2024:BHC-AUG:1101

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 361 OF 2023

Uttam s/o Dhondiba Tambure
age 61 years, occ. Business
r/o Wale Nagar, Khadgaon Road,
Latur. Tq. & Dist. Latur. .. Appellant

Versus

1. M/s Samarth Builders & Developers
Through its proprietor
Ajit s/o Nagnathrao Patil
age 48 years, occ. Business
r/o Wale Nagar, Khadgaon Road,
Latur, Tq. & Dist. Latur.

2. The Vaidyanath Urban Co-operative Bank
Limited, Parli Vaijnath,
Branch Kore Complex,
Masjid Road, Latur
Through its Branch Manager. .. Respondents

Mrs. Anjali Dubey, Advocate for the appellant.
Mr. Golewar, Advocate holding for Mr. A. R. Joshi, Advocate for respondent No. 2.

CORAM : R. M. JOSHI, J.
DATE : 12th JANUARY, 2024.

JUDGMENT :

1. Heard.

2. Admit. By consent, heard finally at admission stage.

3. This appeal takes exception to the judgment and order dated 3rd August, 2019 passed in Regular Civil Suit No. 325/2017 rejecting plaint under Order VII Rule 11(d) of Code of Civil Procedure ("CPC" for short) and confirmation thereof in Regular Civil Appeal No. 90/2022 by judgment and order dated 10th March, 2023.

4. Parties are referred to by their nominclature in the original proceeding for the sake of convenience.

5. Facts which led to filing of present appeal can be narrated in short as under :-

Plaintiff is owner of Plot No. 21 situated within the local limits of Latur Municipal Corporation (suit property). Defendant No. 1 is a builder and developer who had entered into an agreement of development in respect of the suit property with plaintiff. Plaintiff also executed power of attorney in favour of defendant No. 1. These documents are duly registered with Sub-Registrar of Assurances. As per the case of plaintiff, it was agreed between him and defendant No. 1 that plaintiff is entitled for 45% and defendant was to get 55% of built up area constructed on suit property pursuant to the development agreement. Defendant No. 1 was permitted to mortgage the built up area falling to his share. It is alleged by plaintiff that by playing fraud, defendant No. 1 executed deed of mortgage of entire suit property in favour of defendant No. 2-Bank. In the month of May 2017, plaintiff came to know about it and it was also revealed to him that a public auction of the suit property is scheduled on 16th June, 2017. Plaintiff claimed that the mortgage executed between defendant No. 1 and defendant No. 2 is void abinitio. On these averments, declaration is sought that the proclaimation of sale of the suit property is illegal,null and void with further relief of permanent injunction.

6. Defendant No. 2-bank filed application (Exhibit 17) under Order VII Rule 11(d) of CPC for rejection of plaint. This defendant invoked measures under Section 13(4) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SRFAESI Act" for short) and claimed that in view of provisions of Section 34 of the SRFAESI Act, jurisdiction of Civil Court is barred. Both Trial Court and First Appellate Court accepted the contention of defendant No. 2 and rejected the plaint. Hence, this appeal.

7. Learned counsel for plaintiff submitted that the Trial Court as well as the First Appellate Court have failed to take into consideration provisions of SRFAESI Act. According to her, Section 34 of the Act clearly contemplates that only matters which fall within the jurisdiction of tribunal as contemplated by Section 17 are excluded from the jurisdiction of the Civil Court and the issues raised in suit are beyond jurisdiction of Debt Recovery Tribunal (DRT). To support her submission, she placed reliance on following judgments :

(i) Sate Bank of India vs. Shri Sagar s/o Pramod Deshmukh (2017) ibelaw.in 112 HC
(ii) Dhurandhar Prasad Singh vs. Jai Prakash University 2001 DGLS(SC) 900
(iii) Kewal Krishan vs. Rajesh Kumar and others 2021 DGLS(SC) 785
(iv) Mardia Chemicals Ltd. etc. vs. Union of India & others AIR 2004 Supreme Court 2371
(v) Bank of Baroda and others vs. Gopal Shriram Panda and others, MANU/MH/0987/2021

8. Apart from this, it is canvassed that the First Appellate Court has committed error in considering the material other than plaint and document relied upon by the plaintiff along with plaint. To support this submission, she sought leave to place on record relevant documents filed before the First Appellate Court indicating the fact

regarding taking into consideration of documents filed by defendant No. 2 for the purpose of decision of application under Order VII Rule 11(d) of CPC.

9. Learned counsel for respondents, supported the impugned order by contending that both the Courts below have rightly taken into consideration the provisions of Section 34 of SRFAESI Act and no interference is required in the said order. It is contended that the First Appellate Court has confirmed the judgment of the Trial Court not only on the ground of documents filed by bank but also on merit the order was upheld.

10. Following substantial questions of law arise in this appeal :-

> (i) Whether First Appellate Court committed error in considering the pleadings and evidence beyond plaint or documents relied with plaint to reject plaint under Order VII Rule 11(d) of CPC ?
>
> (ii) Whether the First Appellate Court was required to record finding that the issues raised in suit are amendable to jurisdiction of Debt Recovery Tribunal under Section 17 of the SRFAESI Act ?

11. Perusal of the impugned judgment shows that the First Appellate Court has taken into consideration the defence of defendant No. 2 bank as well as the documents placed on record by this defendant. In view of Order VII Rule 11(d) of Code of Civil Procedure, the plaint can be rejected where the suit appears from the statement of the plaint to be barred by any law. Undisputedly, plaintiff has neither pleaded the facts which are reflected in paragraph No. 15 of the judgment of First Appellate Court nor the document confirming the said fact was placed on record in support of the plaint. It is settled law that the defence of defendant or any material placed on record by the defendant cannot be taken into consideration for the purpose of deciding rejection of plaint. The First Appellate Court seems to have got swayed with the fact brought on record by defendant that 55% of the property was only taken possession of by the bank. In any event, the rejection of plaint on basis of any material/defence of defendant is not permissible. Hence, such order cannot sustain.

12. At this stage it would be relevant to take note of provisions of Section 34 of SRFAESI 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).

A bare perusal of this provision shows that bar of Civil Courts jurisdiction is not absolute but the same is restricted to the extent of the matters which DRT or Appellate Tribunal is empowered under the Act to determine.

Section 17(2) of the Act, deals with powers of DRT to decide that the measures taken under Section 13(4) by secured creditor are in accordance with the rules or not and further provisions enable DRT to pass appropriate orders. Having regard to the aforestated provisions, it was incumbent on the part of the learned First Appellate Court to record finding that in order to apply bar under Section 34 of the SRFAESI Act, the issues sought to be raised in suit are amenable to the jurisdiction of Debt Recovery

Tribunal as contemplated by Section 17 of the Act. No findings are found on this aspect too in the impugned judgment and order. Thus, on both counts the judgment impugned deserves interference.

13. In view of the aforesaid discussion, the questions framed above deserve to be answered in affirmative. In view of this, impugned judgment does not sustain and the same is set aside. Regular Civil Appeal No. 90/2022 is remitted back to the First Appellate Court for decision afresh in accordance with law. Parties to appear before the First Appellate Court on 5th February, 2024. The First Appellate Court not to issue fresh notice to the parties.

14. Pending civil application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

dyb