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IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.1230 OF 2024-F
WITH
CIVIL APPLICATION NO. 1231 OF 2024-F

Mr. Shashikant Gangar Aged 62 years,
DIN No. 02126659, residing at 196/197,
3-B, Ganjawala Apartments, Ganjawala
Lane, Borivali (West), Mumbai 400092 Petitioner.

Versus

1. Aditya Birla Finance Limited
Through its managing Director a
Company incorporated and
registered under the Companies Act,
1956 having its Registered Office at
Indian Rayon Compound, Veraval,
Gujarat 362 266 and its Corporate
Office at 10" Floor R Tech Park,
Nirlon Complex, Off Western
Express Highway, Near Hub Mall,
Goregaon (East), Mumbai 400 063.
2. Libox Chem (India) Private Limited
Through its Administrator Having
its office at 112, Kundaim Industrial
Estate, Kundaim, Goa — 403 115
3. Sheshmal Bhatia, Having his
address at 201, Padmanabh 2nd
Floor, Pandurangwadi, Road No.4
Goregaon (E), Mumbai 400 063.
4. Mr. Arvind Manubhai Mehta,
residing at 602/B, Vishal Complex,
Bldg. no. 2, Narsing Lane, Malad
West, Mumbai — 400 064
5. Aashad Trading Through its
proprietor, Mr Wasim Chaudhary,
Plot No. 17, Honda Industrial
Estate, Honda, Sattari Goa -403530

and at
H. No. 304, Near Post Officer,
Postwada, Honda, Sattari North
Goa, Goa, 403530
Email: aashadtradingco@yahoo.in

6. Goa Industrial Development Corporation Through its Managing Director, Plot No. 13A-2 EDC Complex Patto Plaza, Panaji, Goa-403 001.
Email: goaidc1965@gmail.com Respondents.

Mr S. S. Kantak, Senior Advocate with Mr S. Gaonkar, Mr S. Kher, Mr P. Sirvoicar, Ms N. Kholkar and Ms S. Dessai, Advocate for the petitioner.

Mr S. D. Lotlikar, Senior Advocate with Mr A. Nayak Salatry and Ms S Kenny, Advocate for respondent no.1.

Mr S. Desai and Mr J. Ramaiya, Advocate for the respondent no.5.

Mr A. D. Bhobe and Ms S. Shaikh, Advocate for respondent no. 6.

Mr Bhupendara Dave, Advocate for the Administrator.

CORAM:

BHARAT P. DESHPANDE, J

**RESERVED ON :
PRONOUNCED ON:**

**26th SEPTEMBER 2024
15th OCTOBER 2024.**

JUDGMENT:

1. Rule.
2. Rule made returnable forthwith.
3. Heard finally with consent.
4. The present petition is filed thereby challenging the impugned order passed in Commercial Appeal no.6/2023 on 2.5.2024. By the said impugned order First Appellate Court dismissed the said appeal

thereby confirming the order passed by the Commercial Court dated 2.11.2023 in Commercial Suit No. 2/2023.

5. Petitioner is the plaintiff in Commercial Suit No. 2/2023 filed before the Commercial Court at Ponda. Respondent no.1 being defendants filed an application under Order 7 Rule 11 of CPC for rejection of the plaint.

6. Vide order dated 2.11.2023 Commercial Court rejected the plaint on observing that suit is barred by law i.e Section 34 of SARFAESI Act. Petitioner/plaintiff filed Commercial Appeal No.6/2023 which was dismissed by the impugned order upholding the contentions of the respondents and confirming the findings of the trial Court, which is challenged in the present proceedings amongst various grounds as disclosed in the Writ Petition.

7. Heard Mr S. S. Kantak, learned Senior Advocate with Mr S. Gaonkar, learned Counsel for the Petitioner, Mr S. D. Lotlikar, learned Senior Counsel with Mr A. Nayak Salatry, learned Counsel for respondent no.1, Mr S. Desai, learned Counsel along with Mr J. Ramaiya, learned Counsel for the respondent no.5, Mr A. D. Bhobe, learned Counsel Ms S. Shaikh, Advocate for respondent no. 6 and Mr Bhupendara Dave, learned Counsel for the Administrator.

8. Mr Kantak learned Senior Counsel appearing for the petitioner/plaintiff would submit that petitioner is one of the directors and shareholders of the company i.e. respondent no.2.

Petitioner started trading in potassium permanganate since 1988 by importing it along with certain other chemicals in his proprietary concern in the name and style as “Chemiman”. Somewhere in the year 1998, respondent no. 2 M/s Super Electro Manganese Chemicals was declared as bankrupt but subsequently petitioner decided to take over the assets of respondent no.2 for the purpose of manufacturing potassium permanganate and formed a company i.e. respondent no. 2 registered somewhere in November 2000. Respondent nos. 3 and 4 subscribed the shares of respondent no. 2 company. However, somewhere in the year 2002 Mr Om Prakash sold all his shares in respondent no.2 except retaining one share and thereafter the share capital of respondent no. 2 company as held to be to the extent of 33.33.% each by the petitioner, respondent no. 3 and respondent no. 4.

