

Rakesh Kumar and anr Vs. Rakesh Kumar and anr

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Court : Delhi

Decided On : Jan-24-2014

Judge : Jayant Nath

Appellant : Rakesh Kumar and anr

Respondent : Rakesh Kumar and anr

Judgement :

* + IN THE HIGH COURT OF DELHI AT NEW DELHI Reserved on :25.10.2013
Decided on :

24. 01.2014 IA No.1275/2013 in CS(OS) 1727/2012 ... Plaintiffs RAKESH KUMAR & ANR Through Mr. T.K. Ganju, Senior Advocate with Mr. Bharat Gupta, Advocate versus SAROJ MARWAH & ANR Through ... Defendants Mr. Mr. S. Suri with Ms. Gunjan Kumar and Mr. Ankit Khurana, Advocates CORAM: HON'BLE MR. JUSTICE JAYANT NATH JAYANT NATH, J.

IA No.1275/2013(u/O7 11 CPC) 1. The present suit is filed by the plaintiff seeking a decree of declaration and mandatory injunction. The plaintiff is stated to have purchased the suit property from defendant No.1 vide sale deed dated 19.05.2009. The property in question is half undivided share in property bearing No.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 576.53. square yards. It is urged that symbolic possession was handed over to the plaintiff at the time of sale inasmuch as defendant No.2 Bank was a tenant in the suit

property running its currency chest from the entire two and a half storied building. It is stated that the plaintiff rigorously followed up with defendant No.1 as despite being a tenant of the premises, defendant No.2 was paying no rent to the plaintiff. After rigorous follow up, defendant No.2 through its counsel sent a notice dated 17.07.2010 where it was pointed out that defendant No.1 in order to avail a term loan and cash credit facility from defendant No.2 has created equitable mortgage on the suit property by deposit of original title deeds. It was pointed out that defendant No.1 has availed a term loan of `1.65crores and cash credit facility of `6.9crores.

2. It is urged that after investigation what emerges is that there is a term loan on the suit property of `1.65crores. Further, M/s. Bitum Impex, proprietorship concern of Ms.Meenakshi Marwah, daughter-in-law of defendant No.1 has taken a cash credit facility of `3crores from defendant No.2. To secure the aforesaid credit facility, property has been mortgaged including the suit property by defendant No.1. The said facility has been enhanced to `6.90crores. The account of M/s Bitum Impex was declared as Non-Performing Asset. It is further pointed out that defendant No.2 has filed O.A.No.279/2010 before Debt Recovery Tribunal (DRT) and that defendant No.2 is claiming that the said debt which is now `7.25crores is secured to the said defendant No.2 by mortgage of seven different immovable properties including the present suit property.

3. The plaintiffs have urged that they are the absolute and lawful owners of the suit property and bona fide purchasers for consideration. It is averred that the plaintiffs apprehend that defendant No.2 might sell the suit property and cause irreparable damage to the plaintiffs. It is urged that before taking adverse steps to deprive the plaintiffs of their rights, defendant No.2 Bank would have to follow the principle of Marshalling as provided in Section 56 of the Transfer of property Act, namely, that for satisfaction of a debt, defendant No.2 is firstly required to sell 6 properties which stand mortgaged and only thereafter, in case despite sale of the said properties the debt is not extinguished, sell the suit property. Hence, the present suit is filed seeking a decree of declaration declaring the plaintiffs to be the lawful and absolute owners of the suit property and decree for mandatory injunction against defendants No.1 and 2 restraining them from alienating, selling the suit

property. Other reliefs are also sought. The prayer clause reads as follows: a. Pass a decree of declaration thereby declaring and affirming the plaintiffs to be the lawful and absolute owners of the suit property bearing No.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs; b. Pass a decree of Mandatory Injunction thereby restraining defendants No.1 and 2, their servants, agents and persons acting for and on behalf of defendants No.1 and 2, from alienating, selling, transferring, creating, conveying, offering for sale, or otherwise dealing in any manner with the suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs.; c. Pass a decree of Mandatory injunction directing defendant No.1 to pay the debts of defendant no.2; d. Pass a decree of Mandatory injunction directing defendant No.2 to release and handover the original title deeds of suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds or 241.03 Sq.Mtrs or of the entire property bearing no.51/4, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 576.53 Sq.Yds to the plaintiffs; e. Pass a decree of Mandatory injunction directing defendant No.2 to render accounts for rent accrued with respect to the suit property bearing no.51/4-B, Desh Bandhu Gupta Road, Karol Bagh, Delhi-110005 admeasuring 288.27 Sq.Yds. or 241.03 Sq.Mtrs. w.e.f. 19.05.2009; f. Pass a decree of Mandatory injunction directing defendants to apply the principle of Marshalling by bringing the other six properties as detailed in para 3 (xxiii) at serial nos. (a) to (c) and (e) to (g) above to sale first except the suit property, and if the debt is not satisfied out of the other properties only then to proceed against the suit property; g. An enquiry be made by this Court into the damages suffered by the plaintiffs and a decree for such amount as may be adjudged to be the loss may be passed in favour of the plaintiffs and against the defendant No.1 and 2 jointly and severally, for which the plaintiffs undertake to pay the Court Fees at the appropriate stage.

4. Defendant No.2 has filed the written statement. It is stated in the written statement that the present suit is a collusive suit between the plaintiffs and defendant No.1 intending to deprive defendant No.2 of its valuable rights. It is also urged that the alleged sale deed dated 19.05.2009 is collusive. It is stated that Debt Recovery Tribunal vide its order dated 27.01.2011 disposed of the matter in

respect of the mortgage of the suit property though it is admitted that defendant No.2 has filed appeals before Debt Recovery Appellate Tribunal (DRAT) raising a limited challenge to the said order. The right of the plaintiffs claiming Marshalling is denied as it is stated that the mortgage is only in respect of the suit property. It is also strenuously urged that the suit is liable to be dismissed in view of specific bar under the provision of Section 34 of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act) read with Sections 17 and 18 of Recovery of Debts Due to Banks and Financial Institution Act, 1993 (DRT Act).

