(2017) 07 BOM CK 0149

In the Bombay High Court

Case No : 23 of 2015

Mymoona Peer alias Ana Belinda Dias — APPELLANT

Vs

Dena Bank, through its Chief Manager, & Anr — RESPONDENT

Date of Decision : 25-07-2017

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 14(1) - Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking po

Citation : (2017) 07 BOM CK 0149

Hon'ble Judges : Prithviraj K. Chavan

Bench : SINGLE BENCH

Advocate : J.Abreu Lobo

Judgement

1. Appellant has filed present appeal feeling aggrieved with an order of rejection of an application for temporary injunction by the Senior Civil Judge, Panaji on 16.1.2015 in Special Civil Suit No.46/2014/A.

2. Facts necessary for disposal of this appeal, can be summarised, as follows:- The appellant is the original plaintiff, who has filed a Special Civil Suit, against the respondents for declaration, permanent injunction and restoration in respect of the suit property, namely Basement no.1 bearing No.21/357/3 of Village Panchayat of Taleigao.

3. The appellant was married to one Mr. Abdul Majeed Peer, as per the custom of Muslim community, on 24.8.1986 at Kashmir. Subsequently, the marriage was registered in Marriage Registration Book before the Civil Registrar of Tiswadi at Panaji Goa. The appellant converted herself into Muslim community.

4. After the marriage, the appellant and her husband Abdul Majeed Peer jointly purchased the suit property, referred above.

5. Mr. Abdul Majeed, thereafter, executed unilateral Deed of Divorce against the appellant on 27.5.2005, which according to him, is a valid Deed of Divorce, as

per the Shariat Law.

6. Subsequently, on 22.2.1996 Mr. Abdul Majeed purchased a property referred to as LG-2 (A) as House bearing No.21/358 of Village Panchayat, Taleigao, by a Deed of Sale bearing No.426, which was executed before the Sub Registrar, Tiswadi at Panaji. The appellant contends that she had mortgaged the suit property with VPK Urban Co-operative Credit Society Ltd., Taleigao Branch, for a loan amount of Rs.1,50,000/- by depositing the original title deed of the suit property. However, on 20th April, 2011 her husband Abdul Majeed Peer sold the suit property to respondent no.2 by a Deed of Sale without notice to the appellant. It is contended by the appellant that on the very same day i.e. 20.4.2011, itself respondent no.1 (Dena Bank) advanced loan to respondent no.2 fraudulently without observing due diligence.

7. On 26th March, 2012, the appellant intimated respondent no.1 as regards the gross error committed by it in advancing loan to respondent no.2 without verifying the facts, by a written communication, which was not replied by respondent no.1. Thereafter, the appellant preferred a suit against her husband Abdul Majeed and respondent no.2 in the Court of Senior Civil Judge, Panaji seeking relief of declaration that the Sale Deed dated 20.4.2011 is null and void. The said Civil Suit is numbered as 12/12/B.

8. On 11th July, 2012, the VPK Urban Co-operative Credit Society Ltd. returned the original Deed of Sale dated 26.7.1994 in respect of the suit property to the appellant.

9. Thereafter, on 11th August, 2014, respondent no.1 forcibly took possession of the suit premises under the guise of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act, 2002 ("SARFAESI Act" for short), thereby rendering the appellant homeless. By a communication dated 18th August, 2014, the appellant once again informed respondent no.1 about the illegality committed by it by not acting with due diligence and failed to inspect the title of the suit premises resulting into wrongly advancing loan to respondent no.2. This communication was made to respondent no.1 through a notice by an Advocate. Respondent no.1 choose not to reply the said notice. On 3rd September, 2014 the appellant preferred the present suit against the respondents inter alia, seeking relief of temporary injunction. The learned trial Judge, after having heard the respective parties, rejected the application against which the appellant approached this Court.

10. I have heard Shri Abreu Lobo, learned counsel for the appellant. None appeared for the respondents.

11. The learned counsel took me through various documents on record and tried to emphasis as to how ex facie fraud appears to have been committed by respondent no.1, who had, without ascertaining the title of the suit property, on the same date(20.04.2011), advanced loan to respondent no.2 rendering the appellant homeless who, in fact, is a joint owner of the suit property along with

her husband. Respondent no.1 did not act with due diligence when it allowed the mortgage on the same day. It is also submitted that the appellant came to be dispossessed of the suit property on 11.8.2013 and, therefore, she filed suit on 3rd September, 2014.

12. The learned counsel also took me through the records and proceedings and also placed reliance on a few case law.

13. Respondent no.1, in its reply, before the lower Court mainly raised a plea of jurisdiction, as according to it, in view of SARFAESI Act, 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 any 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. Respondent no.1 has inter alia, denied the rest of the averments in the plaint.

