IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Appeal from Order No. 1052 of 2023
With
Interim Application No.18301 of 2023
In
Appeal from Order No. 1052 of 2023

Nirmala Krishna Sharma
3rd Floor, Mani Bhawan, Adjacent
to Saraswati Vidhyalaya, 11th Road,
Chembur, Mumbai-400 071. ....Appellant
(Org.Plaintiff)

Versus

1. Canara Bank
Represented by the Board
of Directors, through Managing
Director & Chief Executive Officer,
112, JC Road, Bangalore-560002.

CHITRA SANJAY SONAWANE
Digitally signed by CHITRA SANJAY SONAWANE
Date: 2024.01.11 20:29:16 +0530

2. Canara Bank
No.7249, Main H.O.P.B.
Dayanand, Saraswati Road, Chembur
Mumbai-400 071.

3. Authorised Officer
Canara Bank, No.7249, Main H.O.P.B.
Dayanand, Saraswati Road, Chembur
Mumbai-400 071.

4. Vivitar Electronics
201, A/549, C, Symphony, 11th road
Chembur, Mumbai-400071

Factory Address:
Plot No.D-178/2, TTC Industrial
Area, MIDC, Nerul, Navi Mumbai

5. Ms Sheela Subramaniam
201, A/549, C, Symphony, 11th Road,
Chembur, Mumbai-400 071.

6. Mr R.Subramaniam
201, A/549, C,Symphony, 11th Road,
Chembur, Mumbai-400 071.

7. The Chairman
Saraswati Co-op.Housing Society Ltd.
CTS No.8, Village Borla,
N.G. Acharya Marg, Chembur,
Taluka-Kurla,Mumbai-400 071. … Respondents

Alongwith

Interim Application No.18301 of 2023
In
Appeal From Order No.1052 of 2023

Nirmala Krishna Sharma,
3rd Floor, Mani Bhawan, Adjacent to
Saraswati Vidyalaya, 11th Road,
Chembur, mumbai-400 071. … Applicant/Original Appellant.

<u>IN THE MATTER BETWEEN:</u>

Nirmala Krishna Sharma,
3rd Floor, Mani Bhawan, Adjacent to
Saraswati Vidyalaya, 11th Road,
Chembur, mumbai-400 071. … Appellant.

Versus

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Represented by the Board
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112, JC Road, Bangalore-560002.

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201, A/549, C, Symphony, 11th Road,
Chembur, Mumbai-400 071.

6. Mr R.Subramaniam
201, A/549, C,Symphony, 11th Road,
Chembur, Mumbai-400 071. … Respondents.

Mr Mathew Nedumpara a/w Ms Hemali Kurne, Mr BS Munday i/by Nedumpara Associates, for the appellant.
Mr OA Das, for respondents No.1 to 3.
Dr Chittoor Rajamannar, for respondents No. 4 to 6.

Coram: R. N. Laddha, J.
Date: 11 January 2024.

P.C.

By consent and at the request of the learned Counsel for the parties, heard finally.

2. The appellant/ plaintiff seeks to challenge the order dated 31 October 2023 passed by the learned Judge of the City Civil Court at Mumbai in S.C. Suit (St) No.7484 of 2023, whereby the learned Judge returned the case papers to the plaintiff as the suit was not maintainable under section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act'). The impugned order reads thus:

> "*By preacipe.*
>
> *Heard the officer from the Board department and Ld. Advocate for the plaintiff.*
>
> *The Board Department raised objection that the prayer pertains to SARFAESI ACT, thus the suit is not maintainable. The Ld. Advocate for plaintiff submitted that the suit is filed by legal heirs of deceased Mr. Kantan. The Mortgage allegedly created in respect of suit property by deceased Mr. Kantan is a sham transaction. Therefore, they have challenged the proceedings initiated by the defendant under SARFAESI Act.*
>
> *Herein is to be seen that the plaintiff has filed the present suit for declaration and permanent injunction. The plaintiff has challenged the order of DRT there by rejecting plaintiffs reliefs for ad-interim injunction. Plaintiff also sought injunction to restrain the defendants for proceeding further under SARFAESI Act. It is contended that the order of DRT has been also challenged*

in the appeal. Thus, in view of Section 34 of SARFAESI Act, the suit is not maintainable.

Hence, the office objection is up held.

Case papers be returned to the plaintiff."

