

MHKO050025992014



ORDER BELOW EXH. 106 IN REG. CIVIL SUIT NO. 363/2014

1. Perused the application.

2. This is an application filed by defendant no. 6 as per Order 7 Rule 11(d) of Code of Civil Procedure to dismiss the suit as this court did not have jurisdiction to try present suit. The defendant no. 6 has submitted that present suit is filed by plaintiff against the defendants for permanent injunction. The suit property is leased to this defendant no. 6. Moreover, the defendant no. 6 has initiated the proceeding regarding the suit property before the Debt Recovery Tribunal, Pune on 01/04/2017 bearing lodging no. 369/2017 and 370/2017. Therefore, the claimed relief cannot be granted in favour of plaintiff. As the proceeding is pending before the Debt Recovery Tribunal hence this court did not have jurisdiction to try the present suit as per section 34 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. As the suit is not within the jurisdiction of this court, hence, it is liable to be dismissed. Lastly, the defendant no. 6 has prayed to allow the application.

3. The plaintiff as well as other defendants have resisted the application by filing their say. The plaintiff has filed say at Exh. 109 and contended that present application is false and frivolous. The plaintiff has further contended that he has filed present suit in the year 2014. The defendant no. 6 did not mention the specific date of mortgage of the suit property. The

defendant no. 6 did not produce any documentary evidence in support of the contention of the application. The defendant no. 5 has mortgaged the property to defendant no. 6 during the pendency of present suit and during the existence of injunction order. Already also injunction order was passed in R.C.S.No. 132/1994 on 22/03/2010. During the existence of injunction order, the defendants have no right to mortgage the property. Therefore, the alleged acts of defendants are illegal and in contempt of court authorities.

4. The plaintiff has further contended that he has issued pre-suit notice to the defendant no. 6 which was received by them. Despite of this fact, the defendant no. 6 has granted loan and the said act of defendant no. 6 is illegal. The defendant no. 6 did not file W.S. and suit has already proceeded further without the W.S defendant No. 6. Moreover, no evidence order is passed against the defendant on 11/03/2019. The plaintiff's case was not challenged by the defendant no.6 Present application is filed with intention to delay the matter. Hence, it is liable to be rejected.

5. The defendant no. 4 has also resisted the application by filing say at Exh. 111. The defendant no. 4 has contended that the defendant nos. 1, 5 and 6 are in collusion with each other. It is within their knowledge that previous various proceedings are decided between the parties. The defendant no. 1 and 5 have prepared false documents and illegally mortgaged the property to defendant no.6. The said transactions are not binding on this defendant. The defendant no. 1 and 5 have no concerned with the suit properties and despite of this fact the defendant no. 6 executed illegal transactions regarding the suit property. The prayer of present application is not maintainable and hence it may kindly be rejected.

6. The defendant no. 2 has also resisted the application by filing say at

Exh. 112. The defendant no. 2 has contended that entire contentions of the application are totally false, frivolous, vexatious, concocted, illegal and not maintainable or tenable either in law or on facts. The plaintiff has filed original suit for partition and separate possession and permanent injunction. Already permanent the injunction was granted against the defendants to not to alienate and not to encumber the suit properties. The said suit was finally disposed of and prayers therein are granted after full-fledged trial. Moreover, permanent injunction was granted against the defendants from not to alienating or encumbering the suit property in any manner. Therefore, the entire loan transactions and execution of mortgage deed of the suit properties by the defendant nos. 1, 5 and 6 is illegal and invalid. Therefore, also the plaintiff has filed Final Decree Application No. 5/2010 and it is pending for adjudication.

