

Pankaj Kumar Tiwari Vs. Indian Overseas Bank Asset Recovery Management Branch & Ors.

Civil Appeal No. 6736 of 2023 arising out of S.L.P (Civil) No. 22744 of 2023
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Full judgment text

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[Civil Appeal No. 6736 of 2023 arising out of S.L.P (Civil) No. 22744 of 2023]

Abhay S.Oka J.

1. Leave granted.
2. It is not necessary to serve notice to the second to eleventh respondents. Notice is accepted by the learned counsel for the first respondent.
3. By the impugned order dated 27th September, 2023, a Division of the Bombay High Court stayed an order passed by a Civil Court in Bihar by entertaining a petition under Article 226 of the Constitution of India.
4. Heard the learned counsel appearing for the appellant and the learned senior counsel appearing for the first respondent.
5. The present appeal discloses a shocking state of affairs. The first respondent is a nationalized bank. The second respondent was the borrower who had created an equitable mortgage in respect of the properties mentioned in paragraph 1 of the impugned order.

The first respondent proceeded against five properties mentioned in paragraph 1 of the impugned order. Orders were passed in favour of first respondent under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "SARFAESI Act, 2002"). The details of the properties as described in paragraph No.1 of the impugned order read thus:

6. Thereafter, the present appellant filed a suit before the Civil Court at Siwan in the State of Bihar in which the defendants (second to fifth respondents) were the borrowers against whom orders under Section 14 of the SARFAESI Act were passed. The appellant relied upon the alleged Memorandum of Understanding dated 4th October 2015 executed by the appellant and the borrowers in relation to the properties which are mentioned above.

The prayer made by the appellant in the suit was to declare their alleged rights in respect of the said properties. A mandatory prayer was made directing defendants in the suit to comply with the Memorandum of Understanding. On 24th January 2023, the Trial Court purported to exercise the power under Rule 1 of Order XL of the Code of Civil Procedure, 1908 (for short "CPC") by appointing the 7th respondent, who was a practising advocate as the Court Receiver for taking possession of the properties mentioned above.

He was permitted to get help from the local police and take physical possession of the properties. The Receiver acted upon the said order and took possession of the aforesaid five properties. Prior to the institution of the suit, orders were already passed under Section 14 of the SARFAESI Act at the instance of the first respondent.

Before the institution of the suit, the first respondent had already taken physical possession of the properties mentioned at S.Nos. 1 and 2, and as regards three other properties, symbolic possession was taken. If these facts had been pointed out to the Civil Court at Siwan, we are sure that the order which was passed on 24th January 2023 would not have been passed.

7. There is one more serious aspect of the case. The appellant cannot plead ignorance about the proceedings initiated by the first respondent. A written statement was filed in the said suit by the first defendant (second respondent) therein in which there is a specific averment in paragraph 12 that litigations and disputes were pending in the Debts Recovery Tribunal and in the Courts of the Chief Metropolitan Magistrate, Mumbai and Thane regarding the schedule properties.

Paragraph 12 also records that the defendants were liable to pay amounts to the first respondent bank and it was stated that they would do so. Thus, the appellant cannot plead ignorance about the knowledge of the pending proceedings initiated by the first respondent Bank. Notwithstanding the knowledge of the said proceedings, the appellant pressed for the appointment of Court Receiver and on 24th January, 2023 the Receiver was appointed with a direction to take possession of the aforesaid five properties.

8. At this stage, the learned counsel appearing for the appellant submits that in paragraph 12 of the Written Statement, the details of the proceedings were not set out. It was the duty of the appellant, before pressing the application for appointment of Receiver, to call upon the defendants to furnish the details. It was the duty of the appellant to place the details before the Trial Court.

Instead of doing that, the appellants pressed the application for appointment of Receiver. We find that in the order of the Trial Court, the fact that the second respondent had mortgaged the said properties has been mentioned. The Trial Court ought not have passed a drastic order appointing Court Receiver without impleading the mortgagee as a party defendant.