14. Respondent no.2 spoke in tune with respondent no.1. Respondent no.2 has also denied almost all the averments in the plaint, as according to her, neither the appellant has been able to establish a prima facie case nor balance of convenience in her favour. In case of refusal of injunction, she would not suffer irreparable loss.

15. At the outset, the registered Sale Deed dated 26th July, 1994 clearly indicates that the suit property was purchased jointly by the appellant and her husband Abdul Majeed Peer and they are joint owners of the same. Thus, by operation of law, both are the co-owners of the suit property where the appellant was carrying her business. It is also clear from the documents on record that by depositing said Sale Deed with the VPK Urban Co-operative Credit Society Ltd., Taleigao on 16.8.2003 the appellant had mortgaged the suit property. It is also clear from the record that the said society had closed the loan account on 11.7.2012 and returned the original Sale Deed to the appellant. That being so, it is difficult to understand as to how respondent no.1 advanced loan to respondent no.2, vide Sanction letter dated 20.4.2011 when infact on the day i.e. 20.4.2011, respondent no.1 alleged to have purchased the suit property from the husband of the appellant. The appellant has, therefore, specifically contended that her husband, without her consent and knowledge fraudulently transferred the suit premises in favour of respondent no.2 on 20.4.2011. Respondent no.2 appears to have borrowed loan from respondent no.1 against security of an asset, which is in the joint name of the appellant and her husband. Thus, it is difficult to digest the fact as to how the respondent no.1 advanced loan to respondent no.2 on 20.4.2011 itself when original title deed (Sale Deed) of the suit property was deposited with VPK Urban Co-operative Credit Society Ltd. by the appellant? When a mortgage of the suit property with the VPK Urban Co-operative Credit Society Ltd. was in subsistence, there cannot be a second mortgage with respect to the same property and, therefore, prima facie, it appears that some fraudulent

act has been committed by the concerned.

16. It reveals from the record that on 11.8.2014 respondent no.2 took possession from the appellant of the suit property under the provisions of Section 14(1) of the SARFAESI Act of which the appellant had made a report with the concerned Police Station.

17. Thus, there appears to be a prima facie case and as it is a settled position of law that while entertaining an application for temporary injunction, merits are not required to be gone into and what is required to be seen is that whether there is serious question of law involved in the case.

18. The question, as to whether the Civil Court is a Coram non judice, would be decided on merits after scrutinizing the evidence of the parties during trial.

19. At this stage, learned counsel for the appellant drew my attention to a case law reported in LAWS (MAD)- 2014-12-209 (K.Deenadayalan Vs. N. Sathish Kumar). It is observed thus:-

"10......

A careful perusal of Section 18 of the said Act would show that it contemplates that no Court shall be entitled to exercise any jurisdiction, powers or authority, except the Supreme Court and the High Court, in relation to the matters specified under Section 17 of the said Act. Thus, it is manifested that only in relation to the matters specified under Section 17 of the Act, the Civil Court''s jurisdiction is ousted. While considering the scope of Section 17 of the said Act dealing with the jurisdiction, powers and authority of the Tribunals, it is evident that such jurisdiction, powers and authority shall be entertained by the Tribunals in respect of the applications from the Banks and financial institutions for recovery of debts due to such Banks and financial institutions. To put it simply, the jurisdiction of the Tribunals to entertain the applications is only in respect of the applications filed by the Banks and financial institutions, that too for recovery of debts due to them. Thus, such jurisdiction, exclusively to be exercised by the Tribunals, as empowered under Section 17 of the Act, cannot be entertained by the Civil Courts and such entertainment is barred under Section 17 of the said Act. Thus, a combined reading of Section 18 and Section 17 of the said Act would only drive this Court to come to a conclusion that the "bar of jurisdiction" imposed under Section 18 on the Civil Courts, is not total to exercise its jurisdiction in all matters in respect of the disputes between the parties, and on the other hand, such restriction is imposed only in relation to the matters specified under Section 17 of the said Act. So, the bar is only qualified and conditional.

12. Further, in a decision reported in 2004 (4) SCC 311 = AIR 2004 SC 2371 (Mardia Chemicals Ltd. Vs. Union of India), the Apex Court held in paragraph 51 as follows:

"51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. ... .." (emphasis supplied)

13. Considering the scope of Section 18 of the Act, coupled with a combined reading of Section 17 of the Act and considering the above decisions of the Apex Court, I am of the view that the "bar of jurisdiction of Civil Courts" contemplated under Section 18 of the Act, is not a total bar as claimed by the petitioner/fourth defendant and on the other hand, it is only under the circumstances stated therein.

14. As this Court has found that the bar of the Civil Court''s jurisdiction is not total and it can be exercised other than the circumstances contemplated under Section 17 of the Act, it has to be now seen as to whether the facts and circumstances of the present case, as stated in the plaint, excludes the jurisdiction of the Civil Court.