9. Since respondent no.2 was incorporated, some dispute arose between the petitioner and the respondent nos. 3 and 4 with regard to credit notes. Subsequently, respondent nos. 3 and 4 took over the complete control of the day to day affairs of respondent no.2 company and started pressuring the petitioner to sell his share. An attempt was made by the respondent nos. 3 and 4 to shut down the company by obtaining an unwarranted loan for the personal benefit of respondent nos.3 and 4 and they also incorporated a new company namely Speed International India Pvt. Ltd with an intention to

siphoning of the funds and diverting customers of respondent no.2 company. Respondent nos.3 and 4 mismanaged the affairs of respondent no.2 company by recklessly borrowing the funds against the assets of respondent no. 2. Petitioner filed a company petition under the provisions of Section 241 and Section 242 before the NCLT Mumbai wherein detail order is passed however, before filing of such petition, respondent nos.3 and 4 without following due process of law and without the knowledge and consent of the petitioner obtained loan from respondent no.1 bank somewhere in October 2020 to the tune of Rs. 3.5 crores, under the pretext of expansion of business.

10. Petitioner observed that respondent no.1 bank without following due process of law and in collusion with respondent nos. 3 and 4 sanctioned the loan and thereafter respondent nos. 3 and 4 deliberately avoided to pay instalment so that respondent no. 2 company could be shut down and taken over by the said respondents. Respondent no.1 bank sanctioned the loan facilities of three crores without following due process and without obtaining any NOC from the concerned department and since defaults were made in repayment, loan was considered as non performing assets. Respondent no.1 thereafter issued notice in August 2022 under Section 13(2) of SARFAESI Act in respect of secured assets for the dues repayment of outstanding loan along with interest. An attempt was made by respondent no.1 before NCLT to hand over possession of

secured assets, however, the Administrator appointed by NCLT refused to hand over possession of respondent no.2. Another application was filed by respondent no.1 bank before NCLT Mumbai however, during the pendency of such application, respondent no.1 approached concerned authority by filing securitisation application case under the provisions of Section 14 of SARFAESI Act before Additional Collector South Goa seeking relief of physical possession. By order dated 26.6.2023 Additional Collector allowed the said application of respondent no.1 and directed them to take forceful possession of the secured assets i.e respondent no. 2 company.

11. Petitioner being, aggrieved by such order passed by Additional Collector, approached DRT Mumbai by filing an application under section 17(1) of the SARFAESI Act. Vide order dated 18.8.2023 DRT Mumbai rejected the interim application and consequently disposed of application under Section 17(1) solely on the ground that, petitioner is not having locus to file such proceedings since the petitioner is merely a shareholder.

12. Petitioner filed an appeal before DRAT Mumbai. However, it was subsequently withdrawn. In the meantime, respondent no.1 took forceful possession of the secured assets of respondent no.2 on 21.8.2023. Petitioner therefore filed Commercial Suit No. 2/2023 making specific allegations of fraud and collusion between

respondent no.1, 3 and 4 and the fact that his attempt to approach DRT Mumbai under Section 17 (1) was unsuccessful.

13. Learned Commercial Court issued notice to the respondent who appeared and thereafter respondent no.1 bank preferred an application under Order 7 Rule 11 of CPC claiming that suit is barred by law. Such application was allowed by the trial Court and then it was confirmed by the Commercial Appellate Court. Both these orders are challenged in the present petition.

14. Mr Kantak would further submit that there are specific allegations of fraud disclosed in the plaint as against respondent nos.1, 3 and 4 and therefore the case of **Mardia chemicals Ltd Vs Union of India and others¹** would squarely apply to the plaint and accordingly, there is no bar to entertain such suit.

15. Secondly Mr Kantak would submits that the petitioner approached DRT Mumbai with an application under Section 17(1) of the Specific Relief Act. However, said authority observed that the petitioner is not entitled to challenge the action taken by the bank. He would therefore submit that the petitioner has been left remediless, which cannot be under any circumstances. He submits that jurisdiction of the Commercial Court under Section 9 of CPC is wide enough and that it has been held by DRT that case is not covered under Section 17, bar under Section 34 of the SARFAESI Act would not come in the way of the petitioner.

1 (2004) 2 Mh. L. J. 1090

16. Mr Kantak would further submit that averments in the plaint would clearly go to show that loan applied by respondent nos. 3 and 4 was sanctioned by respondent no.1 bank without there being any resolution being passed by Board of Directors. He submits that this itself clearly demonstrates collusion and fraud to deprive the plaintiff from his shares and management of the respondent no.2 company. Mr Kantak submit that when DRT observed that the petitioner cannot entertain any application under Section 17(1) of the SARFAESI Act , the only remedy available to the petitioner is to file a suit and when there are specific allegations of fraud, Civil Court is only authorize to entertain and decide such suit.

