5th undivided share in the share of late Umaben.

7. Further, after the demise of late Prafulla Barcha, the plaintiff, defendant Nos.1 and 2 vis-a-vis after the demise of late Mahendra, the defendant Nos.6, 7 and 8 are having shares in the suit property, to the extent of the shares which the deceased Prafulla Barcha and deceased Mahendra were entitled, had they been alive.

8. It is further stated that the suit property is the joint property of late Umben, defendant Nos.4 and 5 and no partition by metes and bound were taken place between the family. Hence, the suit for partition was filed.

9. The suit was filed along with the application under order XXXIX Rule 1 and 2 of the Code of Civil Procedure (CPC) for temporary injunction, restraining the defendant Nos.4 to 8, their agents, representatives or any person claiming through them from alienating or creating any third party interest in the suit property.

10. The learned trial Court vide order below Exh.15 dated 12.07.2021 directed the plaintiff and defendant Nos. 4 and 5 to maintain *status quo* till filing of written statement of defendant Nos.4 and 5.

11. As the respondent no.9 bank initiated proceeding under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "the SARFAESI Act") and as the part of the suit property was a secured asset in the loan account to M/s. LB. Industries Pvt. Ltd. of which defendant No.4 is one of the directors and prammotors and as the defendant Nos.4 and 5 are the mortgagors and guarantors for the credit facilities and sanction granted by the bank to the extent of Rs.80 Crores, the respondent No.9 filed an application for intervention vide Exh.27 along with the application Exh. 26 under Order XXXIX Rule 4 read with

Section 151 of the CPC for vacation of *status quo* order dated 12.07.2021.

12. The learned trial Court vide order below Exh.27 dated 06.08.2021 allowed the application and permitted the respondent No.9 to intervene as defendant No.9.

13. The learned trial Court further vide order below Exh.26 dated 06.08.2021 allowed the application and vacated the order dated 12.07.2021 granting *status quo*.

14. The petitioner feeling aggrieved by the order passed below Exh.26 dated 06.08.2021 preferred Misc. Civil Appeal No.163 of 2021 before the Court of Special Judge, Special Court for Differently-Abled Persons, Senior Citizens and Marginalized Section of Society, Nagpur.

15. The learned lower Appellate Court thereupon, allowed the appeal and set aside the order below Exh.26 dated 06.08.2021 and thereupon, restored the order of *status quo* passed below Exh.15 on 12.07.2021. Further the defendant No.9 Bank was granted liberty to file application under Section 7 Rule 11 of the CPC, raising the objection regarding the jurisdiction of the Court.

16. Accordingly, the application was filed by the bank under Order 7 rule 11 of the CPC read with Section 34 of the SARFAESI Act, for rejection of plaint.

17. As the *status quo* was directed to be maintained by the plaintiff and the defendant Nos.4 and 5 till filing of the written statement of defendant Nos.4 and 5, the plaintiff moved an application for extension of *status quo* order dated 12.07.2021, on filing of the written statement by the defendant Nos.4 and 5, on 29.03.2022.

18. The said application was strongly opposed by the bank on the ground that the plaintiff has filed the suit in collusion with the defendant Nos.4 and 5, who committed default in repaying the loan of the defendant No.9 bank. It was pointed out that the dues are more than 100 Crores.

19. Accordingly, the order below Exh.53 dated 29.03.2022 was passed by the trial Court, rejecting the application for extension of *status quo* order dated 12.07.2021.

20. The plaintiff thereupon, filed Misc. Civil Appeal No.71 of 2022 under Section 104 read with Section 43 Rule 1(r) of the CPC, challenging the order below Exh.53 dated 29.03.2022.

21. The learned lower Appellate Court vide impugned judgment and order dated 10.08.2022, dismissed the appeal and maintained the order of the trial Court, refusing to continue the order of *status quo* granted in favour of the plaintiff. Hence, this petition.

22. Shri Manohar, learned Senior Advocate, for the petitioner argues that the learned Appellate Court failed to appreciate the purport and import of provision of the order 43 Rule 1(r) of the CPC and wrongly came to the conclusion that there is no concept of order of *status quo* and hence, the appeal is not maintainable as envisaged under Rule 4 of Order XXXIX of the CPC.