7. The defendant no. 2 has further contended that the defendant no. 1 and 5 have previously also tried to obtain loan by mortgaging the suit properties. But, the said loan proposal was rejected by concerned financial company because the plaintiff has informed the facts about the pending proceedings to the concerned authorities. Thereafter also, the defendant nos. 1 and 5 tried to obtain loan. In present suit also the defendant nos. 1, 3 and 5 are restrained by way of temporary injunction to not to encumber the suit properties till final disposal of the suit. Moreover, permanent injunction granted in R.C.S. No. 132/94 is also in existence. The defendant no. 6 has filed present application by concealing all above actual facts and circumstances. The defendant no. 6 did not file any written statement and not produce any documents in support of their contentions. The plaintiff and defendants have closed their evidence and at present the suit is posted for final argument. Hence, the defendant no. 6 has filed this application at belated stage to delay and protract the trial. Previously civil and revenue proceedings were pending between the parties since 1994. Those proceedings are pending much earlier

before proceeding of defendant no. 6. Hence, the provision of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not applicable to the facts and circumstances of present case. Moreover, the said proceeding is not maintainable as the loan transaction executed and entered by defendant nos. 1, 5 and 6 in violation of permanent injunction order of civil court. Therefore, the present application is not maintainable and it may kindly be rejected.

8. Perused record. Heard Learned Advocate Mr. P.N.Sharma for defendant no. 6. He has argued that the present suit is not within the jurisdiction of this court as another proceeding is pending before Debt Recovery Tribunal regarding the suit property. He has further argued that the mortgage deed is still in existence, valid and legal. It is within the knowledge of plaintiff and defendants that the suit properties are mortgaged. As the loan account was non performing assets hence bank has started recovery proceedings under SRFAESA Act. The defendant no. 6 has rights against the suit property. Moreover, the defendant no. 6 did not claiming relief about whole suit property. Hence, the suit is liable to be dismissed and accordingly the application may be allowed.

9. During the course of argument Learned Advocate for the defendant no. 6 has relied on the judgment of Hon'ble Bombay High Court in case of ***State Bank of India v/s Sagar*** in which the Hon'ble Bombay High Court has held that the jurisdiction of civil court is barred by section 34 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 if the proceeding arises under said Act. He has also relied on the judgment of Hon'ble Bombay High Court in case of ***Saraswat Co-Operative Bank Ltd. V/s Madan S. Zaa***. I have gone through the cases cited supra. In case of ***State Bank of India V/s Sagar*** the facts are that the bank has issued a notice under section

13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and that notice was challenged but in case in hand no notice was challenged by plaintiff. Therefore, in my humble opinion the facts and circumstances of the case of State Bank of India and in present case are altogether different from each other. It is also necessary to mention here that in case of Sarswat Co-Operative Bank the notice issued by bank was challenged. But, no such issue is pending in present case. Therefore, in my humble opinion the ratio laid down in both cases cited supra cannot be straight way applicable to the present case.

10. On the contrary, Learned Advocate for plaintiff Mr. I.V.Chavan has argued that present application is not tenable at this stage. The defendant nos.6, 1 and 5 have concealing material facts. The plaintiff's evidence is already completed. The plaintiff's civil rights cannot be decided by the Debt Recovery Tribunal. The relief claimed in present suit cannot be adjudicated by the Debt Recovery Tribunal. This court have jurisdiction to try present suit and the rights of civil court cannot be ousted. Therefore, the application is liable to be rejected and accordingly it may be rejected. In support of his submissions he has relied on the judgments of Hon'ble Supreme Court in case of *Mardia Chemicals Ltd. And Ors. V/s Union of India and Ors.* and in case of *Smt. Ramkanyabai and Anrs. V/s Jagdish and Ors.*

11. Learned Advocate for defendant no. 2 Mr. S.B.Pawar has argued that no single documents are produced by defendant no. 6 showing that the proceeding is pending before Debt Recovery Tribunal. The application is not maintainable at this stage. He has further argued that the defendant no. 6 did not file written statement to the present suit and in absence of written statement the defendant no. 6 is not entitle to file application under Order 7 Rule 11. In support of his this submission, he has relied on the judgment of

Hon'ble Supreme Court in case of *Alpana Gupta V/s Apj Towers Pvt. Ltd and Anr. (Civil Appeal No. 6413-1614 of 2019)* and the judgment of Hon'ble Bombay High Court in case of *Pralhad Jagnath Jawale V/s Sitabai Chandar Nikam (Mh.L.J. 2011-04 136)*.

