IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

C.O. 4663 of 2016

M/s. Mangaldham Properties LLP & Anr.
Vs.
Sri Ravi Agarwal & Ors.

For the petitioners		:Mr. Arijit Bardhan Mr. Rishabh Dutta Gupta
For the opposite party No.1	:	Ms. Sohini Chakraborty Mr. Arijit Sarkar
Heard on	:	13.05.2024
Judgment on	:	06.08.2024

Ajoy Kumar Mukherjee , J.:

1. Order dated September 29th, 2016 passed by Civil Judge (Senior Division) 2nd Court Alipore, passed in T.S. No. 20521 of 2013, has been assailed in the present Application, wherein the court below has rejected defendant's application under order VII rule 11 of the Code of Civil Procedure, seeking rejection of plaint.

2. Present opposite parties filed a suit for declaration for cancellation of deeds, permanent injunction, damages and other ancillary reliefs against the petitioners being aforesaid T.S. No. 20521 of 2013. In the said suit opposite party herein claimed that they are the absolute owners of the suit property, which is still under their possession. Previously on one occasion opposite party no. 1 and 2 had to go to Hyderabad for medical treatment and on good faith the opposite parties empowered defendant no.4, Mr. Baid to look after the suit property. It is alleged in the plaint that Mr. Baid misused the trust of the opposite parties and got one power of attorney executed fraudulently and taking advantage of the same he executed and registered a sale deed in favour of defendant no. 3 on January, 5 2010, setting up defendant no. 7 as an alleged creditor of opposite party no. 1 herein. On October 8, 2012 defendant no. 3 executed a deed in respect of the suit property in favour of defendant no. 1 and 2.

3. Main allegation levelled in the plaint is that the petitioners along with the proforma opposite parties herein in collusion with each other practiced fraud, which has affected the right title interest of the opposite parties with regard to suit property. They transacted most illegally with defendant no.8 and 9 with *malafide* intention, inspite of subsisting right, title, interest of the opposite parties in the suit property, with object to illegally earn money. Accordingly opposite parties filed aforesaid suit.

4. Petitioner herein contended that the petitioners have also filed a suit being T.S. No. 26632 of 2012 which is also pending. In the present plaint it has been stated that the cause of action arose when the opposite parties revoked the power of attorney and the defendant no.2 threatened the plaintiffs/opposite party no. 1 and 2 herein to vacate the suit property.

5. In the aforesaid T.S. No. 20521 of 2013 the petitioners herein filed an application under order VII rule 11 of the Code with a prayer for rejection of the plaint on the ground that the suit is barred under the provision of

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after called as SARFAESI Act 2002). The opposite parties contested the said application by filling written objection controverting all the material allegations. However, learned court below after hearing both the parties rejected the said application.

6. Being aggrieved by the said order petitioners herein contended that the opposite party no.1 and 2 indulged in dilatory tactics to prevent the earlier suit being T.S. No.26632 of 2012 from reaching its logical conclusion by taking repeated adjournments. It is further submitted that the opposite party no. 1 and 2 are rank trespasser and are in illegal occupation of the suit property from 06.01.2010 without payment of occupation charges or other statutory charges. The petitioner no. 1 after purchasing the suit property on 08.10.2012, got the suit property muted in his favour and the opposite party no. 1 and 2 has not paid any Municipal taxes since 2009. Learned Court below while rejected the petitioners' prayer for rejection of plaint, did not deem it proper and appropriate to consider the issues and contentions raised by the petitioners. It is settled law under section 34 of the SARFAESI Act, 2002 that the jurisdiction of the Civil Court is barred in respect of matters, which a Debt Recovery Tribunal is empowered to determine in respect of any action taken or to be taken in pursuance of any power conferred under the said Act. It is also to be mentioned that the prohibition covers even matters which can be taken cognizance by the Debt Recovery Tribunal (in short DRT) though no measure in that direction had yet been taken under sub section (4) of section 13 of the said Act of 2002 and as such bar of the jurisdiction also in respect of proceeding which might be taken before the Tribunal later on, the civil court would have no jurisdiction to entertain any proceeding thereof. In other words the bar of civil court would apply to all matters which might be taken cognizance by the DRT apart from those matters in which measures have already been taken under sub-section (4) of section 13 and as such the order impugned is vitiated but the same had not been taken into consideration.