17. In other words Mr Kantak would submit that when the plaintiff is considered as not aggrieved person under Section 17, there cannot be any bar under Section 34 of the SARFAESI Act against the petitioner. He would submit that these aspects are completely being ignored and not considered by the Courts below and thereby impugned order suffers from perversity.

18. Mr Kantak placed reliance on the following decisions:-

- 1 ***Bank of Boroda, through its Branch Manager Vs Gopal Shriram Panda and another,*** ²
- 2 ***Saleem Bhai and others Vs State of Maharashtra and others***³

² (2021)4 AIR Bom R 64.

³ (2003) 1 SCC 557.

19. Mr Lotlikar, appearing for respondent no.1 bank, would submit that remedy available to the petitioner is only before the DRT under Section 17(1) of SARFAESI Act. He submits that petitioner initially challenged the order of DRT by filing an appeal at DRAT Mumbai, however, in the meantime plaintiff/petitioner filed this suit. Subsequently withdrawal of the appeal cannot be a ground for the petitioner to entertain the suit.

20. Mr Lotlikar would submit that the petitioner being a shareholder cannot be considered as an aggrieved party as he has no interest in the property of the company. He would submit that Section 34 of the SARFAESI Act stands attracted. Suit is barred by such law. He submits that there is no right to the plaintiff to file the said suit.

21. Mr Lotlikar would further submit that allegations of fraud are *inter se* between petitioner and the respondent nos.3 and 4 and not against the bank. He would further submit that the Director is entitled to seek loan on the basis of Article of Association and thus when there is no specific pleadings with regard to fraud, plaint has been rightly rejected.

22. Mr S. Desai appearing for respondent no.5/purchaser would strongly submit that bar under Section 34 stands attracted and the suit is clearly not maintainable. He submits that application under Section 17 of the SARFAESI Act filed by the petitioner would clearly

show that it was against the security created by the company and since the petitioner is only a shareholder, has no locus to challenge such proceedings either before DRT or before the Civil Court.

23. Mr Desai would submit that while appeal was pending before the DRAT the petitioner approached the Civil Court with most unclean hand and with conflicting pleadings. He submits that best recourse for the petitioner was to challenge the order of DRT and to argue the appeal to its logical conclusion.

24. Mr Desai would submit that allowing the plaint to retain would be an abuse of process of law. He submits that clever drafting by using words fraud and collusion cannot be allowed to retain since there is clear bar of the jurisdiction of the Civil Court under Section 34 of the SARFAESI Act to entertain such plaint. Mr Desai placed reliance on the following decisions:

1. ***Garment Carft Vs Prakash Chand Goel***⁴
2. ***Punjab and Sind Bank Vs Frontline Corporation Ltd.***⁵
3. ***Crosscraft Private Ltd Vs Authorized Officer, Madgaum Urban Co-op Bank Ltd and others.***⁶

25. Rival contentions fall for determination.

26. The basic contention on behalf of Mr Kantak is that the suit is filed for declaration and permanent injunction under the Specific

⁴ (2022)4 SCC 181

⁵ 2023 SCC Online SC 470

⁶ (2019) 2 AIR Bom R 458

Relief Act and the prayer therein are to declare loan facilities agreement dated 29.11.2020 and creation of mortgage is a fraud and thus illegal and void. He submits that such relief claimed by the petitioner/plaintiff is based on the specific averments in the plaint regarding collusion and fraud played on the plaintiff by the defendants including the bank. He submits that loan was sanctioned without due authorisation and resolution passed by the Board of Directors. In this respect he would submit that there are specific averments made in the plaint that the defendants played a fraud on the plaintiff by obtaining loan and that too without any resolution to that effect.

27. Mr Kantak would then submit that loan was sanctioned on 30.11.2020 whereas the agenda of the meeting was somewhere in the month of December 2020. He specifically relied upon paragraphs 12, 13 and 14 wherein specific allegations have been made regarding fraud and collusion between the defendants including the bank. He would therefore submit that such an aspect is not covered under the SARFAESI Act and Civil Court is the only authority to entertain such a suit under the Specific Relief Act. Power and jurisdiction of the Civil Court under Section 9 is therefore not ousted as far as the present plaint is concerned.

28. Perusal of the plaint would clearly go to show that there are specific pleadings with regard to collusion and fraud played on the

plaintiff by the defendants including the secured creditors/bank. Paragraph no. 11 of the plaint gives details as to the collusion between the secured creditors/bank and defendant nos.2 to 4 in connection with execution of the document of loan. It is contention of the plaintiff that relevant documents were executed by defendant nos. 2 to 4 in favour of defendant no.1/bank on 29.11.2020, 30.11.2020 and thereafter defendant no.1 sanctioned and disbursed part of the loan amount prior to receipt of NOC from Goa Industrial Development Corporation. Secondly, it is claimed that defendant no.1/bank sanctioned and disbursed the loan without there being any authority and lawful resolution passed by defendant nos.2 to 4 for availing such loan. It is claimed in paragraph 13 that notice of 1.12.2020 issued by defendant no.3 calling for a board meeting scheduled on 8.12.2020 for passing of resolution as on the agenda mentioned therein and one Agenda was to consider and discuss availing financial facilities from the bank/financial institution. However, the loan was sanctioned on 30.11.2020 itself. Paragraph 14 of the plaint discloses that in such manner defendants played a fraud upon the plaintiff and entire mortgage agreement is therefore fraudulent.,

29. Plaintiff/petitioner herein has clearly disclosed in the plaint that he is one of the directors having 33.33.% of shares of respondent no.2 company whereas defendant nos.3 to 5 are other directors/share holders.