12. He has further submitted that the previous suit between the parties was decided on merit on 22/03/2010 after full-fledged trial. The injunction decree passed in that previous proceeding is still in operation. Therefore, whatever loan transactions entered between defendant nos. 1, 5 and 6 are in nullity. So also, the proceedings which are based on those loan transactions and mortgage deed are itself illegal. In present suit also temporary injunction order was passed and in existence. Hence, the proceeding as well as any transactions are not maintainable. Therefore, present application may kindly be rejected.

13. Learned Advocate Mr. A. B. Belekar appearing for defendant no. 4 has argued that the application is filed at belated stage and considering the previous litigations between the parties the application is not at all maintainable. In present suit, no relief was claimed against the defendant no. 6. It is within the knowledge of defendant no. 6 that the previous proceeding and injunction orders are in existence. In spite of this fact, the defendant no. 6 entered loan transactions with the defendant nos. 1 and 5. Moreover, the defendant no. 6 did not initiated any legal and valid action against the defendant no. 1 and 5. Therefore, the defendant no. 1, 5 and 6 are in collusion with each other and deliberately executed invalid and illegal documents regarding the suit property. Hence, the defendant no. 6 is not entitle to any relief as prayed in application. Therefore, application may kindly be rejected.

14. Considering the pleadings of the both the parties and rival

submissions of the Learned Advocates of the parties in order to decide this application following points arise for my determination to which I have given my findings thereon is as under:-

SR. NO.	POINTS	FINDINGS
01.	Whether the application is liable to be allowed ?	No
02.	What order ?	Application is rejected

REASONS

15. Before starting to take into consideration the points deciding present application in my opinion it is necessary to mention here the provision of Order 7 Rule 11 of Code of Civil Procedure which is as follows:-

Order 7 Rule 11:- Rejection of plaint :- The plaint shall be rejected in the following cases:

(a) *where it does not disclose a cause of action;*

(b) *where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;*

(c) *where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;*

(d) *where the suit appears from the statement in the plaint to be barred by any law:*

(e) *where it is not filed in duplicate;*

(f) *where the plaintiff fails to comply with the provisions of rule 9 :*

[Provided that the time fixed by the Court for the

correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.]

16. In present application the defendant no. 6 has pleaded that the plaintiff's suit may be dismissed as this court did not have jurisdiction to try the present suit. But, after perusal of above mentioned provision of Order 7 Rule 11(d), it clearly reveals that, it does not provide to dismiss the suit for want of jurisdiction rather the provisions provide the requisite condition when plaint may be rejected. Therefore, it is necessary to decide here that whether the plaint is liable to be rejected or not as per the provision of Order 7 Rule 11(d).

17. It is a settled principle of civil law that in order to consider Order 7 Rule 11 the court has to look into averments in plaint and scrutinize them. It is also clear that averments in written statement are immaterial. Present suit is filed claiming the relief of perpetual injunction against defendant no. 1, 3 and 5 that they may be permanently restrained from selling, transferring or creating any third party interest in the suit properties. No relief is claimed against the defendant no. 6.

18. In order to decide present application it is also necessary to describe here Section 34 of Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 which is as follows:-

Section 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).

19. Admittedly, in present suit, the plaintiff neither challenged any proceeding in respect of any matter which a Debts Recovery Tribunal or the appellate tribunal is empowered by or under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 nor challenged any action taken or to be taken by the authority in respect of power conferred by or under Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. As stated above, the plaintiff's suit is for simpliciter injunction.

