

**IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE
BEFORE**

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

ON THE 14th OF MARCH, 2023

FIRST APPEAL No. 1871 of 2022

BETWEEN:-

1. MURTAZA MALIK S/O LATE SHRI SIRAJUDDIN MALIK, AGED ABOUT 52 YEARS, OCCUPATION: BUSINESS 1 AND 2 KIBE COMPOUND, GRACE BUILDING, INDORE (MADHYA PRADESH)
2. SMT. SALMA MALIK W/O LATE SIRAJUDDIN MALIK, AGED ABOUT 88 YEARS, OCCUPATION: NIL KIBE COMPOUND GRACE BUILDING INDORE (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI ANUJ AGRAWAL, ADVOCATE)

AND

LIC HOUSING FINANCE LIMITED AREA OFFICE
9/1-A, SECOND FLOOR, UV HOUSE, SOUTH
TUKOGANJ, INDORE (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI ZAMEER AHMAD KHAN, ADVOCATE)

Reserved on : 06.02.2023

Pronounced on : 14.03.2023

This appeal coming on for judgement/orders this day, the court passed the following:

JUDGEMENT

1] This appeal has been preferred by the appellants/plaintiffs under Section 96 of the Code of Civil Procedure against the

judgement and decree dated 26/11/2022, passed by the Fourth Additional District Judge, Indore in Civil Suit No.921-A/2019.

2] In brief, the facts of the case are that the appellants/plaintiffs filed a civil suit for declaration simpliciter against the respondent /LIC Housing Finance Limited seeking the following relief:-

“The Plaintiffs therefore pray for a decree declaring that the structure of the Building constructed on the Plot No.1 & 2, Kibe Compound, Indore is not mortgaged with the Defendant;

Cost of the suit be also awarded to the Plaintiffs.”

3] The facts in brief are that the plaintiffs obtained a loan of Rs.12 Crore from LIC Housing Finance Ltd. and for the same, the disputed land situated at Plot No.1 & 2, Kibe Compound, Indore was kept as a collateral security with the LIC Housing Finance Ltd. The case of the plaintiffs is that as the plaintiffs defaulted in making the payment, a notice was affixed on their premises by the defendant/LIC Housing Finance stating that the LIC has the charge over the property and no transaction in respect of the said property is permissible. This notice was affixed on the premises on 19/08/2019, which has given rise to the cause of action to the plaintiffs. Further, the case of the plaintiffs is that certain credit facility has also been obtained by one M/s Kabeer Reality Pvt. Ltd. from the Punjab National Bank and for which, the superstructure constructed on the land (on which the loan was obtained from the LIC Housing Finance), was kept as collateral security and since the aforesaid notice was affixed by the LIC Housing Finance on the said superstructure, the civil suit has been

filed seeking the aforesaid relief.

4] In the aforesaid civil suit, an application under Order 7 Rule 11 of CPC has been filed by the defendant/LIC Housing Finance Ltd. contending that it is barred under the provisions of Section 34 of the SARFAESI Act, 2002. A reply to the aforesaid application was filed by the plaintiffs contending that they have not challenged the measures of the Bank under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as the SARFAESI Act, 2002) and it was also stated that the dispute between the parties is purely civil in nature and cannot be adjudicated by the Debt Recovery Tribunal (DRT), and as such, no cognizance of the dispute which is raised by the plaintiffs can be taken and decided by the DRT. It was also stated that even Section 17 of SARFAESI Act cannot be invoked as no such measures have been taken. The learned Judge of the Trial Court has decided the application under Order 7 Rule 11 of CPC in favour of the defendant/LIC Housing Finance Ltd. and has rejected the suit, hence, this appeal.

5] Shri Anuj Agrawal, learned counsel appearing for the appellants has drawn the attention of this Court to a decision rendered by the Karnataka High Court in the case of *Sri, Raghvan S Vs. Sri. N.B. Rajeev in Regular First Appeal No.1947 of 2016*, wherein also, in similar circumstances, it has been held that only a civil suit is the remedy available to the plaintiff. Reliance is also placed by the counsel for the appellants on a decision rendered by the

Division Bench of this Court in *F.A. No.303/2020 in the case of Sagar Singh Damor Vs. Deepak Sharma delivered on 04/12/2021*, in that case, the suit was for declaration of title to the suit property in which the application under Order 7 Rule 11 of CPC filed by the defendant was allowed, and the said decision was challenged before this Court in the First Appeal wherein it is held that such question cannot be decided by the DRT as contemplated under Section 17 of the Act of 2002, and shall primarily be within the consideration of the Civil Court which has exclusive jurisdiction to entertain and decide the said dispute. Thus, it is submitted that the impugned judgement/order be set aside and the matter be remanded back.

