IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL ST. NO. 9517 OF 2022
WITH
INTERIM APPLICATION NO. 17329 OF 2022

Shri Bhagwandas Jivraj Patel & Ors. .. Appellants

Versus

Union Bank of India and Anr. .. Respondents

Mr. S.S. Patwardhan i/b. Mr. Chetan G. Patil, Advocate for the appellants.
Mr. B.S. Jadhav, Advocate for respondent No.1.
Mr.Nagesh Chavan, Advocate for respondent No.2.

CORAM : KISHORE C. SANT, J.
RESERVED ON : 27.02.2024
PRONOUNCED ON : 13.03.2024

O R D E R :-

01. This appeal is filed challenging an order dated 07.01.2022 passed by the learned 4th Joint Civil Judge, Senior Division, Sangli, below Exh.1 in Special Civil Suit No.138 of 2019, under Order VII Rule 11-D of the Civil Procedure Code, holding that the Civil Court has no jurisdiction to entertain the suit.

02. Since the suit is dismissed for want of jurisdiction, by consent of

the parties the appeal is heard finally at the stage of admission.

03. The facts in short are that the plaintiffs/appellants entered into memorandum of understanding dated 06.06.2015 as party No.1. Party No.2 was defendant No.2 and its partners, whereby party No.2 was to complete the construction for some other entity and for that purpose the plaintiffs were to provide required finance only. Thereafter, defendant No.2 applied to defendant No.1 i.e. present respondent No.1 for loan of Rs. 1,62,50,000/-, to which the plaintiffs stood as a guarantor for one year i.e. till 31.03.2016. The plaintiffs deposited title deeds of the property with respondent No.1 bank on 31.03.2015. Since the plaintiffs stood as guarantor only till 31.03.2016 and since the mortgage was created on the property only till the that period, the plaintiffs issued a notice dated 30.03.2017, stating that one year of guarantor-ship is completed on 31.03.2016. Said guarantee is not renewed and no consent is taken from the plaintiffs to continue bank guarantee. Neither the loan was renewed. It was thus intimated that the plaintiffs need to be discharged from the liability. It was asked to the bank not to renew the loan granted to defendant No.2 without permission of the plaintiffs and not to enter into any transaction. This letter was never replied. The plaintiffs,

therefore, filed a suit on 01.04.2019 for declaration that the plaintiffs are discharged from the liability as a guarantors and for release of the mortgaged property. Further relief was prayed for reconveyance of the deposit of the title deed for release of the property by mandatory injunction. Further injunction was prayed from seizing the mortgaged property and not to recover the loan amount by dealing with the said property.

04. The bank appeared in the suit and filed written statement on 14.09.2019. It is defence of the respondent bank that the loan granted to defendant No.2 was not only for a year but was subject to only renewal and was repayable on demand. The property was mortgaged towards the security of the loan. It was submitted that there are transactions in the loan account till 15.03.2019. There is collusion between the plaintiff and defendant No.2. Making application for discharge appears to be suspicious. The suit ought to have been filed as commercial suit under the Commercial Courts Act. It was also stated that the Court has no jurisdiction to try the suit. The suit is filed four years after the alleged period of mortgage and on this count also suit is not maintainable.

05. Defendant No.2 also filed written statement. However, it is not necessary to discuss the same for decision of this appeal.

06. However, the plaintiff filed an application under Order XII Rule 6 for judgment on the basis of admissions given in the written statement by defendant No.2. In a written statement a statement was made that defendant No.2 had paid Rs.40 lakhs to the plaintiffs. However, same was not actually paid. As the liability is accepted, plaintiffs prayed for order directing defendant No.2 to pay Rs. 40 lakhs.

07. The further facts show that on 04.10.2021, the bank issued a notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002 (SARFAESI, 2002) to the plaintiffs as well as defendant No.2 and claimed amount of Rs.1,66,91,951=56 ps. Same was replied by communication dated 02.12.2020. It is specifically replied that the liability of the guarantor is already ceased to exit after one year from the date of execution of the document. Still on 08.12.2021 possession notice came to be issued by the respondent bank.

08. The learned Trial Court on the basis of the above facts framed preliminary issue by order dated 08.12.2021 as to – Whether the Civil Court has jurisdiction to entertain the suit? After hearing the arguments the trial Court held that the Civil Court has no jurisdiction to try and entertain the suit and dismissed the suit as per Order VII Rule 11D of the CPC. Thus, the original plaintiff/appellant is before this Court.