5. The present application No.1275/2012 is filed by defendant No.2 under Order 7 Rule 11 CPC seeking rejection of the plaint on the ground that the matter is sub-judice before DRAT in Appeals No.137/2011 and 138/2011 and is hence bound by statute i.e. SARFAESI Act and DRT Act.

6. Apart from the above averments in the application, no further details are filed about the nature of proceedings pending before DRAT, the parties, etc. The application is completely devoid of these details.

7. There is no reference to any proceedings under the SARFAESI Act. The sum and substance of the submission of the learned counsel for the applicant/defendant No.2 appear to be that the suit is barred under Sections 17 and 18 of the DRT Act.

8. The basic contention of the learned counsel for defendant No.2/the applicant is that in view of pendency of proceedings before DRAT, the present suit is barred under the SARFAESI Act and DRT Act. Strong reliance is placed on order dated 27.01.2011 passed by DRT in SANo.372/2010 titled as BITUM IMPEX vs. BOM. Copy of the order in this case has been filed by the plaintiffs. Based on this order, it is stated that the present suit is barred.

9. On the other hand learned senior counsel appearing for the plaintiff has vehemently argued relying upon the judgment of the Honble Supreme Court in the case of J.P. Builders & Anr. vs. A.Ramadas Rao and Anr., (2011) 1 SCC429 to contend that if relief of Marshalling is granted by a civil court that would not be

contrary to the provisions of DRT Act. He also relies upon the judgment of the Supreme Court in the case of Indian Bank vs. ABS Marine Products Pvt. Ltd., AIR 2006 SC1899 and Mardia Chemicals Ltd. and Ors. vs. Union of India and Ors., (2004) 4 SCC311 to contend that in a civil suit which is filed against a bank/financial institution, the jurisdiction of civil court is not completely ousted.

10. I have heard learned counsel for the parties. Reference may be had to the provision of Section 17 and 18 of DRT Act.

11. The said provision reads as follows:

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. (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.

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.

12. The Honble Supreme Court in the case of J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.(supra) where a claim for the relief of Marshalling from a civil court was sought/held as follows:

57. It is the claim of the plaintiff before the High Court that having secured a decree for specific performance as per Section 56 of the TP Act, 1882, by applying the principles of marshalling, directions may be issued to the Bank to exhaust its remedy from other items of property which are located in the prime places in Chennai before bringing the properties covered in the agreement of sale. 68. We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 has been enacted it is not a bar for the civil court to apply to other relief such as Section 56 of the TP Act. We are also satisfied that by issuing such direction on the application of Section 56 of the TP Act, the Division Bench, has not modified or eroded the order passed by DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties to sale first to satisfy the mortgage debt payable by defendants No.1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by defendants No.1 and 2, in that event, Bank can proceed against the suit properties.

13. Clearly the legal position would follow that DRT Act is not a bar for a civil court to apply the relief such as Section 56 of the Transfer of Property Act inasmuch as it was held that no prejudice is caused to the Bank inasmuch as it only directs that other properties be sold first to satisfy the mortgaged debt.

14. Section 18 of the DRT Act prohibits a civil court from exercising its jurisdiction in relation to matters specified in Section 17. The Honble Supreme Court in the case of Nahar Industrial Enterprises Limited vs. Hong Kong and Shanghai Banking Corporation, (2009) 8 SCC646 held as follows:

85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counterclaim.

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement

of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set-off or counterclaims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims, determined by a civil court.

15. Though full details have not been given by the applicant/defendant No.2, presumably from the narration of facts in the plaint and written statement, there are no dues or dues payable by the plaintiffs to defendant No.2. Hence, apparently the plaintiffs are not parties to the proceedings initiated by defendant No.2 Bank before the DRT. Being a third party, the Honble Supreme Court in the above judgment clearly recognised its independent right to approach a civil court. The plaintiff not being a debtor, the jurisdiction of the civil court in a proceeding initiated by the plaintiffs would not be ousted.

16. There is no reference to any proceedings commenced by defendant No.2 under the SARFAESI Act. However, in view of the judgment of the Honble Supreme Court in the case of J.P. Builders & Anr. vs. A.Ramadas Rao and Anr.(supra), civil court would still have jurisdiction to deal with the relief of Marshalling as sought for by the plaintiffs. It is no doubt true that some of the reliefs, namely, reliefs which challenge the validity of the mortgage in favour of defendant No.2, sought by the plaintiff may be contrary to the SARFAESI Act. No cogent submissions were made in this regard by learned counsel for the defendant No.2. However, in any case the settled legal position is that a part of the plaint cannot be rejected. (Reference Roop Lal Sathi versus Nachhattar Singh, AIR 1982 SC1559.

17. Reliance by the learned counsel for defendant No.2 on the judgment in the case of Mukesh Bhargava & Anr. vs. Canara Bank & Ors., 2007 (96) DRJ280is

misplaced. That suit was filed seeking a declaration that the plaintiff was the owner of the suit property which had actually been mortgaged to the Bank. On the facts of that case, the Court held that the issue as to whether a title existed in the plaintiff and valid mortgage was created was an issue which has to be gone into by the DRT and the jurisdiction of the civil court was barred under Section 34 of the SARFAESI Act. The issue of Marshalling was not involved in that case.

18. The present application is accordingly dismissed. CS(OS) No.1727/2012 List before the Joint Registrar on 5.2.2014. JAYANT NATH (JUDGE) JANUARY24 2014 rb

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