6] Learned counsel appearing for the respondent/LIC Housing Finance Ltd., on the other hand, has opposed the prayer and it is submitted that no case for interference is made out as the learned Judge of the Trial Court has rightly appreciated the application and has rejected the suit. It is further submitted that the plaintiffs have cleverly drafted the plaint and have obtained only a relief of declaration, which in itself is not maintainable. Counsel has also relied upon para 6 of the decision rendered by the Supreme Court in the case of *The Authorised Officer, State Bank of India Vs. M/s Allwyn Alloys Pvt. Ltd. and others*.

7] Heard learned counsel for the parties and perused the record.

8] The sole question which falls for the consideration of this court is whether the civil suit between the parties seeking relief of declaration can only be decided by the civil court or the same can

also be adjudicated by the DRT under the provisions of DRT/SARFASI Act. In this regard, first of all, the governing provisions, i.e., S.13, 17 and 34 of the SARFASI Act are required to be looked into and the same (relevant excerpts only) reads as under:-

“13. Enforcement of security interest.—(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

XXXXX

17. Application against measures to recover secured debts.—(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within fortyfive days from the date on which such measure had been taken:

XXXXX

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).”

9] So far as the relevant provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 are concerned, the same read as under:-

"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.

[(1-A) Without prejudice to sub-section (1),—

(a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016;

(b) the Tribunal shall have circuit sittings in all district headquarters.]

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

(2-A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016.

18. Bar of jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17:

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 ((39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.

34. Act to have overriding effect.—(1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

10] In this context, it would also be germane to refer to the decision rendered by the Supreme Court in the case of *SBI v. Allwyn Alloys (P) Ltd., (2018) 8 SCC 120*, the relevant paras of the same read as under:-

“5. The High Court proceeded to pass the following operative order in the said writ petition: (*Meherangiz case*, SCC OnLine Bom para 7)

“7. Accordingly, we dispose of the writ petition with the following directions:

(a) Period of 8 weeks is granted for the writ petitioners to approach proper forum to get adjudication of the rights of the writ petitioners as contended in the writ petition and within the said period of 8 weeks, they shall file and seek proper interim relief in their favour. Till expiry of 8 weeks, the first respondent Bank shall not proceed with the matter in terms of the order obtained by them before the Debts Recovery Tribunal so far as the property in question is concerned;

(b) Amount of Rs 25 lakhs shall be deposited in an interest earning deposit, by Respondent 1 Bank and profits of the said deposit shall enure to the benefits of the parties, who become successful in the litigation; and

(c) No order as to costs.”

6. The Bank has assailed the aforesaid decision of the High Court primarily on the ground that all issues concerning the mortgaged/secured property are required to be decided only by DRT; and not in any civil proceedings as has been observed by the High Court in the impugned judgment. For, filing of a civil suit in respect of secured assets is barred by law. Secondly, DRT as well as DRAT have examined the merits of the controversy and justly answered the same against the writ petitioners. The concurrent finding of fact recorded by the said Tribunals is that the writ petitioners have failed to establish any right, title or interest in the subject flat. That finding has neither been disturbed nor is it assailable. According to the Bank, the High Court judgment under appeal is untenable and deserves to be set aside.

7. The contesting Respondents 5 and 6 (writ petitioners), however, supported the view taken by the High Court and

would contend that it is indisputable that Respondent 5 (Writ Petitioner 1) is in physical possession of the subject flat and was entitled to pursue his claim about the right, title and interest in the subject flat in view of the memorandum of understanding dated 13-3-2011, executed between the writ petitioners and Respondents 2 to 4 regarding resale of the subject flat in their (writ petitioners) favour. Respondents 5 and 6 would also contend that the original share certificate and few receipts of payments made to the Society were still in their possession and that the entries effected in the Society's record to transfer the share certificate in favour of Respondents 2 to 4 are fabricated.