3. The dispute between the parties pertains to a mortgage executed by the late Mr Shrinivas Kantan and respondent-bank. The appellant/ plaintiff claims that she is the legal heir of Mr Shrinivas Kantan, her uncle, based on a family arrangement/ settlement. The plaintiff alleges that her late uncle held a 1/3rd share in a flat bearing No. B1 on the fifth floor of the building of respondent No.7-society, and to secure the loan advanced by respondent-bank to respondent No.4, he acted as a guarantor and fraudulently mortgaged his 1/3rd share in the said flat. On default in repaying the loan, the respondent-bank issued notice to the guarantors, including the deceased, under the SARFAESI Act and proceeded to sell the flat by e-auction. After her uncle's demise, when the plaintiff discovered the public and auction notices issued by the respondent-bank, she approached the Debt Recovery Tribunal (for short, 'DRT') to challenge the notices and restrain the Bank from selling the flat. This application was dismissed by an Order dated 28 January 2022 on the ground that the plaintiff was not an aggrieved person as required under the SARFAESI Act. Subsequently, the plaintiff approached the learned trial Court by filing the above suit, which the learned trial Court, by the impugned order dated 31 October 2023, held as not maintainable.

In the suit, the plaintiff sought the following reliefs:

> "*a) Declare that the mortgage allegedly created in respect of the property situate at B1 504, Fifth Floor, Shree Saraswati Co-operative Housing Society Limited, C.T.S. No.08, situated at Village Borla, N. G. Acharya Marg, Chembur (E), Taluka Kurla, Mumbai admeasuring 935 sq. ft. by the deceased Mr. Kantan is a sham transaction being one vitiated by fraud and is void ab initio;*
>
> *b) Declare that the Plaintiff is the legal heir of the deceased Mr.Kantan, who was legally the one third co-owner of the flat being the property situate at B1 504, Fifth Floor, Shree Saraswati Co-operative Housing Society Limited, C.T.S. No.08, situate at Village Borla, N. G. Acharya Marg, Chembur (E), Taluka Kurla, Mumbai admeasuring 935 sq. ft.*
>
> *c) to declare that all actions taken by the Respondent Bank being taken behind the back of the Plaintiff are void and further to grant perpetual prohibitory and mandatory injunction restraining and prohibiting the Defendants Nos.1 to 5 and their officers, agents and men from any manner interfering with the absolute right of possession and enjoyment of the properties of the Plaintiff so too of her company, which the Defendant No.1 bank falsely claims to be a secured asset at its hands or initiating or continuing any action under any law as against the plaintiff/ her company;*
>
> *d) To declare that the order of the DRT rejecting ad-interim injunction is void;*
>
> *e) declare that in so far as, the matters pertaining to the Hindu succession are concerned the Debt Recovery Tribunal created under the provisions of the DRT Act, 1993 does not provide for special forums for the enforcement of the Rights and redressal of grievances, the Civil Courts are empowered for the same and the jurisdiction of the Civil Court is not ousted;*"

4. Mr Mathew Nedumpara, the learned Counsel appearing on behalf of the appellant, submits that the execution of the mortgage

by the deceased Mr Kantan was fraudulent, and the DRT is not empowered to deal with the issues of fraud, but only the civil court is competent to decide such issues. He submits that the jurisdiction of the civil court is not to be readily inferred, but such exclusion must either be explicitly expressed or clearly implied. He further submits that even if the jurisdiction is so excluded, the civil court has the jurisdiction to examine the cases where the provisions of the SARFAESI Act have not been complied with, or the statutory Tribunal has not acted in conformity with the Act or not followed the fundamental principles of judicial procedure. In this respect, the learned Counsel invited the attention of this Court to section 13 of the SARFAESI Act to state that the respondent-bank did not follow the principles of natural justice by issuing fresh notices on the legal representatives of Mr Kantan, and the recovery proceedings were initiated against a dead person.

5. The learned Counsel placed on record an affidavit dated 11 January 2024 stating that the appellant is the daughter of one Mrs Vanaja Rama Murthy, the sister of the deceased Mr Kantan. He states that the appellant, being the legal heir/ niece of the deceased Mr Kantan, the respondent-bank, ought to have served upon her a fresh notice under section 13(2) of the SARFAESI Act before initiating the recovery proceedings. To support his contentions, he

relied upon ***(i) Kiran Singh Vs Chaman Paswan*[1]*; (ii) A. R. Antulay Vs R. S. Nayak*[2]*; (iii) Mafatlal Industries Ltd. Vs Union of India*[3]*; (iv) Mardia Chemicals Ltd. Vs Union of India*[4]*; (v) SV Subramaniam Vs Cypress Semiconductor Technology India Private Limited*[5]*; (vi) Bank of Rajasthan Ltd. Vs VCK Shares & Stock Broking Services Ltd.*[6]*; and (vii) Mrs. Leelamma Mathew Vs M/s. Indian Overseas Bank*[7]**.