30. In the case of **Mardia Chemicals Ltd**, the Apex Court while dealing Section 34 of the SARFAESI Act observed in paragraph 51 that to a very limited extent jurisdiction of the Civil Court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil Court in the cases of English mortgages.

31. It is well settled proposition of law that while considering an application under Order VII Rule 11 of CPC, the Court is required to look into the averments in the plaint and documents relied and referred in the plaint. It is also equally well settled that Court cannot look into contents of the written statement/reply or documents relied therein. By a meaningful reading of the contents of the plaint, Court has to assess whether a suit filed therein is barred under any law or is not having any cause of action to institute such a claim. At this stage, only the contents in the plaint are required to be considered as germane and not written statements or other documents relied upon by the respondents.

32. In the case of **Saleem Bhai** (supra), the Apex Court observed that germane facts for deciding an application under Order VII Rule 11(a) and (d) of CPC and the averment in the plaint and not the pleas

taken in the written statement. The Court has to consider only the pleading in the plaint and documents referred therein. Similarly, the duty of the Court is to read such pleadings in a meaningful manner so as to observe whether the suit as framed therein is having cause of action, barred by limitation or otherwise.

33. Learned Commercial Court vide its order dated 2.11.2023, allowed the application filed by defendant no.1 under Order VII Rule 11 of CPC and thereby rejected the plaint. Observation of the learned trial Court are found from paragraph 8 onwards which discloses relevant facts as pleaded in the plaint. As far as pleadings of fraud are concerned, the learned Commercial Court in the paragraph 13 observed that plaint paragraph no. 11 discloses the pleadings of fraud as well as collusion which also continued in paragraph 13. However, in one line in paragraph 15, learned Commercial Court observed that except using words fraud, collusion and fraudulent, there are no specific particulars in respect of fraud pleaded by the plaintiff and thus mere use of such orders cannot come out of the bar under Section 34 of the SARFAESI Act.

34. The learned Commercial Court further observed in paragraph 16, by relying on the decision of the ***Punjab and Sind Bank*** (*supra*) decided by the Apex Court that to a very limited extent jurisdiction of the Civil Court can be invoked when action of the secured creditor is alleged to be fraudulent. However, in paragraph

17, the learned Court further observed that since there is no specific pleading with regard to fraud, it cannot be said that the action of defendant no.1 who is a secured creditor is fraudulent. Thus, Section 34 comes into operation.

35. This order was challenged by the petitioner before the First Appellate Court in Commercial Appeal No.6/2023. Vide impugned judgment dated 2.5.2024, appeal came to be rejected. The learned First Appellate Court framed two points regarding bar of Section 34 of the SARFAESI Act, and whether the trial Court committed an error. As far as point no.1 is concerned, the First Appellate Court considered the provision of Section 17(1) and Section 34 of the SARFAESI Act. It also considered and quoted observations of this Court in the case of **Bank of Boroda, through its Branch Manager** (supra), as found mentioned in paragraph 14. The First Appellate Court then considered paragraph 11 of the plaint and quoted it and then discussed the pleadings of fraud in paragraph 16. However, in paragraph 17, the First Appellate Court observed that undisputedly, the dispute falls within four corners of SARFAESI Act thus there is expressed bar under Section 34 of the said SARFAESI Act.

36. Such finding in paragraph 17 is clearly perverse to the record as suit is filed under the Specific Relief Act and plaint clearly discloses that reliefs claimed therein are not covered under the SARFAESI Act.

Thus, such finding of the learned First Appellate Court cannot be accepted.

37. Further learned First Commercial Appellate Court quoted the provisions of Section 34 of the SARFAESI Act and then observed in paragraph 19 about the contents of paragraph 11 of the plaint. It further observed that contention of the plaintiff that defendant no.1/bank sanctioned and disbursed the loan without authorisation and lawful resolution being passed by defendant nos. 2 to 4 is incorrect. It then went to discuss the bar under Section 34 of the SARFAESI Act in paragraph 20 of the said order and observed that such bar can be dispensed with only when the plaintiff succeeds in bringing his case within the exception when there is necessarily a fraud or collusion being committed between financial institution and the other person to defraud person. However in the same breath the First Appellate Court observed that there is no pleadings against defendant no.1 as to in what manner defendant no.1 was responsible to defraud the plaintiff in collusion with the defendant nos. 3 and 4.