8. After having considered the rival submissions of the parties, we have no hesitation in acceding to the argument urged on behalf of the Bank that the mandate of Section 13 and, in particular, Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the 2002 Act"), clearly bars filing of a civil suit. For, no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or DRAT is empowered by or under this Act to determine and no injunction can be granted 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 Act.

9. The fact that the stated flat is the subject-matter of a registered sale deed executed by Respondents 5 and 6 (writ petitioners) in favour of Respondents 2 to 4 and which sale deed has been deposited with the Bank along with the share certificate and other documents for creating an equitable mortgage and the Bank has initiated action in that behalf under the 2002 Act, is indisputable. If so, the question of permitting Respondents 5 and 6 (writ petitioners) to approach any other forum for adjudication of issues raised by them concerning the right, title and interest in relation to the said property, cannot be countenanced. The High Court has not analysed the efficacy of the concurrent finding of fact recorded by DRT and DRAT but opined that the same involved factual issues warranting production of evidence and a full-fledged trial. The approach of the High Court as already noted hitherto is completely fallacious and untenable in law.

10. The learned counsel appearing on behalf of the Bank persuaded us to decide the merits of the controversy between the parties but as noted earlier, the High Court has not analysed the same at all but chose to dispose of the writ petition by giving liberty to the writ petitioners to pursue their remedy before a proper forum. Respondents 5 and 6 (writ petitioners) would, however, contend that crucial aspects have been glossed over by DRT and DRAT including the effect of admitted position that Respondent 5 (Writ Petitioner 1) is in possession of the subject property and also having custody of the original share certificate and few receipts issued by the Society. In these circumstances, we deem it appropriate to relegate the parties before the High Court by setting aside the impugned judgment and leaving all questions open to be decided by the High Court on its own merits and in accordance with law.”

(emphasis supplied)

11] So far as the decision rendered by the Karnataka High Court in the case of *Sri, Raghvan S Vs. Sri. N.B. Rajeev (supra)* is concerned, the relevant paras of the same read as under:-

“34. Therefore, the prohibition or the bar of jurisdiction of a Civil Court does not extend to any matter over which the Debts Recovery Tribunal or an Appellate Authority could adjudicate. In other words, if a person is aggrieved by any of the measures initiated by a secured creditor under Section 13 or any other Sections of the SARFAESI Act, in such a situation, the aggrieved party could approach the Debts Recovery Tribunal or the Appellate Tribunal under Sections 17 and 18 respectively. Therefore, no suit could be filed as per Section 9 of CPC to challenge any of the measures initiated by a secured creditor under the provisions of the SARFAESI Act. Hence, the Civil Courts' jurisdiction to entertain a suit for the purpose of declaration of a title of a secured asset or to seek any other relief in respect of that asset is not barred as Debts Recovery Tribunal or an Appellate Tribunal cannot grant such reliefs. The decision of the Division Bench of the Calcutta High Court in *Kaaiser Oil Pvt. Limited* is categorical in the above context.

35. Similarly, in *Ram Rattan @ Rattan Lal*, the Punjab and Haryana High Court has held that if the plaintiff approaches a Civil Court to contend that the secured asset is his own property and the borrower had not created a mortgaged interest in respect of the same, the Bank will be entitled to contend that the plaintiff was not the owner of the property which was rightfully mortgaged in his favour by a person who was the owner. Of course, in such circumstances, there could also be a collusion between the borrower and the plaintiff so as to defeat the rights of the secured creditor to enforce measures for recovery of the outstanding dues. Civil Court will have to determine if there is any such collusion or not and accordingly decide the suit.

36. Thus, the catena of cases discussed above have clearly brought about a distinction between the jurisdiction of the Debts Recovery Tribunal and the Appellate Tribunal to entertain a proceeding or an appeal under Sections 17 and 18 of the SARFAESI Act by any person aggrieved by the measures initiated under Sections 13 and 14 or any other provisions of SARFAESI Act as opposed to a person filing a suit before a Civil Court in respect of any immovable property which incidentally happens to be a secured asset. In the latter situation, the person could approach a Civil Court and seek a declaratory or other relief in respect of the secure asset. Such a relief cannot be granted by the Debts Recovery Tribunal or the Appellate Tribunal as they are not a Civil Court acting under Section 9 of CPC.