23. It is submitted that both the Courts below have failed to consider the law laid down by the Division Bench of this Court on the point of reference about the maintainability of civil suit for enforcing the civil rights, in the case of Bank of Baroda Vs Gopal Shriram Panda and Others[1].

1 2021 (4) AIR Bom R 64

24. It is submitted that the petitioner is neither borrower nor the guarantor to the loan advanced by the respondent No.9. It is submitted that the petitioner is exercising her civil right of succession by seeking partition in the suit property which was not considered by both the Courts below.

25. It is submitted that the applications for temporary injunction and amendment are pending, despite this fact, the learned trail Court decided the application for extension of *status quo* on merit, as if the Court decides the application for temporary injunction.

26. It is submitted that no relief is claimed against the respondent No.9/bank, but the only relief claimed is a share in the suit property and therefore, it cannot be said that the *status quo* would operate against the bank. It is further submitted that it is obligatory for the trial Court to decide the application Exh. 5 which is pending and till then, the *status quo* ought to have been continued.

27. On the other hand, Shri Bhangde, learned Senior Advocate, for the respondent No.9 Bank argues that the present petition cannot be considered as *bona fide* petition and as such it is necessary to decide, whether the private interest would override the public interest.

28. He has drawn attention of this Court to the family tree and dates of events mentioned in the reply to the present petition and it is argued that the plaintiff is in collusion with the defendant Nos.4 and 5 filed the suit just to prolong the bank proceeding.

29. It is further submitted that the respondent No.4 /defendant No.4 Jaydeo is behind filing of the suit through the plaintiff and therefore, accordingly, it is submitted that the suit is *mala fide*.

30. It is further submitted that the whole intention of the plaintiff is to stall the bank proceeding. It is submitted that against a $1/45^{th}$ share claimed by the plaintiff, the injunction is sought against the whole property, including the property. It is submitted that the judgment of the Division Bench of this Court in the case of Bank of Barora (supra), is not on the point of grant of injunction in such case, but it only says that any civil right is involved, to that extent, the suit is maintainable.

31. He accordingly submits that as the suit is *mala fide* and not maintainable in view of the provisions of the SARFAESI Act, both the courts below have rightly denied the extension of *status quo* order in favour of the petitioner.

32. In the backdrop of rival submissions of both the parties, I have perused the documents filed along with the writ petition, reply filed by the bank and the orders passed by the trial Court as well as the Appellate Court.

33. After going through the record, following dates of events would be relevant and important to consider the challenge raised in this petition:

a)	21.08.1982	Sale deed was executed between the seller, Vallabh Co-operative Housing Society Ltd. and the purchasers Smt. Umaben, Jaidev (defendant No.4 and Vijay (defendant No.5) in respect of plot No.5, Civil Lines, Nagpur. Suit property is half of this plot;
b)	19.12.2007	Smt. Umaben executed Will in respect of her 1/3 rd share and bequeathed the same equally to her sons Vijay and Jaidev. (Referred in registered Deed of Partition);
c)	17.04.2009	Smt. Umaben died (page No.66);
d)	25.01.2010	Partition Deed (registered) was executed between Vijay and Jaidev dividing Plot No.5 equally amongst themselves;
e)	18.04.2011	Jaidev mortgaged his divided 1/2 share to the Union Bank by deposit of Original Title Deed etc. as Guarantor for loan of Rs.16,00,00,000/- given to M/s L.B. Industries Pvt. Ltd. (Page No.93-97). The mortgage in favour of Bank is noted in the