6. Mr OA Das, the learned Counsel appearing on behalf of respondents No.1 to 3/ Bank, submits that respondent No.5 is the proprietress of respondent No.4 firm. Respondents No.5 and 6 and the deceased Mr Kantan were co-owners of the flat. They stood as guarantors for the credit facilities availed by respondent No.4 and mortgaged the flat as collateral security. On 30 March 2021, the borrower's account was declared as an NPA, and on 16 April 2021, the respondent-bank issued a notice under section 13(2) of the SARFAESI Act to respondents No.4 to 6 and the late Mr Kantan. In his lifetime, the deceased never contested the validity of this notice or the mortgage and instituted any proceedings to that effect. The borrower and the other guarantors, i.e., respondents No.4 to 6, have also, to date, neither challenged the mortgage nor the notices

1 1954 SCC Online SC 11
2 (1988) 2 SCC 602
3 (1997) 5 SCC 536
4 (2004) 4 SCC 311
5 2008 (1) CTC 471
6 2022 LiveLaw (SC) 941
7 2022 LiveLaw (SC) 973

issued by the bank nor the recovery action of the bank. On non-payment of the outstanding dues, after the completion of the statutory period of 60 days, the respondent-bank, on 2 July 2021, took symbolic possession of the flat, and the possession notice was affixed on the door of the flat. After receiving the valuation report, the respondent-bank put up the flat for e-auction; thereafter, the flat was sold to Ms Dhanashree Racheti and Mr Shailesh Racheti. By an order dated 11 August 2023, the learned ACMM, Esplanade, Mumbai, on the respondent-bank's application under section 14 of the SARFAESI Act, appointed a court commissioner to take physical possession of the flat. Subsequently, the court commissioner, in his letter dated 15 December 2023 addressed to the Commissioner of Police, Mumbai, requested police assistance to take possession of the flat.

7. The learned Counsel for respondents No.1 to 3/ bank submits that the appellant has no locus to challenge the recovery proceedings initiated by the bank as the appellant is neither the mother, widow, or daughter of the deceased nor has she produced any succession certificate or any other testamentary document to show that she is a legal heir of the deceased Mr Kantan. A mere statement that she is the legal heir of Mr Kantan is not sufficient to bestow the title of a legal heir upon the appellant when, in fact, the appellant is required to follow the procedure laid down under

section 214 of the Indian Succession Act, 1925 (for short, 'the ISA'). He submits that the DRT rejected the appellant's challenge to the notices as no document was produced by the appellant to show that she is the legal heir of the deceased. Still, no steps have been taken by the appellant to obtain an heirship/ succession certificate or any document as required under section 214 of the ISA evidencing her relationship with the deceased, Mr Kantan. In the absence of any such document, the respondent-bank was not under any obligation to inform her about the recovery proceedings. The onus is upon the appellant to show that she is the legal heir of the deceased Mr Kantan and not on the respondent-bank.

8. The learned Counsel for respondents No.1 to 3/ Bank contends that the order passed by the DRT is appealable under section 18 of the SARFAESI Act. Instead of availing the statutory remedy, the appellant filed a review application bearing MA No.34 of 2022 before the DRT to recall the order dated 28 January 2022, which stood dismissed by an order dated 9 January 2024. He contends that to secure the credit facilities availed by respondent No.4, respondents No.5 and 6, the deceased Mr Kantan executed a mortgage in favour of the bank by depositing the title deeds of the flat. After the borrower and the guarantors failed to repay the outstanding dues, the bank, by following the procedure laid down under the SARFAESI Act, sold the flat by e-auction. He submits

that the appellant cannot go forum shopping to challenge the validity of the DRT order by moving to the civil court and the DRT in review. The appellant ought to avail the statutory remedy and agitate its contentions before the Debt Recovery Appellate Tribunal (for short, 'DRAT'). The learned Trial Court has rightly held that the suit is not maintainable and barred in terms of section 34 of the SARFAESI Act and passed the impugned order; thus, the present appeal is without merit and ought to be dismissed. To support his contentions, he relied upon ***(i) State Bank of India Vs Jigishaben[8]; (ii) Canara Bank Vs P. Selathal[9]; and (iii) V. Thulasi Vs Indian Overseas Bank[10].***