38. With these observations of the learned trial Court and that of the First Appellate Court, pleadings in the plaint are required to be once again considered.

39. As earlier observed, the suit is filed for declaration and permanent injunction claiming the main relief of grant of a

declaration that loan facility agreement dated 29.11.2020 and creation of Mortgage is a fraud and therefore illegal and void.

40. To substantiate such prayer plaintiff has disclosed that he is one of the directors having 33% shares in respondent no. 2 company and now respondent nos. 3 to 5 were inducted. The main contention starts from paragraph no. 6 of the plaint wherein it is claimed that defendant nos. 3 and 4 conspired against plaintiff and took over complete control and management of defendant no.2 company thereby excluding the plaintiff in order to pressurise him to sell his share. It is then pleaded in paragraph 6 that defendant nos. 3 and 4 made efforts to shut down the company by taking unwanted loan for their personal benefits and incorporated a new company in the name of Speed International India Pvt. Ltd along with their other family members in order to conduct the same business which defendant no. 2 company is doing so as to siphoning of funds and diverting customers of defendant no.2 to a new company. These specific allegations are made against defendant nos.3 and 4. However, plaintiff further pleaded in paragraph 6 that on getting knowledge of another company floated by defendant nos. 3 and 4 and siphoning of funds as well as diverting customers to the new company, he filed company petition under Sections 241 and 242 of the Companies Act before NCLT, Mumbai against defendant nos.3 and 4 for misappropriation and mismanagement of defendant no.2 company.

41. It is further pleaded in paragraph no.7 of the plaint that NCLT Mumbai vide order dated 24.2.2022 prima facie concluded that the operation of defendant no.2 company were shut down as a result of wrongful acts committed by defendant nos.3 and 4 which demonstrated the acts of operation and mismanagement resulting from the wrongful acts by defendants nos. 3 and 4. The NCLT, Mumbai appointed Administrator to take over the control and management of affairs of the defendant no.2 company.

42. Further in paragraph 8 of the plaint, it is specifically pleaded by the plaintiff that before filing of the company petition before the NCLT, defendant no. 2 availed loan facility from defendant no.1 by making an application dated 7.10.2020 for the purpose of business expansion and in that application defendant nos. 3 and 4 were shown as co-borrowers thereby signing such application. Defendant nos. 3 and 4 in the said application for grant of finance/loan shown plot no. 112 having admeasuring area of 1360 sq. mts at Kundaim Industrial Estate, Kundaim as a secured assets.

43. Plaintiff then in paragraph 10 disclose that defendant no.1/bank sanctioned loan facility of Rs.3 crores in favour of defendant no. 2 vide sanctioned letter dated 30.11.2020.

44. Paragraphs nos. 11 to 14 of the plaint further show as to how fraud and collusion exists between defendant nos.1, 3 and 4 with respect to such loan transaction. Plaintiff has clearly disclosed the

aspect of fraud and collusion between the bank and defendant nos. 3 and 4 by disclosing that loan was sanctioned even without any resolution passed by Board of Directors to avail such loan for and on behalf of the defendant no.2 company. Paragraph 13 of the plaint would go to show that notice dated 1.12.2020 calling for the board meeting scheduled on 8.12.2020 shows the Agenda including the one to discuss availing financial facility from the bank/financial institution/body corporate etc. Thus it is contention of the plaintiff that the loan was sanctioned on 30.11.2020 whereas the meeting of the Board of Directors was called on 8.12.2020.

45. It is the case of the plaintiff that defendant nos.3 and 4 deliberately failed to comply with the conditions of the loan and allowed the said loan account to become non performing account so that defendant no.2 company could be shut down and then the entire business could be taken over by defendant no.3 and 4 who has already floated separate company having some business with these pleadings regarding fraud and collusion, it cannot be accepted that there are no proper or sufficient pleadings alleging collusion between the bank and defendant nos. 3 and 4. Specific instance is given in the plaint demonstrating that the loan was sanctioned without having resolution to that effect.

46. Mr Kantak, while arguing, would submit that when there are specific pleadings regarding collusion and fraud, observations of both the Courts below are clearly perverse.

47. I am in full agreement with the submissions advanced by learned Senior Counsel Mr Kantak on this aspect. A meaningful reading of the plaint would clearly go to show that there are specific and sufficient averments with regard to fraud played by bank along with defendant nos. 3 and 4 against the petitioner/plaintiff and the purpose of it. It is difficult to accept such finding of the Courts below about absence of pleadings. Plaint does not contain mere words such as fraud/fraudulent etc but it specifically discloses the instances by which plaintiff is trying to demonstrate as to how such fraud and collusion exists.