20. Though the defendant no. 6 has contended that the proceedings are initiated before the Debt Recovery Tribunal, Pune but no necessary documents are produced by defendant no. 6 showing the present pendency of proceeding. In absence of necessary documents the dates of pending proceedings cannot be gathered. So also, it cannot be concluded that recovery proceedings, if any, are pending before the Debt Recovery Tribunal are pending before filing of this suit. It is also necessary to mention here that admittedly present suit is filed on 04/10/2014. The record shows that the defendant no. 6 was appeared on 28/10/2014. But till today neither the defendant no. 6 has filed any W.S. nor any application for rejection of plaint. There are no pleadings of defendant no. 6 regarding the pendency of recovery proceedings before the Debt Recovery

Tribunal.

21. As stated above, it is a settled principle of civil law that the question of rejection of plaint under Order 7 Rule 11(d) of C.P.C. has to be considered upon the facts which are appearing from the plaint and not from the facts stated in the defence by the defendants. It is the fact on record that the defendant no. 6 was appeared since inception and filed present application at the time of final argument and after completion of evidence of parties.

22. Along with list Exh. 115 the defendant no. 6 has produced certain documents at Exhs. 115/3 and 115/4. Those are the orders of Tahsildar and Collector. From the bare perusal of those documents it reveals that recovery proceedings are already decided. Means, at present no proceeding is pending before the Debt Recovery Tribunal.

23. The plaintiff has produced the copy of judgment in R.C.S.No. 132/1994. While passing decree in R.C.S.No. 132/1994 the specific shares of the parties are decided. Moreover, the defendants are permanently restrained from transferring the suit properties or creating any third party interest upon those properties. The injunction order passed in R.C.S. No. 132/1994 is still in existence. In present suit also the plaintiffs have pleaded that the defendant nos. 1 and 5 have obtained loan from defendant no. 6 by mortgaging one of suit property i.e. city survey no. 2976. The plaintiff was also aware that previously certain transaction was executed regarding city survey no. 2976 before filing the suit, hence, whatever temporary injunction order was passed in present suit cannot be applied to the previous Acts before filing of the suit.

24. It clearly reveals from the record that the defendant no. 6 was well aware about the previous decisions and the acts of defendant nos. 1 and 5.

Despite of this fact, the defendant no. 6 did not initiate any action against the defendant nos. 1 and 5 for the reasons best known to defendant no. 6. The present application is filed at a belated stage. It is also necessary to mention here that in present suit also injunction order was passed regarding the suit properties and the defendants are restrained from creating any third party interest during the pendency of the suit. The defendant no. 6 is at liberty to prove that injunction order cannot be granted against one of the suit property i.e. city survey no. 2976 because of the necessary proceedings under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002.

25. It is pleaded in suit itself that the defendant no. 1 and 5 have mortgaged city survey no. 2976 before passing any order in present suit. But, it is worthy to mention here that permanent injunction order passed in R.C.S. No. 132/1994 was in existence till today. The decree passed in R.C.S.No. 132/1994 was not set aside. It is also not the say of defendant no. 6 or any other defendants that the said decree was set aside. The defendant no. 6 was also aware about the decree passed in R.C.S. No. 132/1994. But, surprisingly the defendant no. 6 did not initiate any action against the defendant no. 1 and 5 for playing fraud upon them that during the existence of permanent injunction order they have mortgaged one of the suit property i.e. the city survey no. 2976 to the defendant no. 6.

26. Considering all the above discussed aspects, I am of the opinion that the suit is not barred by the provisions of Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. Being a suit for simpliciter injunction this court has jurisdiction to try present suit on merit. Hence, the defendant no. 6 is not entitled to the relief to dismiss the present suit

as per Order 7 Rule 11(d) of C.P.C. as prayed. Accordingly, point no. 1 is answered in negative and to answer point no. 2 following order is passed.

ORDER

1. Application is rejected.
2. Suit to proceed further.
3. Parties to take note.

(Dictated and pronounced in open court.)

Ichalkarnji

Date:- 31/12/2019

(A. S. Jadhav),

3rd Jt. Civil Judge (J.D.),
Ichalkarnji.