09. The learned Advocate for the appellant vehemently argued the appeal. He submitted that the Civil Court has jurisdiction as the relief claimed is for declaration that the plaintiff is no more liable for the liability in the capacity as a guarantor and for release of the mortgaged property. He submitted that the reasoning is based upon the provisions of the SARFAESI Act. The notice under the SARFAESI Act was issued on 04.10.2021 i.e. after the institution of the suit on 01.04.2019 and even after filing of the written statement by the respondent-bank. The trial Court has failed to consider the specific notice that was issued by the plaintiff to the bank on 06.06.2016. The said notice is not answered by the bank, neither any action was taken on that, till filing of the suit. He submits that section 34 of the SARFAESI Act, has no

application to the present case. He submits that while looking to the prayers in the plaint, it is clear that it is only the Civil Judge who has the jurisdiction to grant such prayer. He relied upon judgment in the case of **Bank of Baroda, Through its Branch Manager Vs. Gopal Shriram Panda and Anr., reported in 2021 SCC OnLine Bom 466**.

10. The learned Advocate for respondent No.1 vehemently opposed the appeal. He submits that the trial Court has rightly framed the preliminary issued in view of Order XIV Rule 2 of the CPC. In view of Section 35 of the SARFAESI Act, the provisions of the said Act overrides other laws and once action under the SARFAESI Act is started, the Civil Court ceases to have jurisdiction. His further argument is that looking to the definition of the borrower under section 2(1)(f) of the SARFAESI Act, even the plaintiff is a borrower within the meaning of said definition as he is guarantor and has mortgaged the property. He further submits that in view of section 17 of the SARFAESI Act, the provisions of the Contract Act are not applicable. The guarantor at the most can file a suit against the principal borrower. Looking to the object of the SARFAESI Act, it is clear that no Civil Court shall entertain the suit of this nature. It is also his argument that the present suit is outcome

of a fraud upon bank. It is submitted that the prior agreement between the plaintiff and defendant No.2 is not brought to the notice of the bank while executing the document by relying upon judgment in the case of **Mardia Chemicals Vs. Union of India, (2004) 2 Mah.L.J.1090**, wherein it is held that civil suit is maintainable only in case of fraud.

11. The learned Advocate for respondent No.1 also relied upon judgment of the Hon'ble Supreme Court in the case of **Kotak Mahindra Bank Ltd. Vs. Girnar Corrugators Pvt. Ltd., - Civil Appeal No. 6662 of 2022**.

12. The learned Advocate for respondent No.1 submits that even in view of section 137 of the Contract Act, mere forbearance to sue principal debtor does not discharge surety. In this case the guarantor has not shown any agreement to contrary. The bank is thus entitled to proceed against the guarantor/appellant. By use of clever drafting, the plaintiff is trying to obtain the relief from the civil court. He relied upon judgment passed by the Hon'ble Supreme Court in **SLP (C) No. 11030 of 2022 in the case of Charu Kishor Mehta Vs. Prakash Patel & Ors**.. It is submitted that a suit cannot be filed to injunct bank from taking action under the SARFAESI Act. All the questions in

this suit can be decided by the Debt Recovery Tribunal (DRT). He supports the order passed by the learned Trial Court and prays for dismissal of the appeal.

13. The learned Advocate for respondent No.2 submits that in view of Section 34 of the SARFAESI Act, section 17 does not come into play. He submits that there is no breach of the agreement by defendant No.2 and prays for rejection of the appeal.

14. After hearing the parties and considering the nature of dispute, the questions that arise for consideration are as under :-

i) Whether the order passed by the learned trial Court holding that the Civil Court has no jurisdiction is correct?

ii) Whether the relief prayed for can be granted by the DRT in a suit for the relief as prayed in the plaint in the present case?

15. Certain dates material for consideration of this appeal are :-

i) 31.03.2015 – The plaintiff stood guarantor for loan for a period of one year and also mortgaged the property.

ii) 30.03.2017 – The plaintiff issued notice to the bank for discharge of liability and for release of the mortgaged property.

iii) 01.04.2019 – The suit filed by the plaintiff for declaration and injunction.

iv) 04.10.2021 – The bank issued notice under section 13(4) of the SARFAESI Act.