48. The contention of the learned counsel for the respondent that pleadings regarding fraud are *inter se* only between plaintiff and defendant nos.3 and 4, cannot be accepted for simple reason that there are specific instances and allegations of collusion and fraud even played by bank/defendant no.1 while sanctioning the loan and that too without any proper resolution passed by the Board of Directors of the company. Therefore, averments in the plaint are supported by document i.e order passed by NCLT would clearly go to show that *prima facie* there was mismanagement of the affairs of the defendant no.2 and also obtaining of a loan thereby securing assets

in favour of the bank, without following due process of law. With these averments in the plaint, contentions raised by the respondents needs to be rejected outright. Similarly observations of both the Courts on the aspect of absence of specific pleadings regarding fraud and collusion, are clearly perverse. Record speaks otherwise and more specifically the pleadings as discussed above. Thus it is clear from the record and more specifically the prayer, the suit is clearly maintainable as far as relief is concerned and that too when there are specific pleadings with regard to fraud and collusion between the bank and defendant nos. 3 and 4.

49. Besides, the order passed by NCLT dated 24.2.2022 would show that the application was filed by the present petitioner/plaintiff claiming to be the director of the company against defendant nos.3, 4 and 5 praying for stay of the board resolution dated 8.11.2022 and seeking an injunction restraining said defendants from either disposing of or encumbering in any manner the assets of the said company. A specific allegation was made that there is collusion between the respondents/directors who constituted another company by name Speed International India Pvt. Ltd having the same business and misappropriated large sums of money of defendant no.2 company. Finally NCLT observed in paragraphs 25, 26 and 27 as under:-

- “25 The only issue which arises for consideration is whether it is necessary to restrain Respondent No. 2 and Respondent No. 3 from disposing of or encumbering the assets of Respondent No. 1 company and pass stay of resolution passed in the Board meeting held on 08.11.2020.
- 26 In the given backdrop of events described in the aforesaid paras, it is established beyond doubt and the fact that the operations of the Company has been closed from December 2020, and there are existing disputes pending between the parties with regard to payment of commission to the Petitioner and that the Respondent N 2 and 3 were in negotiation for sale of their stake in the Company to the Petitioner and lastly, with regard to the resolution passed at the Board meeting on 08.11.2021, wherein it was decided to dispose the assets of the Company, in the absence of the Petitioner herein, this Bench concludes that these events demonstrates the acts of oppression & mismanagement of the Respondent No.1 Company and the Petitioner has made out a prima facie case, balance of convenience in his favor and this court holds that the Board Resolution dated 8.11.2021, is prejudicial to the interest of the Company per se.
- 27 The Court orders as follows:
 a) The Board Resolution dated 08.11.2021 is stayed.
 b) Respondent No. 2 and Respondent No. 3 are restrained from dealing with the assets of the Respondent Company pending final disposal of the Company Petition.
 c) Mr Ram Ratan Kanoongo, having IBBI No. IBBI/IPA-001 /IP00070/2017-18/ 10156 having Email Id-rrkanoongo@gmail.com and Contact No. 9821031996 is appointed as an Administrator to take over the control and management of the affairs of the Company pending final disposal of the Petition.”

50. The above document attached to the plaint would clearly go to show that even the resolution passed by the Board of respondent no. 1 company on 8.11.2022 was considered to be prejudicial to the interest of the company *per se* and accordingly, it was stayed. Accordingly respondent nos. 2 and 3 therein were restrained from dealing with the assets of the company pending the disposal of the said matter.

51. The above averments as well as documents would clearly show that there are specific pleadings with regard to fraud and collusion between the bank as well as defendant nos.3 and 4 and thus for that limited purpose of claim declaring loan facility agreement dated 29.11.2020 and consequently creating of Mortgage i.e secured assets is a fraud, certainly comes within Section 9 of CPC and to that effect bar under Section 34 of the SARFAESI Act as discussed in the case of *Mardia Chemicals Ltd* (supra) would not be absolute.

52. Even otherwise declaration which is claimed in the suit as found in the prayer clause (a), cannot be agitated before any other forum except a Civil Court and that too on specific allegations of fraud and collusion between the respondent nos. 1, 3 and 4.

53. Matter could have been disposed of on the above aspect itself, however, since other aspects were also argued with regard to orders passed by DRT Mumbai under Section 17 of the SARFAESI Act on an application by the plaintiffs, it is necessary to discuss such aspects also.

54. Plaintiff paragraph 20 further shows that defendant no.1 while application was pending before the NCLT, approached Additional Collector South Goa under Section 14 A of the SARFAESI Act seeking relief to take physical possession of the alleged secured assets of respondent no.2 company.

55. Plaintiff paragraph 21 further shows that plaintiff upon learning of such attempts on the part of defendant no.1, filed an intervention application before the Additional Collector which was allowed by order dated 18.5.2023. Defendant no.1 bank took a stand before Additional Collector that if the plaintiff is aggrieved by such proceedings under Section 14 of the SARFAESI Act, he should approach DRT Mumbai. In the meantime, Additional Collector vide its order dated 26.6.2023 allowed said application and directed defendant no.1 to take forceful possession of the secured assets from the Administrator appointed by NCLT Mumbai.

