IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 521 OF 2024

Shri. Mahalaxmi Co-operative Bank Ltd,
Kolhapur through its authorized officer
Prashant Hanmant Patki ...Applicant

Versus

Akshay Anil Sarda and ors. ...Respondents

Mr. Rugwed Kinkar, a/w Drupad Patil, for the Applicant.
Mr. Chetan Patil, a/w Vishwesh Gadage, for the Respondents.

CORAM:	N. J. JAMADAR, J.
RESERVED ON:	14th JANUARY, 2025
PRONOUNCED ON:	16th APRIL, 2025

ORDER:-

1. This revision is directed against an order dated 3rd June, 2024 passed by the learned Civil Judge, Senior Division, Kolhapur, whereby an application preferred by the applicant – respondent No.9 for rejection of the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 ("the Code") came to be rejected.

2. Shorn of unnecessary details, the background facts can be stated as under:

2.1 Giridharlal Sarda was the husband of Pushpawati (D4) and father of Anil (D1), Nitin (D5), Dhiraj (D7), Dipak (D8) and Mahesh, the deceased defendant No.6, and the predecessor-in-title of defendant Nos.6A and 6B. Akshay, the plaintiff is the son of Anil (D1) and Sangita (D2). Giridharlal Sarda passed away on 26th December,2015.

2.2 The plaintiff averred that Giridharlal, his grandfather, was engaged in a cloth business. Giridharlal had acquired properties described in paragraphs 1A and 1B out of the income of the said family business. The property described in paragraph 11(E) was purchased by late Giridharlal from joint family funds in the name of defendant No.1. Likewise, the properties described in paragraph 1C were acquired in the name of defendant No.6 out of the income from the joint family business and the property described in paragraph 1D was acquired in the name of defendant Nos.5, 6 and 7. An area admeasuring 43.9 sq. mtrs. of land alongwith the structures thereon was acquired by defendant Nos.5, 6 and 7 out of the joint family funds. The suit properties are undivided properties. There has not been partition by metes and bounds. The plaintiff thus asserted that he has 1/24th undivided share in the suit properties.

2.3 The plaintiff claimed that defendant Nos.1 and 5 to 8, taking undue advantage of the mutation of the suit properties in their names, have availed financial facility from Shri. Mahalaxmi

Co-operative Bank Ltd., Kolhapur, (D9). Certain instruments have been executed to create security interest in the suit properties without the consent of the other co-owners. Defendant Nos.1 and 5 to 8 had not apprised the plaintiff about the creation of security interest over the suit properties. The plaintiff became aware of the said transactions when encumbrances were noted on the record of rights of the suit properties and defendant No.9 obtained symbolic possession of the suit properties under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act, 2002"). Defendant No.9 addressed a notice to take actual possession of the suit properties on 5th April, 2024. Thus, the plaintiff was constrained to institute the suit for partition and separate possession of his 1/24th undivided interest in the suit properties and also to restrain defendant Nos.1 and 5 to 9 from transferring, alienating or otherwise creating third party interest in the suit properties.

2.4 Defendant No.9 filed an application for rejection of the plaint contending that the suit has been instituted to stall the action of defendant No.9 in accordance with the provisions contained in the SARFAESI Act, 2002. The suit is, thus, clearly barred by the provisions contained in Section 34 of the

SARFAESI Act, 2002. Likewise, the suit was not maintainable on account of absence of pre-suit notice as envisaged by the provisions contained in Section 164 of the Maharashtra Co-operative Societies Act, 1960 ("the Act, 1960").

2.5 The application was resisted by the plaintiff.

2.6 By the impugned order, the learned Civil Judge was persuaded to reject the application observing that the question as to whether the suit properties were the joint family properties of the plaintiff and defendant Nos.1 to 8 or the self-acquired properties of defendant Nos.1 and 5 to 8 was required to be determined at the stage of trial. Since the suit has been instituted for partition and separate possession of the share of the plaintiff, the Debt Recovery Tribunal ("DRT") would not have jurisdiction to decide the issues raised in the suit. Thus, the jurisdiction of the Civil Court was not barred. Nor the pre-suit notice, as envisaged by Section 164 of the Act, 1960, was warranted in the facts of the case.