16. Looking at the prayers of the suit, it is seen that the plaintiff has prayed for declaration that the plaintiff is not liable as guarantor to the loan, as there is breach of duty by the bank, in taking steps to recover the loan within one year. The second relief sought is for the reconveyance deed in respect of the title deed by mandatory injunction and the third relief sought is not to recover the amount of loan by dealing with the property which is mortgaged by way of deposit of the title deed.

17. The Trial Court considered the judgment in the case of **Bank of Baroda (Supra)**. Para No.17 of the said judgment is as under :-

> "17. The concession as given in Mardia Chemicals (supra) in para 53 thereof, that in cases when a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contract Act e.g. where any variance in terms of the contract has been made without his consent then in such cases a Civil Court may have jurisdiction to entertain the case as character as a guarantor itself is denied, or a plea is raised that the guarantor stood discharged due to any of the contingencies as enumerated in the Contract Act, needs to be also borne in mind, apart from which when fraud and

> misrepresentation are alleged, it would be the Civil Court which would have jurisdiction, as such a plea, cannot be entertained and decided by the DRT in its jurisdiction under Section 17 of the SARFAESI Act read with Section 17 of the DRT Act. Of course, not every pleading of fraud, would bring the matter out of the jurisdiction of the DRT. It is only if the fraud or misrepresentation, as alleged, is prima facie apparent on the face of it, that the Civil Court will, in such a matter have jurisdiction. The Hon'ble Apex Court in the case of A. Ayyasamy (supra), has delineated the nature of pleadings necessary to constitute a prima facie case of fraud, and have held that not every allegation of fraud will take the matter out of the jurisdiction of the Forum, where it is being litigated. The fraud alleged must be not only apparent on the face of the record but must also be all pervading."

. This Court in the said judgment considered that in cases when a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contract Act e.g. where any variance in terms of the contract has been made without his consent, then in such cases a Civil Court may have jurisdiction to entertain the cases as character as a guarantor itself is denied, or a plea is raised that the guarantor stood discharged due to any of the contingencies as enumerated in the Contract Act. In para 22 this Court held that any exclusion of such a right, has to be zealously guarded against and the exclusion clause has to be strictly construed for the reason that the exclusion cause may at times be in conflict with the common law rights of a citizen and may result in denial of the remedy for a wrong caused to him, in the propagation of the exclusion principle. The Court further considered that the rights and remedies for enforcement of such rights, in relation to specific issues were created by enactments, separate fora in the form of Tribunals came to be created for enforcement of such rights. The only purpose was to provide a speedy remedy. It is held that such special fora is restricted to a particular extent and nature of right and it does not address all factors and facets of violation of claims which may arise out of enforcement of such rights by a special forum. Thus, it is held that a security interest may at times also involve the common law rights of a citizen, who is not a party to its creation. In clause (l) of the said para it is further held that when a security interest was validly created and the applicability of the measures, itself is in doubt, the DRT cannot determine such issue. In para No.22.4 it is specifically held that Special Forum/DRT would not have jurisdiction in the cases given as (a), (b) and (c). Clause (a) is as under :-

> "(a) A plea by the guarantor of discharge under Sections 133 and 135 of the Contract Act."

18. Ultimately, the Division Bench answered the question in clause 27(E) as under :-

> "(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."

19. This judgment was passed on a reference by posing specific

questions. This Court finds that this judgment is clearly applicable to the case in hand.

20. Coming to the submission of the respondents, as far as section 34 and 35 of the SARFAESI Act are concerned, this Court finds that bar is created under section 34 of the SARFAESI Act to entertain any suit or proceeding in respect of any matter which DRT 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.

. The learned Advocate for the respondent emphasized on the words "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". He thus submits that in this case the bank was entitled to take action under the SARFAESI Act. Such power cannot be exercised by filing a suit praying for injunction. It is not necessary that the action is taken by the bank. Suit cannot be entertained even where creditor is likely to take action.

With the aid of section 35, he submits that provisions of the SARFAESI Act are to override other laws, as it is a special law.

21. This Court, however, finds that while considering section 34 this Court has to consider as to whether otherwise the DRT has jurisdiction to grant relief when relief is claimed like prayers in the present suit. The answer is clearly NO, in view of judgment of Division Bench in the case of **Bank of Baroda (Supra)**.

