ORDER BELOW EXH.5

(Passed on 21st January, 2022)

Read the application. Perused documents on record. Heard learned counsel Shri Ravi Giripunje for the plaintiff. Plaintiff has filed present application for exparte ad-interim injunction to restrain the defendants from creating third party interest over the suit property. Plaintiff has filed present suit for declaration that loan dtd.13.07.2015 disbursed by virtue of sanction letter dtd.30.06.2015 is outcome of fraud. Further, prayed for declaration that document of mortgage dtd,13.07.2015 executed by one of the Director of defendant no.5 in favour of defendant no.1 is fraud, forged, fraudulent, null and void. Further, prayed for declaration that defendant no.9 has no authority to pursue the proceeding of revenue recovery certificate on the basis of fraudulent loan.

2. The learned counsel further submitted that plaintiff has filed present suit for quashing the notice dtd.15.12.2021 issued by defendant bank against plaintiff. The learned counsel further submitted that there is a systematic fraud played by defendant no.6 & 7 by submitting the documents of legal juristic person i.e. defendant no.5. Defendant no.1 has started the proceeding under the SARFAESI Act on the basis of fraudulent document. He further submitted that already defendant no.5 created interest of so many persons on the suit property prior to sanction of the loan. The plaintiff never put his signature of any document. Defendant no.5 & 6 have opened the account in the name of defendant no.5 and transferred the loan amount in their personal account by playing fraud

with the company.

3. I have gone through the documents. Admittedly, only defendant no.6 applied for loan on 01.07.2015. Document further shows that bank has sanctioned the loan on 30.06.2015. This fact shows that before the application for loan, bank has decided to disburse loan of Rs.6 Crore prior to application. The learned counsel Shri Ravi Giripunje invited my attention towards the mortgage.

4. On perusal of mortgage deed, it appears that there is name of the plaintiff in the title of mortgage deed. However, there is no signature of plaintiff. Only one person i.e. defendant no.6 has executed the mortgage in favour of bank. Plaintiff has produced document below Exh.10 which ws that an amount of Rs.1 Crore 25 Lakhs transferred in the name of Suresh on 18.12.2015. All the amount of loan transferred in the name of defendant no.7 i.e. Suresh Dadarao Doifode, who is guarantor of said loan. He further submitted that by using the document of bank, defendant no.6 & 7 played fraud with the company without consent of plaintiff. The father of defendant no.7 was the director of defendant bank.

5. The learned counsel argued that civil court has jurisdiction when plaintiff coming with the case that defendant nos.6 & 7 obtained loan by committing fraud and he placed reliance in the case of *Bank of Baroda -Vs- Gopal Panda, reported in 2021 SCC OnLine Bombay 446*, wherein the Hon'ble Bombay High Court, Division Bench at Nagpur held that

"22.3. A security interest may at times also involve the common law rights of a citizen, who is not a party to its creation. In such a circumstance,

can it be said that merely because a security interest has been created and it has to be enforced in a particular Forum in a particular manner, the citizen whose common law right has been infringed, would have to approach the Forum which has no jurisdiction and wherewithal to decide and enforce such violation. The following could be considered as examples of this :--

(a) In Vineeta Sharma v. Rakesh Sharma, (2020) 9 SCC 1,

the Hon'ble Apex Court, whole considering the amendment to Section 6 of the Hindu Succession Act, 1956, whereby a daughter was recognised as a coparcener, has held that such recognition would give her right in the coparcenary property by her birth in the coparcenary and not from the date of death of her father or the amendment. In such a matter if the male members of the family have already created a security interest in such coparcenary properties in favour of the Bank and for non payment of dues, if the same are being sought to be taken possession of and sold by auction, under Section 13 of the SARFAESI Act, can the Special Forum, DRT herein, which is undertaking this exercise, on being approached by the daughter who now due to the amendment to the Hindu Succession Act, 1956, has a share therein which stands recognised retrospectively by the Apex Court, decide and determine the rights of such daughter and grant a preliminary decree delineating her share and take further action to separate her share? If it cannot, then could it be said that the Civil Court does not have the jurisdiction to do so, in view of the bar created under Section 34 of the SARFAESI Act? But if it is so held then the daughter in spite of having a right in the property duly recognised by law, would be left remediless, as she cannot go to the Civil Court nor the Special Forum, the DRT, has any authority to determine the extent of her right and grant her *the relief which she would be entitled to.*

(b) *Where the owner/borrower/guarantor has entered into an agreement of sale of the property and has accepted consideration resiles from the contract which is then put to enforcement by instituting a suit for specific performance, during the pendency of which if a security interest is created by the owner by offering the property as an equitable mortgage, and the property is then put to auction, can the Tribunal in such a case upon the plaintiff approaching it under Section 17, adjudicate the rights of the plaintiff vis-a-vis the security interest and release the property from further process under the SARFAESI Act? If the security interest in spite of the notice of the pendency of the suit is put to auction for recovery of the dues of the Bank, how would the principle of lis pendens in Section 52 of the Transfer of Property Act, affect the situation? This is more so, as by filing a suit, the right of the plaintiff, has become crystallized. What would happen to the suit for specific performance, which in such a circumstance, on account of loss of the subject property, would be rendered futile?*