37. We find considerable force in the argument of learned counsel for the plaintiff inasmuch as the DRT does not have the jurisdiction to grant the relief of declaration of title and injunction in respect of any immovable property; that power is exclusively in the domain of the Civil Court. It is coincidental in the instant case, the Banks have assumed that 'B' schedule property which is stated to be purchased by the plaintiff is the subject matter of mortgage. It is for the plaintiff to prove his case and for the defendants and Banks to prove otherwise. After trial, the trial Court could always dismiss the suit if plaintiff fails to prove his case. But in the instant case, it is not on the averments of the plaintiff, but on the contentions and submissions and the averments made in the affidavit in support of the application filed under Order VII Rule 11(d) of the CPC; that

the trial Court has proceeded to reject the plaint. Infact, the trial Court has made certain observations which could have been made only after trial of the suit and at that stage.

38. Further, in the case of Jagdish Singh, the suit was for partition and separate possession of the suit schedule property, which was also a secured asset and subject to action initiated under the SARFAESI Act. Similarly, in the case of M/S.SREE ANANDHAKUMAR MILLS LTD., the suit was for partition and separate possession. But in the instant case, the suit is for the relief of declaration of title and injunction in respect of the 'B' schedule property. As already stated, the plaintiff would have to prove his case in accordance with law and there has to be an adjudication of title vis-à-vis the suit schedule property. In the circumstances, there would have to be trial of the suit.

39. Hence, we find that the impugned order and decree of the trial Court is erroneous. The same is set aside. O.S.No.26444/2014 is restored on the file of the trial Court. Accordingly, the appeal is allowed.”

12] On due consideration of submissions and perusal of the documents filed on record, this Court finds that so far as the civil suit is concerned, an innocuous relief appears to have been prayed as stated above and for the sake of convenience, it is once again reproduced as under:-

“The Plaintiffs therefore pray for a decree declaring that the structure of the Building constructed on the Plot No.1 & 2, Kibe Compound, Indore is not mortgaged with the Defendant;

Cost of the suit be also awarded to the Plaintiffs.”

13] It is an admitted fact that the land in question on which the superstructure is standing, has been mortgaged with the LIC, whereas the superstructure itself is kept as a collateral security with Punjab National Bank. It is also not denied that the plaintiffs

have defaulted in making the payment which has led to filing of the aforesaid civil suit. The relief clause itself demonstrates that the suit has been cleverly drafted to stall the efforts by the LIC Housing Finance to realize the amount it had lent to the plaintiffs. According to the plaint, the LIC Housing Finance has extended the facility of loan to the tune of Rs.12 Crores to the plaintiffs, and as per the documents filed with the plaint, certain flats have also been mortgaged on the land in question. In the considered opinion of this Court, the plaint has been rightly rejected by the learned Judge of the Trial Court holding that it is barred under Section 34 of the SARFAESI Act and no illegality or jurisdictional error has been committed by the learned Judge of the Trial Court in holding that as the land in question as also the superstructure on the said land have been mortgaged with the LIC as also to Punjab National Bank by the plaintiffs, the plaintiffs cannot seek such relief from the civil Court, which can surely be decided by the Debt Recovery Tribunal.

14] This court also finds that the plaintiffs have also averred in the plaint that the defendant has already initiated proceedings under the Securitization Act for taking possession of the building structure falsely claiming that the superstructure of the building is also mortgaged, but this Court has no hesitation to hold that this is not such an issue which cannot be decided by the DRT and efforts on the part of the plaintiffs to circumvent the DRT proceedings cannot be allowed to succeed, the only purpose of which is to

defeat the recovery proceedings initiated under the Securitization Act. This court is also of the firm view that as the DRT deals solely with the bank loan transaction, the subject of mortgage is something that the DRT has an expertise in handling and it cannot be said that the issue of mortgage can be decided by a civil court only.