9. Dr Chittoor Rajamannar, the learned Counsel for respondents No.4 to 6, submits that respondent-bank was aware of Mr Kantan's demise and did not follow the necessary procedure under the SARFAESI Act. He contends that the respondent-bank ought to have issued fresh notices to the legal representatives of the deceased. At this juncture, it is to be noted that these respondents never made any grievance, raised any complaint, or instituted any proceedings against the bank's recovery action. These respondents choose to remain absent before the City Civil Court at Bombay in the civil suit and the DRT in the securitisation application and the

8 2011 (2) Mh.L.J. 342
9 (2020) 13 SCC 143
10 (2011) 8 MLJ 441

review proceeding. They did not file their reply before these authorities in those proceedings, nor did they do so in the present appeal.

10. This Court has heard the learned counsel for the parties at length and given anxious consideration to the material on record and the applicable law.

11. On perusal of the record, more particularly the appellant's affidavit dated 11 January 2024, it can be inferred that Mrs Vanaja Rama Murthy, the mother of the appellant, is still alive. The appellant claims to be a legal heir of the deceased on the strength of her relation with her mother, Mrs Vanaja Rama Murthy, who she claims to be the sister of the deceased Mr Kantan. However, Mrs Vanaja Murthy being a legal heir of the deceased, as claimed by the appellant, has not made any grievance against the respondent-bank's action, nor has she initiated any proceedings to challenge the mortgage executed by her deceased brother and the bank's action. Before the civil court and even before the DRT, she was not made a party to the proceedings. Additionally, the deceased Mr Kantan, during his lifetime, did not challenge the mortgage and the notice issued under section 13 of the SARFAESI Act. Furthermore, the other purported legal representatives of Mr Kantan have also not made any grievance or challenged the recovery proceedings before

any authority to date.

12. The appellant, in her plaint, claims that the deceased, Mr Kantan, declared her as his legal heir by way of a family arrangement/ settlement. However, no such document is placed on record.

13. The DRT rejected the claim of the appellant on the ground that she did not submit any document to show that she was the legal heir of the deceased. However, to date, she has not filed an application before the appropriate authority to obtain an heirship certificate or letters of administration to the estate of the deceased as required under the law.

14. In the plaint except the mere averments of fraud, nothing is found in the record to substantiate the allegation of fraud. The appellant initially approached the DRT. Thereafter, she approached the City Civil Court at Bombay. A bare perusal of the plaint shows that the plaintiff sought a declaration from the civil court to declare the order dated 28 January 2022 passed by DRT as void. As per section 18 of the SARFAESI Act, the order passed by the DRT is appealable before the DRAT. Admittedly, in paragraph 28 of the plaint, the plaintiff states that she has challenged this order in appeal before the DRAT. Section 34 of the SARFAESI Act

explicitly bars the civil court's jurisdiction to entertain any suit or proceeding in respect of any matter which the DRT or DRAT is empowered to determine. The question of the validity of the order dated 28 January 2022 passed by the DRT can be gone into only by the DRAT as laid down by the SARFAESI Act, and it explicitly bars an adjudication on this issue by the civil court.

15. In ***State Bank of India Vs Jigishaben*** (*supra*), the Hon'ble Supreme Court observed as follows:

> *"…….the mere use in a stray averment in the plaint of the expression 'systematic fraud', would not be sufficient to bring the case within the scope of the exception carved out in Mardia Chemicals (supra) since the plaint has to be read and construed as a whole. So constructed, it is clear that the case of the plaintiff clearly falls within a matter which the Debt Recovery Tribunal is empowered by and under the Act to determine. Moreover, no injunction of the nature sought could be granted by the court in respect of any action taken or to be taken in pursuance of the Act. The necessary corollary is that recourse to proceedings in the form of a civil suit is barred by section 34."*

16. Further, Rule 11 of Order VII of CPC provides for the rejection of a plaint. Clause (d) of Rule 11 states that a plaint shall be rejected when the suit appears from the statement in the plaint to be barred by any law. The court is empowered to reject the plaint *suo moto*. Further, under Rule 11, a plaint cannot be rejected in part. A reference in this regard can be made to the decision of the

Hon'ble Supreme Court in ***Patil Automation (P) Ltd. v. Rakheja Engineers (P) Ltd.***[11] and ***Geetha v. Nanjundaswamy***[12].

17. Given the above, no interference is warranted in the impugned order. Accordingly, the present appeal stands dismissed. The pending interim application does not survive and is disposed of.

[R. N. Laddha, J.]

11 (2022) 10 SCC 1
12 2023 SCC OnLine SC 1407