I have already pointed out while discussing the facts of the case that the respondent/plaintiff has filed the present suit for declaration that the sale of the first schedule to the suit properties, in public auction by the sixth defendant to the fourth defendant, is null and void, unenforceable and not binding on the plaintiff. Apart from the said relief, the plaintiff is also seeking the reliefs of injunction and partition. It is the categorical case of the plaintiff that the entire proceedings before the DRT were made against a dead person, namely the said Srikantiah and that the plaintiff was not a party to the said proceedings before the DRT. It is also specifically stated in the plaint that the sale conducted was a fraudulent one and the fifth defendant-Bank has not disclosed the earlier sale of the property in favour of the plaintiff in the proclamation of sale. Thus, it is the case of the plaintiff that the auction sale is illegal and tainted by fraud and mala-fide, inasmuch as the conveyance executed in favour of the plaintiff was very much anterior in point of time, which was suppressed in the proclamation of sale. It is also not in dispute that the plaintiff is neither a borrower nor a party to the proceedings before the DRT. Thus, it is evident from a reading of the plaint that the plaintiff has made allegations of fraud, mala-fide and suppression of material facts and further claimed that the entire proceedings before the DRT were against a dead person. Further, the plaintiff claims that the suit property was the joint family property consisting of the said Srikantiah and his two sons and therefore, the surety said to have been executed by the said Srikantiah will not bind the sons.

"11. Bar of jurisdiction under Section 18 of the 1993 Act:-(a) In the case of Lala Ram Swarup and others Vs. Shikar Chand and another, reported in AIR 1966 SC 893, the Supreme Court noticed the observation of the Privy Council in the case of Secretary of State Vs. Mask & Co. (67 I.A. 222), wherein, the Privy Council observed that even where jurisdiction is excluded, the Civil Courts have jurisdiction "to examine into cases where the provisions of the Act have not been complied with, or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. In the said case of Lala Ram Swarup (cited supra), the Supreme Court observed that, "in our opinion, the bar created by relevant provisions of the Act excluding the jurisdiction of the civil courts cannot operate in cases where the plea raised before the civil court goes to the root of the matter and would, if upheld, lead to the conclusion that the impugned order is a nullity."

(b) In the case of State of A.P. Vs. Manjeti Laxmi Kantha Rao, reported in 2000 (3) SCC 689, the Supreme Court observed that, "The normal rule of law is that the civil courts have jurisdiction to try all suits of civil nature except those of which cognisance by them is either expressly or impliedly excluded as provided under Section 9 of the Code of Civil Procedure .... where a statute gives finality to the orders of the Special Tribunals, jurisdiction of the civil courts must be held to be excluded if there is adequate remedy to do what the civil courts would normally do in a suit and such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

(c) We have noticed the aforesaid observations, as in the present case, one of the grounds taken is that the DRT has not followed the procedure contemplated under the Debts Recovery Tribunal (Procedure) Rules, 1993 and the impugned orders were passed, which are nullity in the eye of law.

(d) Section 17 of the 1993 Act relates to "jurisdiction, powers and authority of Tribunals, as quoted hereunder: "Section 17. Jurisdiction, powers and authority of Tribunals.--(1) A Tribunal shall exercise, on and from the appointed day, 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".

20. From the aforesaid ratio laid down in the citation, it is clear that jurisdiction of the Civil Court is not totally barred or ousted. The jurisdiction of the Civil Court is still in existence and can be invoked when it appears that the action of secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable, which may not require any probe whatsoever. A harmonious reading of Sections 17 and 18 needs to be required. In the given set of facts, without going into the detailed merits, it appears that this question needs to be adjudicated upon during the course of trial.

21. It appears that the learned lower trial Court in the impugned order had unnecessarily gone into the aspect as to whether the appellant could be governed by Communion of Assets, in the light of the fact that she had been divorced by her husband and lost her status as a Muslim. Merely because the appellant was divorced as per the Mohammedan Law by her husband would not

ifso facto mean that she is barred from claiming ownership right over the suit premises regardless of her marital status. It seems that the learned trial Court committed an error in prejudging the matter by referring the said Abdul Majeed Peer as a ex-husband and also holding that he ought to have been a party to the suit, when the appellant had sought a declaration that the process of securitisation by respondent no.1 is fraudulent and, therefore, null and void. The learned trial Court fell into grave error by attributing a motive for filing the suit by presuming the purported failure of the appellant in the other Civil Suit, which is still pending in another Court.

22. In view of the observations made hereinabove and, in the peculiar circumstances, the impugned order dated 16.1.2015 in Special Civil Suit No.46/2015/A is quashed and set aside. It would be just and proper to direct the parties to maintain status quo in respect of the suit property in view of the order passed by this Court on 20th May, 2015. It is made clear that the trial Court shall not get influenced with the observations made hereinabove while deciding the lis on merits. The trial Court shall make an endeavour to decide the suit at the earliest by giving due opportunity to the parties.

23. The appeal is accordingly to dispose of in the above terms with no order as to costs.