3. Being aggrieved, defendant No.5 has invoked the revisional jurisdiction.

4. I have heard Mr. Kinkar, the learned Counsel for the applicant, and Mr. Patil, the learned Counsel for respondent

No.1, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record including the plaint in Special Civil Suit No.221 of 2024.

5. Mr. Kinkar, the learned Counsel for the applicant, would urge that the learned Civil Judge did not properly appreciate the nature of, and the avowed object with which, the suit came to be instituted. Laying emphasis on the fact that in the plaint, especially in the clause of cause of action, it has been categorically averred that the suit came to be instituted after defendant No.9 took symbolic possession of the secured assets under Section 13 of the SARFAESI Act, 2002, Mr. Kinkar would urge that the suit was driven by the objective of derailing action under Section 13 of the SARFAESI Act, 2002. If the plaintiff and any other person, claimed that they have any interest in the secured assets and, thus, aggrieved by the measures taken by the secured creditor, it was incumbent upon them to make an application to the DRT as provided under Section 17 of the SARFAESI Act, 2002. Instead of resorting to the said statutory remedy, the plaintiff has instituted the suit to scuttle the measures under the SARFAESI Act, 2002 adopting the device of cleaver drafting. The learned Civil Judge ought to have read the plaint in a meaningful manner. If so read, according to Mr.

Kinkar, it becomes abundantly clear that the suit for partition and separate possession is a subterfuge to obviate the action under the SARFAESI Act, 2002.

6. Mr. Kinkar would urge that the security interest in the suit properties were created from the year 2005 onwards. The suit for partition and separate possession came to be instituted in the year 2024, only after defendant No.9 Bank took measures under Section 13 of the SARFAESI Act, 2002. Moreover, the legality and validity of the mortgages executed by the co-defendants have not been challenged by the plaintiff. In these circumstance, according to Mr. Kinkar, the suit was clearly barred by the provisions contained in Section 34 of the SARFAESI Act, 2002.

7. To lend support to these submissions, Mr. Kinkar placed reliance on the decisions of the Supreme Court in the cases of ***T. Arivandandam vs. T. V. Satyapal and another***[1] and ***Sree Anandhakumar Mills Limited vs. Indian Overseas Bank and others***[2] and the judgment of this Court in the case of ***Mrs. Smita w/o Sunil Wadalkar vs. Shri Jitendra s/o Vasantrao Kulkarni and others***[3]**.**

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1 (1977) 4 Supreme Court Cases 467.

2 (2019) 14 Supreme Court Cases 788.

3 Appeal from Order 8/2022 dtd.15/6/2022.

8. In opposition to this, Mr. Patil, the learned Counsel for the respondents, submitted that the controversy sought to be raised on behalf of the plaintiff is no longer *res integra.* Placing heavy reliance on a Division Bench judgment of this Court in the case of ***Bank of Baroda vs. Gopal Shriram Panda and another***[4] Mr. Patil would urge that the controversy as regards the maintainability of a suit to agitate the rights which can not be adjudicated by the Tribunal under the Recovery of Debts and Bankruptcy Act, 1993 ("the RDB Act"), has been conclusively settled. The reliance by the applicant on the judgment in the case of ***Sree Anandhakumar Mills*** (supra) is of no assistance to the applicant as in the case of ***Bank of Baroda*** (supra) the Division Bench has considered the import of the judgments in the cases of ***Sree Anandhakumar Mills*** (supra) and ***Jagdish Singh vs. Heeralal and others***[5]**,** which is the foundation of the decision in the case of ***Sree Anandhakumar Mills*** (supra). After an elaborate analysis, the Division Bench has held that where the civil rights of persons other than 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 granted by the DRT under

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4 (2021) 4 AIR Bom R 64.