		record of rights;
f)	16.03.2018	Revised Sanction Letter of Union Bank of India for Rs.80,00,00,000/- ;
g)	17.03.2018	Mortgage (registered of suit property was executed by Jaidev in favour of the bank;
h)	04.12.2018	Notice Under Section 13(2) of the SARFAESI Act (Page No.148-151) was issued by the Bank and served upon the debtor and guarantor- Jaidev;
i)	19.11.2019	Order Under Section 14 of the SARFAESI Act by the Additional District Magistrate, Nagpur;
j)	02.12.2020	Possession Notice under Section 13(4) of the SARFAESI Act was issued by the bank and served on the debtor and guarantor -Jaidev whereby symbolic possession is taken;
k)	05.12.2020	Possession Notice is published in the newspapers viz. Indian Express and Lok Satta;
l)	15.07.2021	Sale Notice;
m)	18.02.2021	The petitioner filed Special Civil Suit No. 191/2021 in the Court of Civil Judge, Senior Division, Nagpur, claiming partition and separate possession of her 1/45th share, against her father, sister, uncles and aunt. There is no disclosure about loan taken from the Union Bank of India and mortgage of suit property by Jaidev and the steps taken by the bank under the SARFAESI Act. She also filed application for grant of temporary injunction;
n)	12.07.2021	The learned 16th Joint Civil Judge Senior Division, Nagpur granted *status quo* till filing of the written statement by the defendant Nos.4 and 5; and
o)	30.07.2021	M/s L.B. Industries, Mr. Jaideo and his son Mr. Shamal filed IA No.64 of 2021 in S.A.

No.113 of 2019 before DRT and placed on record the aforesaid *status quo* order.

34. From the above referred dates of events, it is evident that after the death of Umaben on 17.04.2009, partition deed was executed on 25.01.2010 between defendant Nos.4 and 5 and thereby they divided the suit property equally amongst themselves.

35. It is further evident that, there is a Will executed by Smt. Umaben on 19.12.2007 bequeathing her $1/3^{rd}$ share to her sons i.e. defendant Nos.4 and 5.

36. Thus, from 17.04.2009 i.e. date of death of Umben, till the date of partition i.e. 25.01.2010 between defendant Nos.4 and 5, the defendant Nos.4 and 5 were the absolute and joint owner of the suit property

37. Further after Revised Sanction Letter of the bank for 80 Crores, the suit property was mortgaged with the bank and the registered mortgaged deed was executed by defendant No.4 in favour of the bank on 17.03.2018.

38. Thereafter, because of default in repayment by the defendant No.4, a proceeding under the provisions of the SARFAESI Act was initiated by the bank in the month of December 2018.

39. Admittedly, the suit was filed in the month of February 2021. It is pertinent to note that the mother of the plaintiff Prafulla died on 25.12.2019 i.e. after 12 years of execution of the Will by Umaben and 9 years after the partition of the suit property between the defendant Nos.4 and 5.

40. Late Sau Prafulla never raised any grievance, challenging the Will deed of Umaben or partition between the defendant Nos.4 and 5 during her lifetime. She even did not claim any share in the property of late Umaben before or after the death of Umaben.

41. The fact as regards the Will executed by Umaben and partition deed executed between defendant Nos.4 and 5 has not been pleaded by the plaintiff in the plaint or no challenge is raised to the Will or partition deed. However, after disclosure these facts by the Bank, the plaintiff by filing the application for amendment has sought amendment to the plaint, raising a grievance about the genuineness of the Will and partition deed and also seeking to add prayer challenging the Will deed and partition deed. The amendment application is pending for decision. The only explanation for such huge and inordinate delay in making the pleading and raising the challenge to the Will and partition deed, given by the plaintiff is, lack of knowledge about the execution of the Will deed and partition deed.

42. However, it is not the case of the plaintiff by way of amendment also that the mother of the plaintiff also had no knowledge about the Will and partition deed. No explanation appears to have been pleaded for not claiming any share in the suit property by the mother of the plaintiff after the death of Umaben on 17.04.2009 and during the lifetime of the mother of the plaintiff.

43. In the above referred backdrop, it cannot be ignored that the claim of the defendant No.9 bank against the defendant Nos.4 and 5 is of more than 100 Crores, whereas, the plaintiff is claiming $1/45^{th}$ share in the suit property. It is pertinent to note here that the entire suit property was not mortgaged with the bank but the half of the suit property was mortgaged with the bank.