9. Then comes the role played by the first respondent bank. The order passed by the Civil Court in Bihar was appealable under Order XLIII of the CPC. Instead of availing the remedy of the appeal, the first respondent took the extraordinary step of invoking the jurisdiction of the Bombay High Court under Article 226 of the Constitution of India by specifically challenging the order of appointment of the Receiver passed by the Civil Court in Bihar.

In our view, the first respondent ought not to have filed such a petition when a statutory remedy was available. Moreover, the High Court ought not to have entertained the Writ Petition. The jurisdiction of the High Court under Article 226 is no doubt very wide. But the propriety and judicial discipline required the High Court not to entertain such a petition.

The High Court ought to have relegated the first respondent to the statutory remedy while possibly granting a limited protection. A statutory remedy was available to the first respondent before the concerned Court in Bihar. If the High Courts start entertaining Article 226 petitions for challenging the orders passed by the Civil Courts in other states, it will lead to a chaotic situation. Therefore, we have no manner of doubt that the impugned order will have to be set aside.

10. However, we also find that the appellant has indulged in the suppression of material facts while persuading the Trial Court to pass a drastic order for appointing a Court Receiver. There is another feature of the case. In the written statement filed by the defendants in the suit filed by the appellant, an issue of maintainability was raised.

The order of the Trial Court noted that the first respondent had mortgaged the properties. The Trial Court did not pay attention to the issue of maintainability as well as the issue of territorial jurisdiction. An order appointing a Court Receiver has very drastic consequences. As noted earlier, such a drastic order was casually passed by the Civil Court.

11. The learned senior counsel appearing for the first respondent stated that in terms of the impugned order, the possession of the properties at serial Nos. 1 and 2 has been handed over to the said respondent by the Court Receiver and the status quo ante has been restored as regards the properties at serial Nos. 3, 4 and 5.

12. Therefore, we propose to dispose of this appeal by directing that the order dated 24th January 2023 of the Civil Court shall not be acted upon to enable the first respondent to adopt appropriate remedies. We also make it clear that the status quo as obtaining in respect of the above five properties immediately before the Civil Court passed the order dated 24th January 2023 shall be maintained.

13. The learned counsel appearing for the appellant at this stage agrees that the appellant will implead the first respondent as party defendant No.5 to the suit. 14. Hence, we dispose of the appeal by passing the following order:

(a) We set aside the impugned order dated 27th September 2023 passed by the Bombay High Court and dismiss Writ Petition No.7064 of 2023 on the ground that a statutory remedy was available to the first respondent and therefore, the Bombay High Court ought not to have entertained the Writ Petition under Article 226 of the Constitution of India for challenging the order passed by a Civil Court in another State;

(b) The appellant will carry out a formal amendment to the suit for impleading the first respondent bank as a party defendant No.5;

(c) The order dated 24th January 2023 passed in Title Suit No.2024 of 2022 by the learned Civil Judge, Senior Division XII, Siwan shall remain stayed with a clarification that status quo as regards the five properties above, as prevailing immediately before the passing of the said order, shall continue to operate. The order dated 24th January 2023 shall be treated as an ad-interim order;

(d) We direct the appellant and the first respondent to appear before the Trial Court on 30th October 2023 in the morning. It will be open for the first respondent to file a written statement in the suit and reply to the application for appointment of a Court Receiver. It will be open for the first respondent to raise all possible contentions, including the contention regarding maintainability of the suit and lack of territorial jurisdiction;

(e) After hearing the first respondent, the Trial Court will pass a fresh order on the application for appointment of Court Receiver. We make it clear that till the said application is pending, the order dated 24th January 2023 will remain in abeyance and status quo as prevailing just before passing of the said order, will continue to operate;

(f) We also make it clear that in the event the order which may be passed on the application for appointment of Court Receiver by the Trial Court be adverse to the respondent No.1, the said order shall not be acted upon for a period of one month from the date of passing of the order; and

(g) It is further made clear that notwithstanding this order, it will be open for the first respondent to initiate appropriate proceedings on the basis of the orders under Section 14 of the SARFAESI Act which are already passed and to take over possession of the remaining three properties in accordance with the law.

15. The appeal is accordingly partly allowed on the above terms.

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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