5 (20140 1 SCC 479.

Section 17 of the RDB Act read with Section 13 and 17 of the SARFAESI Act, 2002.

9. Mr. Patil further submitted that the decision in the case of ***Mrs. Smita Wadalkar*** (supra) is also of no assistance to the applicant as in that case this Court was dealing with an appeal against an order refusing to grant injunction.

10. I have given careful consideration to the submissions canvassed across the bar. The facts are quite clear. The relationship between the plaintiff and defendant Nos.1 to 8 is not much in dispute. Nor the jural relationship between defendant Nos.1 and 5 to 8 and defendant No.9 is in contest. The factum of creation of security interest over a major part of the suit properties is rather incontestable. In fact, the measures initiated by defendant No.9 under Section 13 of the SARFAESI Act, 2002 are specifically pleaded as the acts giving rise to the cause of action to institute the suit. As is evident, the plaintiff claims that all the suit properties are the joint family properties; though the suit properties were acquired in the names of defendant Nos.1 and 5 to 8 either individually or jointly, yet they constitute the joint family properties as Giridharlal, the grandfather of the plaintiff, had acquired those properties out of the income of the joint family business, and there has not been a partition by metes and bounds.

11. The learned Civil Judge was of the view that the core question as to the character of the suit properties was required to be adjudicated at the trial after providing an opportunity to the parties to adduce the evidence and, consequently, the rights of the parties to succeed to the suit properties and partition and separate possession thereof cannot be decided by the DRT.

12. Whether the aforesaid approach of the learned Civil Judge is justifiable?

13. Section 13 of the SARFAESI Act, 2002 empowers any secured creditor to enforce the security interest without the intervention of the Court or Tribunal, in accordance with the provisions of the said Act, notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1882 ("TP Act, 1882).

14. Under Section 17 of the SARFAESI Act, 2002, any person including the borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor may make an application to the Tribunal assailing the legality, propriety and correctness of the measures initiated by the secured creditor.

15. The measures which can be taken by the secured creditors have been enumerated in Section 13 of the SARFAESI Act, 2002. Section 34 of the SARFAESI Act, 2002, bars the jurisdiction of the Civil Court to entertain any suit or proceedings in respect of any matter which the Tribunal or Appellate Tribunal is empowered by or under the said Act to determine and proscribes grant of injunction by any Court or Authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act or under the RDB Act, 1993. Section 35 provides that the provisions of the SARFAESI Act, 2002 shall have overriding effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

16. The fulcrum of the submissions on behalf of the applicant was that the instant suit is clearly barred by the provisions of Section 34 of the SARFAESI Act, 2002. Section 34 reads as under:

> **"Section 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)."

17. Whether the aforesaid provision excludes the jurisdiction of the Civil Court to entertain, try and decide the suit of the present nature, is at the heart of the matter.

18. To being with, it is necessary to note that the jurisdiction of the Civil Court to decide the suits of civil nature is of wide amplitude. It is considered to be plenary. The normal rule is that the Civil Courts have jurisdiction to decide all suits of civil nature except those of which cognizance by the Civil Court is either expressly or impliedly barred. An inference of exclusion of the jurisdiction of the Civil Court is not to be readily drawn. On the contrary, there is a presumption in favour of the existence rather than the exclusion of the jurisdiction of the Civil Court. Where the jurisdiction of the Civil Court is stated to be barred by the adjudicatory machinery created by the special statute, then investigation as to the issues like whether the statute gives finality to the orders of the Tribunal or Authority created therein and whether such Tribunal or Authority is empowered to do what the Civil Court would normally do in a suit, warrant consideration. Even in such cases, the jurisdiction of the Civil Court cannot be completely barred. If it can be demonstrated that the provisions of the particular statute have not been complied with or the Tribunal or Authority constituted thereunder has not acted in conformity with the fundamental principles of judicial procedure, the Civil Court can still adjudicate the rights and liabilities of the parties.