7. Mr. Bardhan further submitted that it is manifested from paragraph 17(g) of the plaint wherein plaintiff averred that defendant no. 3, 4 and 5 have mortgaged the suit property to the bank and the bank has initiated a proceeding before DRT. In this context Mr. Bardhan pointed out prayers in (m) (n) (q) (v) of para 21 of the plaint. He therefore argued that the reliefs have been claimed in the suit, with regard to an immovable property which is a secured asset as envisaged under the SARFAESI Act, 2002. When it is an admitted position that the bank has taken steps for the purpose of recovery of its dues and when a notice under section 13(2) of the Act of 2002 had already been issued, the civil court has no jurisdiction to deal with such matter as the DRT or appellate authority is only empowered to determine in respect of any action taken or to be taken in pursuance of any power conferred under this Act. In this context he relied upon ***Jagdish Singh Vs. Hiralal*** reported in **(2014) 1 SCC 479** and ***Shri Ananda Kr. Mills Vs. Indian overseas Bank*** reported in **(2019) 14 SCC 788.** He further contended that when measures under section 13(4) of the Act of 2002 has not been challenged by the secured creditor in a suit before the civil court, the Civil Court denuded of its jurisdiction if any of the properties involved in the suit is a secured asset. In reply to the argument advanced by learned counsel for the opposite party that DRT have no jurisdiction to decide the issue of fraud, Mr. Bardhan relied upon a judgment of this court passed in **Idol India projects Ltd. Vs. *Smt. Nupur Ghosh & Others,*** reported in **2014 SCC Online Cal 20247**. In this context he also referred and relied upon **Delta International ltd. and others Vs. Smt. Nupur Mitra & others** reported in **2017 SCC Online Cal 9775** and contended that plaintiff cannot by clever drafting seek to create an illusion of a cause of action and thereby continue with an action in a civil court bypassing the provisions of special statute. The court below ought to have keep in mind the purpose and object of the special statutes, while considering the claims made in the plaint. In this context he also relied upon ***Jalan Inter continental Hotels Pvt. Ltd. Vs. State Bank of India & another*** reported in **AIR 2017 Cal 194**. Accordingly petitioners prayed for allowing the application filed under Order VII rule 11.

8. Ms. Chakraborty learned counsel appearing on behalf of the opposite party argued that the scope of application under order VII rule 11 is very limited. The court while deciding such application has to consider only the averments of the plaint to come to a conclusion as to whether the plaint falls within the mischief of order VII rule 11 (d) to reject such plaint. Referring judgment reported in **(2017) 13 SCC 174,** she further argued since the power conferred on the court to terminate civil action at the threshold is drastic, the conditions enumerated under order VII rule 11 to exercise power of rejection of plaint, should be strictly adhered to. She further submits that from the plain reading of the plaint, there is nothing to show that the suit is barred by any law. Accordingly the court below was justified in not allowing defendants' prayer for rejection of plaint and as such the order impugned does not call for interference invoking jurisdiction of this court under Article 227 of the Constitution of India.

9. I have considered submissions made by both the parties.

10. Needless to say that under order VII rule 11(d), the plaint can be rejected only when the averments made in the plaint, discloses that the suit is barred under any law, more specifically under section 34 of the SARFAESI Act, 2002.

11. Section 34 of the SARFAESI Act, reads as follows:

> *"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)".*

12. Now I am to consider whether the averments made in the plaint as well as the prayer made in the plaint creates any bar under section 34 of the Act of 2002 to come to a conclusion that the issue involved in the suit comes within "*action taken" or "to be taken" in pursuance of any power conferred under the Act of 2002 or under the Recovery of Debts due to Banks and Financial Institutions Act 1993.*