44. In the circumstances, I find substance in the submission of the learned Senior Advocate appearing for the respondent bank that any order of *status quo* without clarifying the nature and extent of such order would cause hurdle in the proceedings filed by the bank under the SARFAESI Act. Even otherwise, in such matters, passing of orders of *status quo* should be avoided by the trial Court and if the *status quo* order is passed, it would not be vague and indefinite. While ordering the *status quo,* the Court must state in unequivocal term, what *status quo* is. The Court must also mention, whether the plaintiff or defendant in possession. Leaving the matter in doubt, an ambiguity may result in dangerous consequences.

45. The Division Bench of this Court in the case of *Bank of Baroda* (supra), has observed thus:

> *"25. A meaningful interpretation has to be put to the language of the bar as contained in Section 34 of the SARFAESI Act so that the object and purpose sought to be achieved by the Act is not rendered illusory and is fulfilled. However, at the same time, the civil rights, which may be available in respect of security interest, cannot be lost sight of, which also have to be protected and the common law remedy available for the enforcement cannot be rendered ineffective. No doubt, Section 34 by creating a bar of jurisdiction ensures the recovery of public money in a speedy manner, however, the bar has to be read and construed in light of the language it contains and not otherwise so as to impeach upon the rights of a civil nature as available, which are equally important*

> *for a citizen. In the zeal to ensure speedy recovery of money, the civil rights which a citizen has, cannot be permitted to be rendered redundant and balance between both the rights has to be maintained, which would only be possible on a case to case basis. The bar under Section 34 of the SARFAESI Act, therefore, in view of the discussion made above, in our considered opinion, is not absolute, but is restricted to examination by the DRT of the actions of the secured creditor under Section 13 of the SARFAESI Act and the rights available under Section 17 of the SARFAESI Act, to be in accordance with the provisions of the SARFAESI Act and the Rules made thereunder, as indicated.*"

46. The Division Bench of this Court in the above referred reference, while answering the reference, has recorded the following answer:

> *"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."*

47. Thus, it is clear that, in such situation, the balance between both rights has to be maintained, which would only be possible on a case to case basis.

48. Thus, considering the above referred observations made coupled with the events namely, execution of the Will deed, the partition deed and the time chosen by the plaintiff to file the suit i.e. only after the proceedings initiated by the bank under the SARFAESI Act, for recovery of more than 100 Crores against the defendant Nos.4 and 5, along with the stand of the plaintiff claiming ignorance of knowledge about the Will deed and the partition deed, the doubt is created about the bonafides of the plaintiff. Therefore, while striking the balance in this case, I do not find *prima facie* case and balance of convenience in favour of the plaintiff and further no irreparable loss would be caused to the plaintiff which cannot be recovered in terms of money, if *status quo* is not continued.

49. There is no doubt that the finding recorded by the learned lower Appellate Court to the effect that there is no power to grant *status quo* under Order XXXIX and Rule 1 and 2 of the CPC, is erroneous and contrary to law. However, on merits, the findings recorded by both the Courts below, are sustainable in the eyes of law.

50. As far as the submission of the learned Senior Advocate for the petitioner that the application for extension of the order of *status quo* was decided as if the Court is finally deciding the application Exh.5, is concerned, I do not find any error committed by both the Courts below, as the *status quo* was granted as an interim relief, on the application filed by the petitioner under Order XXXIX Rule 1 and 2 of the CPC.

51. Thus, both the Courts below have rightly entered into the merits of the matter, after filing of the written statements by the defendant Nos.4, 5 and the written statement of the bank. Hence, I do not find any error committed by the both the Courts below in considering the matter on merits.

52. As regards the pendency of Exh. 5 application, I am of the opinion that as the trial Court after recording the reasons in detail on merits decided the application Exh.53, the Court may decide, whether the application Exh.5 still survives and pass an order to that effect.

53. In the circumstances, I pass the following order:

The writ Petition is **dismissed**.

Rule is discharged. No costs.

[ANIL S. KILOR, J.]

Digitally signed byNIRANJAN DOMAJI THAWRE
Signing Date:14.02.2023 17:12