22. Coming to the judgment in the case of **Charu Kishor Mehta (supra),** in that case, credit facility was availed from the bank. There was some amount outstanding. The bank moved an application before the DRT for recovery of its dues from the borrower. The application was allowed by the DRT and recovery certificate was issued directing the borrower and guarantor to repay the outstanding dues. The order of the DRT was challenged before the Debt Recovery Appellate Tribunal (DRAT). Thereafter, the settlement took place between the parties. In view of settlement the borrower agreed to handover possession of the secured assets. He further gave an undertaking not to obstruct execution in case of recovery certificate is

issued in case of default of consent term. Inspite of that the borrower failed to repay the amount and to handover the possession of the secured assets in breach of consent terms in the settlement. The borrower even obstructed proceedings of the recovery certificate by filing proceedings under the SARFAESI Act and also before the High Court and Hon'ble Supreme Court. It is, thereafter, applications before the DRT were filed by the borrower seeking discharge from the liability, stating that his liability was only to the extent of Rs.5 crores with interest. Said application was also dismissed by the DRT. That order was also challenged in the High Court and before the Hon'ble Supreme Court. After all these proceedings, the borrower filed a suit before the trial Court for stay of the auction and against the participation of the defendants in the auction. It is in that case it was held that the Civil Court has no jurisdiction. The Hon'ble Apex Court considered the judgment in the case of **Mardia Chemicals (supra)**. In para 51 it is held that a very limited jurisdiction of the Civil Court can also be invoked, for the example given in that case.

23. So far as judgment relied upon by respondent No.2 in the case of **Kotak Mahindra (supra)** is concerned, the question before the Hon'ble Apex

Court was as to whether the MSMED Act would prevail over the SARFAESI Act and whether the recovery proceeding/recoveries under the MSMED Act would prevail over the recovery made/recovery proceedings under the SARFAESI Act. The Hon'ble Supreme Court considered Section 24 of the MSMED Act, which provides that provisions of section 15 to 23 of the MSMED Act would have overriding effect over other laws. It is in that view it was held that in MSMED Act, there is no specific express provision giving 'priority' for payments under the MSMED Act over the dues of the secured creditors or over any taxes or cesses payable to Central Government or State Government or Local Authority as the case may be. It was held that in sharp contrast to this, section 26E of the SARFAESI Act which has been inserted vide Amendment in 2016, provides that notwithstanding anything inconsistent therewith contained in any other law for the time being in force, after the registration of security interest, the debt due to any secured creditor shall be paid in 'priority' over all other debts. This Court finds that even the judgment would not have application to the facts of the present case.

24. By going through the judgment challenged in this appeal, it is seen that the learned Court has also considered notice dated 04.10.2021

issued by the bank under section 13(4) of the SARFAESI Act. It is trite law that the position as on date of filing of the suit needs to be considered while dealing with the suit. There is no reason to consider the event that took place, much after filing of the suit. In this case, suit was filed on 01.04.2019 and the notice of discharge was given on 30.03.2017. Thus, action under the SARFAESI Act is taken more than five years after issuance of the notice and 2 ½ years after the suit is filed. The learned Trial Judge could not have considered the subsequent action sought to be taken by the bank under the SARFAESI Act. On this count also, this Court finds that the order passed by the learned Trial Court is incorrect. So far as submission that by filing a suit the bank cannot be injuncted is concerned, this Court finds that prayers (a) to (c) in the suit cannot be taken to injunct the bank from taking any action. So far as prayer (d) is concerned, there may be some debate. At this juncture, it would not be proper to go into that question.

25. In view of all the above discussion, this Court finds that in the present case the Civil Court has jurisdiction to entertain the suit. So far as question as to whether the DRT has jurisdiction to grant relief, it is already considered in this order that the DRT does not have jurisdiction to grant relief

prayed for in the plaint in the present suit. Consequently, this Court finds that the appeal needs to be allowed. Hence, the following order :-

<u>O R D E R</u>

(i) The appeal is allowed.

(ii) The order dated 07.01.2022 passed by the learned 4th Joint Civil Judge, Senior Division, Sangli, below Exh.1 in Special Civil Suit No.138 of 2019 is set aside.

(iii) It is held that the Civil Court has jurisdiction to try and entertain the suit. The suit is restored to its original position. The Trial Court to decide the suit as expeditiously as possible.

(iv) In view of disposal of the First Appeal, connected Interim Applications do not survive and are disposed off accordingly.

[KISHORE C. SANT,J.]