13. On perusal of the plaint it appears that in para 21 of the plaint, plaintiff has made twenty six prayers which includes the prayer for declaration of the general power of attorney dated 15.01.2009 and the sale deed executed in favour of defendant No.3 by defendant No.4 in the name of plaintiffs as void. The plaintiff also prayed for decree that the defendant no. 3 has not acquired any right title interest in the property and all transactions entered into by any of the defendant no. 3 to 5 or anyone representing any of them with the defendant no. 8 to 9 concerning the suit property are *void-abinitio.* It also includes declaration that the defendant no.1 to 9 acted in conspiracy to defraud the plaintiffs on their right title interest and possession in respect of the suit property and to that extent mandatory injunction and also permanent injunction restraining defendant from taking any action whatsoever against the plaintiff, denying the right title interest and possession of the plaintiff with regard to suit property and every part thereof and also for recovery of damages.

14. From a cursory look on the plaint it appears that grievance of the opposite parties/plaintiffs is mainly against defendant no.2 who allegedly practiced fraud upon them and he impleaded other defendants as they had made conspiracy with defendant no.2. At this juncture the question arises as to whether the DRT have the jurisdiction to decide such fraud and to declare deeds sought to be cancelled as void in the suit. DRT is basically empowered to set aside the measures taken by the secured creditor invoking section 13. However the petitioners relying upon judgments reported in **(2019) 14 SCC 788** and also judgment of this court reported in **2014 SCC Online Cal 20247** contended that the DRT has the power to set aside all such action including sale and restoration or possession and such power is exercisable in all attending circumstances including fraud.

15. The aforesaid judgment of the co-ordinate Bench of this court is factually distinguishable with the case in hand as plaintiff opposite parties herein are claiming that they are in possession of the suit property and they are not aggrieved due to any action by DRT. Moreover, in the said case the plaintiff not only denied the intention to create a security but also alleged that a fraud has been committed on her by the said lessee in connivance with the banks in creating an equitable mortgage.

16. A Division Bench of this court in **Kaaiser oils Pvt. Ltd. Vs. Allahabad Bank** reported in **2017 (4) CHN (Cal) 410** considered **Jagdish Singh Vs. Hiralal (supra)** and came to a finding that DRT or appellate Tribunal is empowered to determine by or under the Act of 2002 except certain cases. General principles which were laid down in the said judgments are as follows:-

(i) *Civil Court's jurisdiction to entertain a declaratory suit is not barred as the DRT is not authorized to issue any declaration relating to title of the parties etc. DRT's Jurisdiction is restricted only to issuance of certificate.*

(ii) *Civil Court's jurisdiction to entertain a Civil Suit is not barred when complicated questions of disputed facts are involved in the lis which is required to be resolved by elaborate trial on evidence.*

(iii) *Civil Court's jurisdiction to entertain a suit is not barred when ultimate decision is to be taken on the allegations of fraud and misrepresentation.*

(iv) *Civil Courts' Jurisdiction to entertain any suit filed before the Bank takes any step for recovery of its dues by following the provisions of the Debt Recovery Act or the SARFAESI Act, is not barred.*

(v) *Civil Court's jurisdiction to entertain any suit in the nature of set off or counter-claim is also not barred, particularly when any of the actions of the bank to recover its dues as per the SARFAESI Act is not challenged in the suit."*

17. Learned Court below while rejected the application under VII rule 11 opined that in the suit a question has been raised regarding possession of the property and other questions relating to documents, as raised. The defendant no.1 and 2 in order to save the defendant no. 3 and 4 created sham documents of purchase without consideration, in order to defraud bank's claim rather than to cheat public money, which involves trial and such observation by the court below does not appear to be perverse, warranting interference by this court invoking jurisdiction under Article 227 of Constitution of India.

18. Having considered the facts and circumstances of the case and keeping in mind the settled principle of law that while considering application under order VII rule 11 of the Code, the averments made in the plaint are germane and since the fact stated in the plaint and also the principal reliefs prayed in the plaint are not barred under section 34 of the SARFAESI Act 2002, I have no other option but to conclude that the ultimate finding in the order impugned does not call for interference.

19. **C.O. 4663** of **2016** is accordingly dismissed.

20. However this order will not preclude the petitioners/defendants to file appropriate application before the court below challenging maintainability of the suit.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(AJOY KUMAR MUKHERJEE, J.)