(c) *Another case in point would be where two or more persons hold title to the security interest and one of them has a power of attorney of the other, for taking steps to get the property mutated and do all activities necessary in that regard including to get the property partitioned, without any authority, mortgages the entire property with the Bank under the power of attorney which is accepted by the Bank, which on failure to repay is sought to be auctioned by invoking the powers under Section 13 of the SARFAESI Act. Can the Special Forum on the plea of the other co-owner enter into an adjudication of the issue* *about the nature and scope of the power of attorney and grant a declaration that the security interest was not legal to the extent of the share of the other co-owner?*

(d) Where on a prima facie demonstrable case, the person who has created the security interest, was not having any legal right in the property in respect of which security interest is created.

(e) Where the Bank is aware from documents on record that the borrower/mortgagor is not having any absolute right int eh property or is having a limited right, contrary to which the security interest is created in the whole of the property bis-a-vis the borrower/mortgagor who is having only defined or undefined undivided share/interest in the property and the entire property is mortgaged.

(f) Where right of inheritance is claimed in the property, in respect of which a security interest is created.

(g) Since the claim of the Bank or Financial Institution, could only be for recovery of the debts due, in a suit for specific performance in respect of the security interest, the consideration, agreed could always be directed to be transferred to the Bank or the Financial Institution, as it would be the obligation of the Seller, under Section 55 of the Transfer of Property Act, to transfer a clear and marketable title, free of encumbrances and it cannot be said that the suit, since it involved the security interest, would be hit by the bar under Section 34, as the DRT cannot decide the claim for specific performance, which is within the domain of the Civil Court.

(h) In a suit for setting aside an alienation and partition of joint family properties, the plea of absence of legal necessity, in an alienation by

a Karta of Hindu Joint Family, has consistently, if proved, been upheld by the Courts to upset the alienation. If such a suit involves the security interest, can it be said that it would be affected by the bar under Section 34 of the SARFAESI Act or that the remedy would lie under Section 17 of the SARFAESI Act, when the DRT has no power to adjudicate upon the issue and pass an appropriate decree.

(i) Could the suits in which pleas under Sections 31 and 34 of the Specific Relief Act are involved, in respect of the property which is the subject matter, which is also a security interest, be considered to be triable by the DRT under Section 17 of the SARFAESI Act?

(j) In a case where the declaration of an account as a non-performing asset (NPA), is contrary to the guidelines as framed by the RBI, could the DRT grant a declaration to that effect and consequendy set aside all subsequent actions, if it finds that the declaration as NPA was contrary to the guidelines? or a civil suit would lie?

(k) Rights as available under the Transfer of Property Act, of foreclosure of accounts under Section 67; claim for redemption of mortgage under Section 60.

(1) whether a security interest was validly created and when the applicability of the measures, itself is in doubt, can the DRT determine this?

These situations are indicative and point towards existence of Civil Court's jurisdiction, even in cases, where a security interest has been created. The above examples are not exhaustive and there may be other cases, where the security interest would also become the subject matter of a litigation involving rights available under the Civil Law, and therefore each case shall have to be tested on its own merits."

Further, Hon'ble High Court held that “*(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 if 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.”*

6. Plaintiff is seeking declaration in respect of the document executed and alleged transaction is fraudulent. Considering the ratio laid down by Hon'ble Bombay High Court, Bench at Nagpur, in the above case Civil Court has jurisdiction to try the present suit which is of civil nature as plaintiff is not party to the mortgage deed.. The learned counsel further submitted that all the properties mortgage with the bank having the value of rupees approximately 20 Crore and they are going to sold the property only for 2.40 Crore. Suit has to be decided on merits. In order to decide the suit injunction application and on merits, subject matter of suit has to be preserved.

7. The learned counsel further invited my attention on the public notice which shows that defendant bank is going to sell the property by auction on 21.01.2022 at 1.00 p.m. There are several allegations in respect of the fraud committed by defendant no.6 and 7 in the plaint stated on oath. The issue of fraud has to be decided on merits. Hence, it would be just and

proper to restrain the defendants from creating third party interest over suit property till their appearance. Plaintiff has made out prima facie case so as to grant exparte ad-interim injunction against the defendants. Hence, I proceed to pass the following order.

ORDER

[i] Issue exparte ad-interim injunction against defendants restraining them from creating third party interest over the suit property till next date.

[ii] Issue show cause notice against all the defendants as to why injunction should not be confirmed till final decision of suit.

[iii] EP & SB is allowed.

Nagpur
Date : 21.01.2022.

(B.V. Baravkar)
I/c. 11th Jt. Civil Judge (Sr. Dn.),
Nagpur.