19. On the aforesaid premise of the nature of the jurisdiction of the Civil Court, if the provisions of Section 34 of the SARFAESI Act, 2002 are considered, it becomes abundantly clear that the jurisdiction of the Civil Court is barred "<u>in respect of</u>" any matter which the DRT or the Appellate Tribunal is empowered under the said Act to determine and the second part of Section 34 proscribes the grant of injunction also "<u>in respect of</u>" any action taken or to be taken in pursuance of any power conferred under the SARFAESI Act, 2002 or the RDB Act, 1993. Though the expression, "in respect of" appears to be of wide connotation, yet, the said expression is required to be appreciated in the light of the expression which follows, "*any matter which a DRT or Appellate Tribunal is empowered by or under this Act to determine".* On a proper construction, the latter expression governs the former expression, "<u>in respect of</u>". On a plain reading, it thus becomes evident that the interdict contained in Section 34 of the SARFAESI Act, 2002 to a suit or proceeding is in respect of any matter which the DRT is empowered by or under the SARFAESI Act, 2002 to determine. The necessary corollary is that the prohibition is in respect of the matters which properly fall within the ambit of the measures envisaged by Section 13 of the SARFAESI Act, 2002.

20. Likewise, the bar under Section 18 of the RDB Act, 1993 is in relation to the matters specified in Section 17 of the said Act, which, in turn, empowers the Tribunal to exercise the jurisdiction, powers and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial Institutions.

21. The aforesaid statutory regime, therefore, necessities an enquiry into the matters which can be legitimately determined by the Tribunal or the province of Authority of the Tribunal under the SARFAESI Act, 2002 and RDB Act, 1993. Incontrovertibly, the Tribunal constituted under the RDB Act, 1993 is a creature of statute. The Tribunal cannot exercise Authority or assume jurisdiction over the matters which have not been specifically entrusted to the Tribunal for determination. Of necessity, the Tribunal, has to act within the parameters of the jurisdiction conferred upon it.

22. Keeping in view the aforesaid construct of the statutory provisions, recourse to the decision of the Supreme Court in the case of ***Sree Anandhakumar Mills*** (supra) becomes necessary. In the said case, the second respondent therein had instituted a suit for partition of the secured assets in respect of which the secured creditor had initiated measures under the SARFAESI Act, 2002. The Supreme Court, following its earlier judgment in the case of ***Jagdish*** (supra) observed that a suit for partition would not be maintainable in a situation where proceeding under the SARFAESI Act, 2002 had been initiated. The observations in paragraphs 4 to 6, which also extract the enunciation of law in the case of ***Jagdish*** (supra), read as under:

> "4. The matter need not engage the Court in any great detail as in view of the law laid down by this Court in *Jagdish Singh vs. Heeralal and others ((2014) 1 SCC 479)* it would clear and evident that the suit filed by the second respondent (i.e. O.S. No.106 of 2009) is not maintainable. In *Jagdish Singh* (supra) this Court after an elaborate consideration of the provisions of the SARFAESI Act, particularly, Section 2(zf), 2(zc), 13(1), 17, 18 and 34, took the view, on almost similar facts, that a suit for partition would not be maintainable in a situation where proceedings under the SARFAESI Act had been initiated. It was also held that the remedy of any person aggrieved by the initiation of proceedings under the SARFAESI Act lies under Section 17 which provides for an efficacious and adequate remedy to a party aggrieved. Paragraph 24 of the report in *Jagdish Singh (supra)* which make the above position clear may be usefully extracted below:
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> > "24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take

possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

5. Beyond the above, we do not consider it expedient and prudent to record any findings in view of the final direction that we propose to pass. But for the purpose of the present controversy it would suffice to say that our view as recorded above with regard to the issue of maintainability of the suit would be an adequate reason to set aside the order of the High Court and maintain the sale and possession of the appellant – auction purchaser."

(emphasis supplied)

23. The aforesaid pronouncement as well as the decision in the case of ***Jagdish*** (supra) was considered by the Division Bench in the case of ***Bank of Baroda*** (supra) wherein a reference was made to a larger Bench to answer the following question:

"Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation Act ?