15] So far as the judgement in the case of *Sri, Raghvan S Vs. Sri. N.B. Rajeev(supra), Sagar Singh Damor Vs. Deepak Sharma* and *The Authorised Officer, State Bank of India Vs. M/s Allwyn Alloys Pvt. Ltd. and others (supra)*, are concerned, they are distinguishable on facts. So far as the facts as narrated by this court in the case of *Sagar Singh Damor (supra)* are concerned, the same read as under:-

2. The suit giving rise to this appeal has been filed by plaintiff for declaration of his title to the suit property which is a house constructed over plot No.1146 and 1147, Pheonix Town Colony, Village Kellod Hala, Tehsil and District Indore, for declaration that the power of attorneys dated 10.09.2014 allegedly executed by him in favour of defendant No.1 and the sale deed dated 17.06.2015 executed by defendant No.1 in favour of defendant No.2 on strength of such power of attorney is null and void and not binding upon him, for declaration that the loan obtained by defendant No.2 from defendant No.4 and mortgage of the suit property is not binding upon him, that defendant No.4 does not have any right to disposses him from the suit property or alienate the same in favour of any third person and for declaration that defendant No.4 does not have any right to recover any amount from the suit property.
3. The plaintiff has submitted that by two registered sale deeds both dated 24.03.2013 he had purchased two plots from its previous owner. On 12.08.2013 he entered into an agreement with defendant No.1 for raising construction

over the plots. An agreement was also executed between them upon payment of Rs.9,00,000/- by plaintiff. Defendant No.1 has eventually taken a sum of Rs.53,64,909/- from plaintiff for construction of the house but has not completed the same reports regarding which were made by plaintiff to various authorities. Plaintiff then got suspicious and made enquiries from the office of Sub Registrar and found out that defendant No.1 has got executed two power of attorneys on 10.09.2014 allegedly executed by him. Plaintiff has neither signed upon them nor has affixed his thumb impressions thereupon. The alleged power of attorneys are forged and fabricated and have been got manufactured by defendant No.1 by impersonation. On their strength defendant No.1 has executed a registered sale deed on 17.06.2015 in favour of defendant No.2 with respect to the suit property.

4. The plaintiff further submitted that on the basis of aforesaid forged documents defendant No.2 has mortgaged the suit property with defendant No.4 Bank and has obtained a loan from it. The said loan transaction is not binding upon him and defendant No.4 is not entitled to recover any loan amount from him or the suit property. Defendants No.2 to 4 are attempting to alienate the suit property regarding which they do not have any right and are also threatening to forcibly dispossess the plaintiff there from.”

16] A perusal of the aforesaid facts clearly reveals that they are distinguishable from the facts of the case in hand. There is no such dispute in the present case which requires elaborate evidence to be led as the only question is how LIC can realised its dues from the property, the land of which is mortgaged with it but a different charge is created in respected of the building appurtenant to the said land.

17] Similarly, the in the case of *Sri, Raghvan(supra)*, the plaintiff had sought the following relief as is disclosed in para 2 of the judgment:-

2. The appellant was the plaintiff in O.S.No.26444/2014, while the respondents herein were the defendants in the said suit. The plaintiff filed the said suit seeking the following reliefs:

"Wherefore, the plaintiff most respectfully prays that this Hon'ble Court be pleased to pass a judgment and decree against the defendants that:-

- a. Declaring that the plaintiff is the absolute owner of the plaint 'B' schedule property.
- b. Consequentially pass an order of permanent injunction restraining the defendants from interfering with the plaintiff's peaceful possession and enjoyment of the plaint 'B' schedule property.
- c. Pass any other relief / reliefs as this Hon'ble Court deem fit in the facts and circumstances of the case and;
- d. To award the costs of the suit in the interest of justice and equity."

18] From the bare perusal of the same, it is clearly a distinguishable case as its relief substantially from the present suit, the relief of which was for declaration regarding a mortgage as reproduced above, thus, this judgment is also of no avail to the appellant.

19] This court also finds the conduct of the PNB officers rather intriguing in advancing loan to the plaintiffs on a collateral security of the building, which is situated/erected on the land which is kept as a security with the LIC.

20] In view of the aforesaid discussion, no case for interference is made out and the appeal being devoid of merits is hereby *dismissed.*

(SUBODH ABHYANKAR)
JUDGE

krjoshi