(2011) 12 DEL CK 0340

In the Delhi High Court

Case No : Regular First Appeal (OS) 37 of 2011

Sushma Suri and Another APPELLANT

Vs

Mahamedha Urban Cooperative Bank Ltd. and Another RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 34

Citation : (2012) 1 BC 483 : (2011) 185 DLT 307

Hon'ble Judges : S.P. Garg, J;Pradeep Nandrajog, J

Bench : Division Bench

Advocate : Pradeep K. Bakshi and Mr. Rajat Navet, for the Appellant; Gautam Awasthi, Advocate for R-1, for the Respondent

Final Decision : Allowed

Judgement

Pradeep Nandrajog, J.—Appellants were the plaintiffs. Respondent No. 1 was the defendant No. 1 in the suit. Shakuntala Rani Raizada, Sarita Gupta and Rashtriya Import Export Inc. the sole proprietary firm of Sarita Gupta were defendants 2, 3 and 4 respectively. Plaintiffs sought a declaration that the alleged mortgage created by defendant No. 3 in favour of defendant No. 1 with respect to the second floor of property No. E-9, Kalindi Colony was illegal, void, ab-initio, non-est and a nullity. Permanent injunction was sought restraining defendant No. 1 from taking any action qua the second floor of property No. E-9, Kalindi Colony u/s 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. As pleaded in the plaint, plaintiffs claimed title through defendant No. 2 under a registered sale deed dated 07.05.2010, pleading that defendant No. 2 had acquired title to the property E-9, Kalindi Colony on the strength of a will dated 26.05.1984 executed in her favour by her husband Indira Mohan Rai Raizada who died on 26.08.1992 and was the original allotted of the land. It was pleaded that after the death of the husband of defendant No. 2 and after she got the property mutated in her name she demolished the existing construction and rebuilt the same and sold the second floor to the plaintiffs on 07.05.2010. Pleading that the plaintiffs were surprised when a notice dated 31.07.2010 was pasted outside the building by defendant No. 1 threatening to take possession and sell the second floor on the strength of an alleged mortgage created by defendant No. 3 in favour of defendant No. 1 suit was filed.

2. It was pleaded in the plaint that inquiry conducted by the plaintiffs reveal that one Sunil Bhat and defendant No. 3 got executed a sale deed dated 27.02.2009 from defendant No. 2 in the name of defendant No. 3 qua the second floor of E-9, Kalindi Colony and defendant No. 2 sought cancellation of the sale deed vide CS(OS) No. 1004/2009. In said suit, on 26.05.2009 an injunction order was passed against defendant No. 3 and Sh. Sunil Bhat restraining them from creating any third party rights in the second floor of E-9, Kalindi Colony. The suit was finally settled on 10.07.2009 and as per which the sale deed dated 27.02.2009 was cancelled.

3. Since the bank i.e. defendant No. 1 gave no particulars to the plaintiffs qua its claim for the mortgage, it is apparent that the plaintiffs could not plead material particulars qua the fraud and unfortunately for them, the counsel little realized that it is permissible to file a suit seeking declarations with a prayer that upon disclosure made by the opposite party qua facts within the knowledge of the opposite party, the plaintiff reserves liberty to amend the plaint; and this has proved fatal for the plaintiffs inasmuch as IA No. 17596/2010 under Order 7 Rule 11 CPC filed by defendant No. 1 that the bar created by Section 34 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 renders a civil court incapacitated to entertain the plaint has succeeded. Reliance by the plaintiffs on the observations made by the Supreme Court in the decision reported as Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., that if it is the case of a party that the mortgage in favour of a bank or a financial institution has been obtained by fraud, a civil suit may be maintainable, has been noted but relief declined in the absence of material particulars of the fraud pleaded in the plaint.

4. Courts in India are not only courts of law but are courts of justice and equity. Justice and equity plays a very important role in the administration of justice. If prima facie fraud emerges from the documents produced before the Court, it becomes the duty of the Court to look into the same.

5. If the learned Single Judge would have looked into the documents filed by the defendant No. 1 it would have dawned on him that the bank had filed an affidavit stated to have been executed by Smt. Sarita Gupta i.e. defendant No. 7 in the month of June 2009, with the date not written thereon. Treating the affidavit being deposed to on 1st June 2009, with respect to the pleadings in the plaint, the learned Single Judge would have realized that in the suit filed by defendant No. 2 against defendant No. 3, an injunction had been passed by this Court on 26.05.2009, restraining defendant No. 3 from creating any charge on the

property. Had the learned Single Judge looked a little deeper at the relevant extract of the title deed register filed by the bank the same would show that apparently defendant No. 3 had deposited the title deed of the property on 15.04.2009. Contrivance prima facie emerges. The affidavit deposed to on a day not known, but in the month of June 2009, evidencing a desire to mortgage the property is having an entry in the title deed register of the mortgage being already created on 15.04.2009. What is a fraud? Anti-dating documents or entries to overcome injunctions passed by Courts would prima facie constitute a fraud. The fact that on 26.05.2009 the defendant No. 3 stood injuncted to create any third party interest in the second floor, that in June 2009 she filed an affidavit with the bank evidencing a desire to mortgage said property but title deed register showing equitable mortgage on 15.04.2009 are facts which stare and prima facie stink.

6. We speak no further lest either party is prejudiced at the trial for the reason we prima facie find traces of officers of the bank conniving with defendant No. 3 to anti-date entries in the title deed register casting a doubt on the date of the alleged mortgage. If the mortgage was not created by 26.05.2009, defendant No. 3 being under an injunction from said date in the suit filed by defendant No. 2, any subsequent mortgage created would be in the teeth of the injunction. But we leave it at that, highlighting once again the documents produced by the bank do not prima facie inspire confidence and there are traces of contrivance sufficient to settle an issue pertaining to fraud.

7. Advising the plaintiffs to amend the suit plaint in view of the disclosures now made by defendant No. 1 and also advising learned counsel for the plaintiffs to raise his professional bar and understand that pleadings with respect to facts in the personal knowledge of the opposite party can be laid in a suit by reserving the right to amend the plaint upon disclosure being made and for which a prayer should be made to said effect that the Court should pass a decree directing the opposite party to make a disclosure on the subject on which the disclosure is sought, we allow the appeal. Impugned order dated 28.02.2011 is set aside. Application under Order 7 Rule 11 i.e. IA No. 17596/2010 filed by defendant No. 1 is dismissed.

8. We leave the parties to bear their own costs.