24. After an elaborate analysis, the Division Bench answered the question as under:

> "Answer :
> The answer, looking to the nature of the question, in our view, is in parts :-
> (A) Jurisdiction of the Debts Recovery Tribunal, to decide all matters relating to Sections 13 and 17 of the SARFAESI Act, is exclusive.
> (B) In all cases, where the title to the property, in respect of which a 'security interest', has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters, to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the DRT.
>
> (C) The jurisdiction of the Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Sections 13 and 17 of the SARFAESI Act, in relation to enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.
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> (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.
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> (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.
>
> (F) Examples as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.
>
> (G) The principles laid down in para 33 (i) to (ix) of *Sagar Pramod Deshmukh (supra)* are in accordance with what we have discussed and held above."

(emphasis supplied)

25. While arriving at the aforesaid answers, the Division Bench specifically referred to the decision in the cases of ***Jagdish*** (supra) and ***Sree Anandhakumar Mills*** (supra) and observed as under:

> "21.3 ……. *Jagdish Singh* (supra) does not take into consideration Nahar Industrial Enterprises (supra) nor does it consider the issue of enforcement of the civil right of 'any person', vis-a-vis the security interest and the scope and extent of jurisdiction of the Civil Court under Section 9 of C.P.C. The additional ground as available in *Jagdish Singh* (supra) was that no rights of the respondent nos.6 to 8 had been crystallized in the secured assets, before creating security interest in respect of the same, however, it is material to note that the Hon'ble Apex Court in *Atma Ram Mittal Vs. Ishwar Singh Punia, (1988) 4 SCC 284*, by relying on *Om Prakash Gupta Vs. Digvijendrapal Gupta (1982) 2 SCC 61*, has held that it is a well-settled principle that the rights of the parties crystallize to (sic on) the date of the institution of the suit, which in *Jagdish Singh* (supra) already stood instituted. The dictum in *Sundeep Kumar Bafna (supra)* may thus be attracted.
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> 21.4 Sree *Anandhakumar Mills Limited* (supra), relies upon *Jagdish Singh* (supra) and reiterates that under the provisions of Section 17 and 18 of the SARFAESI Act, the respondent no.2, had an adequate and efficacious remedy, which was open for him to avail of. What has been stated in respect of *United Bank of India Vs. Satyawati Tondon and others, (2010) 8 SCC 110* and *Jagdish Singh* (supra) stands equally applicable for *Sree Anandhakumar Mills Limited* (supra)."

26. The aforesaid judgment of the Division Bench of this Court in the case of ***Bank of Baroda*** (supra) is thus a complete answer to the submissions sought to be canvassed on behalf of the applicant based on the decision in the case of ***Sree Anandhakumar Mills Limited*** (supra).

27. In the case at hand, *prima facie,* there is material to indicate that the suit properties in respect of which partition is claimed are impressed with the character of joint family properties. Indisputably, the DRT has no jurisdictional competence to decide the questions of the character of the joint family properties, the entitlement of the alleged co-sharers to partition, effect the partition and pass incidental and consequential orders. Therefore, where the right of inheritance in the property over which security interest has been created is agitated, normally, the dispute is to be adjudicated by the Civil Court. To such a suit, the bar of exclusion of Civil Courts jurisdiction under Section 34 of the SARFAESI Act, 2002 cannot be legitimately pleaded. Of course, the question of bar under the provisions of Section 34 of the SARFAESI Act, 2002, is required to be determined keeping in view the facts and circumstances of the given case, and no straitjacket rule can be enunciated.

28. The conspectus of aforesaid consideration is that, in the facts of the case, the learned Civil Judge cannot be said to have committed any error in declining to reject the plaint under Order VII Rule 11(d) of the Code. The application, thus, deserves to be rejected.

29. Hence, the following order:

: O R D E R :

The application stands rejected.

No costs.

[N. J. JAMADAR, J.]