56. Plaintiff then pleaded about the contrary stand taken by the bank before the Additional Collector to that of one taken before the DRT Mumbai. Defendant no.1 in the proceedings before DRT Mumbai took stand that the plaintiff has no locus standi to file proceedings whereas before the Additional Collector it would claim that plaintiff if consider himself as aggrieved, shall approach DRT.

57. Plaintiff paragraph 23 further shows that plaintiff approached DRT Mumbai by filing an application under Section 17(1) of the

SARFAESI Act claiming to be the director of defendant no.2 company, challenging the orders passed by Additional Collector for taking possession. An interim application was also filed to restrain Additional Collector or the bank from taking forceful possession. It further shows that DRT Mumbai vide its order dated 18.8.2023 rejected the application filed by the plaintiff on the ground that plaintiff has no locus to approach DRT as he is merely a shareholder.

58. Plaintiff further shows that the plaintiff filed an appeal before the DRAT challenging the order dated 18.8.2023 however, it is also pleaded that the plaintiff is taking appropriate steps to withdraw the said appeal since the suit was filed and that defendant no.1 had forcefully taken the possession on 21.8.2023 from the Administrator.

59. It is the contention of Mr Kantak that when the plaintiff approached DRT Mumbai with an application under Section 17(1) of SARFAESI Act, the same was rejected on the ground that plaintiff has no locus to approach DRT.

60. It is the contention of Mr Kantak that application under Section 17 could be filed by any person including a borrower, aggrieved by any of the measures referred to in sub Section (4) of Section 13 taken by the secured creditor. He submits that Section 13(4) of the SARFAESI Act gives powers to the secured creditor to take necessary steps in case the borrower fails to discharge his liability in full within the specified period.

61. It is the contention of Mr Kantak that as per DRT, plaintiff is not an aggrieved person in respect of any action taken under Section 13(4) and therefore bar under Section 34 of the SARFAESI Act will not apply to the plaintiff. According to Mr Kantak since the plaintiff is considered as not having locus to challenge the proceedings under Section 17 of the Act, contention raised by the plaintiff is not covered under Section 13(4) and hence bar under Section 34 of the SARFAESI Act is not attracted.

62. Submission of Mr Kantak certainly requires consideration as the plaintiff approached the authority under the DRT challenging the action taken by Additional Collector on an application filed by defendant no.1 bank under Section 14 of the SARFAESI Act.

63. Section 34 of the said Act reads thus:-

“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).”

64. The contention of Mr Kantak needs to be accepted since the language used in Section 34 to attract bar is with regard to 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.

65. The question of fraud and collusion and the relief claimed in the suit of declaration that the loan facility and the mortgage created in favour of defendant no.1 is a nullity, is certainly not coming within the jurisdiction of DRT or under the SARFAESI Act. Such declaration is only permissible under the Specific Relief Act.

66. At this stage, the Court is duty bound to consider only the plaint and the documents relied therein. No document relied upon by the defendant could be looked into. The contention of Mr Kantak that the First Appellate Court in paragraph 25 relied upon the document produced by the defendants appears to be correct. A careful reading of the plaint and list of documents would go to show that such documents cannot be considered as contrary to the pleadings.

67. Mr Lotlikar appearing for the bank tried to demonstrate that there was a resolution passed by the Board of Directors, prior to sanction of the loan. However, such document cannot be looked into for the purpose of deciding an application under Order VII Rule 11 of CPC and that too for rejecting a plaint. It is not at all the case of the defendant that by clever drafting, the plaintiff deliberately suppressed the vital document from the Court. It is also not the case of the defendants that for the purpose of passing of such resolution as

alleged, plaintiff was also present being one of the directors. Thus such contention on behalf of the defendants cannot be looked into.

68. Mr Desai appearing for the respondent no. 5 strongly contented that there is no point in allowing such plaint to retain since it would be futile exercise and even otherwise there is finding on the part of DRT that the plaintiff is not having any locus to challenge it. He would submit that plaintiff being one of the shareholders cannot claim ownership over the company and its assets and therefore, he has no locus even to challenge loan translation.

69. It is necessary to note here that the main contention of defendant no.1/bank in filing an application under Order VII Rule 11 of CPC is that the suit is barred under Section 34 of the SARFAESI Act. It would go to show that only ground for rejection of the plaint is as far as Section 34 of the SARFAESI Act. Arguments were advanced before both the Courts below is about such bar under Section 34. Admittedly no application is filed on behalf of the defendant no. 5 for rejection of plaint. Only because DRT in its order observed that plaintiff is not having locus to approach said authority, it does not lie in the mouth of defendant no. 5 to claim that that plaintiff is also not having any locus to file the suit. Accordingly, such contention raised, cannot be accepted.

70. In the case of **Bank of Baroda** (supra), the Division Bench of this Court answered the reference made to it which reads thus:-

"Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation Act?"

71. After discussing the various decisions together with the object and the purpose of said Act as well as DRT Act, answer to the reference is as under:-

"The answer, looking to the nature of the question, in our view, is in parts :-

(A) Jurisdiction of the Debts Recovery Tribunal, to decide all matters relating to Section 13 and 17 of the SARFAESI Act, is exclusive.

(B) In all cases, where the title to the property, in respect of which a 'security interest', has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters, to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the DRT.

(C) The jurisdiction of the Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 13 and 17 of the SARFAESI Act, in relation to enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.

(D) Where civil rights of persons other than the borrower(s) or guarantor (s) are involved, the Civil Court would have jurisdiction, that too, when it is prima facie apparent from the face of record that the

relief claimed, is incapable of being decided by the DRT, under Section 17 of the DRT Act, 1993 read with Section 13 and 17 of the SARFAESI Act.

(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 of 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.

(F) Examples as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.

(G) The principles laid down in para 33 (i) to (ix) of Sagar Pramod Deshmukh (supra) are in accordance with what we have discussed and held above.”

72. Answers recorded in the above and more specifically (C), (D) and (E) would clearly help the petitioners in the present proceedings.

73. The above observations of the Division Bench of this Court are therefore certainly binding while deciding the present matter.

74. Mr Desai while placing reliance in the case of **Crosscraft Private Ltd** (supra) tried to submit that there is clear bar under Section 34 of the SARFAESI Act and since the DRT has already observed that the plaintiff is not having any locus, there will be a futile exercise in allowing the present petition and asking the trial Court to decide the suit on merits. In this respect he would try to

submit that the Apex Court clearly observed in paragraph 13 in the case of **Crosscraft Private Ltd** (supra) that the suit is not maintainable against the secured creditors and auction purchaser.

75. In the case of **Crosscraft Private Ltd** (supra) the challenge was to the action of Magistrate under Section 14 of the SARFAESI Act, the Division Bench of this Court observed that the action under Section 14 of the SARFAESI Act is in aid and assistance to the bank to attach and to take possession of the secured assets as provided under Section 13(4) of the SARFAESI Act, without intervention of the Court. Thus, it is clear that matter in Cross Craft Private Ltd(supra) is on a different aspect whereas the suit filed by the plaintiff is challenging sanction of a loan and that too by collusion and fraud between the secured creditors and directors of defendant no. 2 company.

76. Another contention of Mr Desai that since DRT has accepted that the plaintiff has no locus, it would be a waste of time to allow the suit to go on. He would submit that by clever drafting the plaintiff is trying to challenge loan agreement where in fact possession of the secured creditors is already taken and an auction was conducted wherein defendant no. 5 is a successful purchaser. He claimed that at this stage, DRT considered that the plaintiff is not having any right to the property of the company being only a shareholder, thus the suit itself needs to be thrown out.

77. Submission of Mr Desai, at the first instance looks to be impressive however, it is a fact that an application for rejection of the plaint is filed by defendant no.1/secured creditors on the ground that the plaint is barred by law under Section 34 of the SARFAESI Act.

78. Application for rejection of plaint is not on any ground of locus of plaintiff. Thus the above submission and that too in a writ petition cannot be entertained as tried to be projected by Mr Desai.

79. In the case of ***Garment Craft***(supra), the Apex Court while considering the powers of High Court under Article 227 of the Constitution of India observed that High Court while exercising supervisory jurisdiction does not act as a Court of first appeal to re-appreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the Court or Tribunal has

come to. It is axiomatic that such discretionary relief must be exercised to ensure that there is no miscarriage of justice.

80. Applying the above proposition to the matter in hand, one thing is clear that by rejecting a plaint when there are specific pleadings regarding fraud and collusion by giving specific instances, there by applying Section 34 of the SARFAESI Act, clearly amounting to miscarriage of justice.

81. Plaintiff/petitioner was thrown out as having no locus to challenge the action of the secured creditors under Section 17 of the SARFAESI Act. Now by the impugned order plaintiff/petitioner is thrown out at the initial stage by a Civil Court thereby practically preventing the plaintiff from having any remedy available to him against the action of the secured creditors.

82. Application filed before the trial Court is only on the ground that the suit is barred by law. Once it is observed that there is a window available to the plaintiff though limited as found out in the case of **Mardia Chemicals Ltd** (supra), the impugned order certainly needs interference in the supervisory jurisdiction of this Court to prevent injustice being caused to a party who is having no remedy against the action of the secured creditors.

83. Secondly, the application was not filed on any other grounds. Besides both the Courts below did not reject the plaint on any other ground except that it is barred by law and therefore, in a writ petition

or in a supervisory jurisdiction, it is not permissible for this Court to look into any other ground for rejecting the paint.

84. Having concluded that the plaint cannot be rejected and bar created under Section 34 of the SARFAESI Act cannot be applied to the averments in the plaint, option available to this Court is to quash and set aside both the orders of the trial Court thereby restoring the plaint to the file of Commercial Court to be decided in accordance with law.

85. For all the above reasons, both the impugned orders are hereby quashed and set aside, plaint in Commercial Suit is restored.

86. Rule is made absolute in the above terms. No cost.

BHARAT P. DESHPANDE, J.