

M/S SWADESHI CEMENT LTD & ORS Plaintiffs
 Through : Mr. A.M. Singhvi, Sr. Adv.
 with Mr. Arun Kathpalia and
 Mr. Vivek Malik, Advs.

versus

UOI & ORS Defendants
 Through : Mr. Atul Nanda and
 Mr. Gaurav Gupta, Advs.
 for D-1.
 Mr. Dushyan Dave, Sr. Adv.
 with Mr. S.L. Gupta, Adv. for
 D-2& 3.

CORAM :-
THE HON'BLE MR. JUSTICE J.R. MIDHA

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| 1. | Whether Reporters of Local papers may be allowed to see the Judgment? | YES |
| 2. | To be referred to the Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

JUDGMENT (Oral)

I.A.No.5756/2010

1. The extension of one week is granted to the plaintiffs to deposit the Court fee. The Court fee be deposited by the plaintiffs by 10th May, 2010.
2. The application stands disposed of.

CS(OS)No.838/2010

1. The plaintiffs have filed this suit for declaration and permanent injunction against the defendants.

2. BRIEF FACTS OF THE CASE

2.1 On 5th June, 2008, defendant No.3 issued a demand notice to the plaintiffs under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) demanding a sum of Rs.52,84,08,000/- within 60 days failing which defendant No.3 shall enforce the security interests on the secured assets without intervention of the Court or Tribunal by taking recourse to one or more measures mentioned in Chapter 3 of the SARFAESI Act for realization of its dues.

2.2 On 26th October, 2008 and 7th November, 2008, defendant No.3 published the possession notice in the newspaper notifying the public that defendant No.3 has taken the possession of the properties of the plaintiffs mentioned therein on 23rd October, 2008 in exercise of the powers under Section 13(4) and 13(12) of the SARFAESI Act read with Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002.

2.3 On 8th December, 2008, the plaintiffs filed an application before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act challenging the possession notice issued by defendant No.3 under Section 13(4) of the SARFAESI Act. The plaintiffs sought the stay of the auction, sale and creation of third party interest by defendant No.3.

2.4 On 30th July, 2009, the plaintiffs filed an application before the Debts Recovery Tribunal under Section 19(25) and 22 of Recovery of Debts Due to Banks & Financial Institution Act, 1993 (RDDB&FI) for appointment of Receiver in respect of the secured assets of the plaintiffs and further direction that Receiver should handover the possession of the secured assets to the plaintiffs.

2.5 On 11th September, 2009, the Debts Recovery Tribunal held that no prima facie case for appointment of Receiver or handing over the possession of the secured assets was made out. However, the Tribunal directed the plaintiffs to deposit Rs.10.00 crores within 10 days and another sum of Rs.10.00 crores within next 10 days with respondent No.3. The plaintiff was also directed to file an affidavit-cum-undertaking by 15th September, 2009 before the learned Tribunal to abide by the directions of the learned Tribunal.

2.6 Aggrieved against the aforesaid order of Debts Recovery Tribunal, the plaintiffs filed an appeal before Debts Recovery Appellate Tribunal (DRAT) which was dismissed on 12th October, 2009. The relevant finding of the DRAT is reproduced hereunder:-

“22. In the case at hand, the appellant, after availing of loan and credit facilities nearly 25-27 years back did not repay even a single penny. Completely unmindful and oblivious of discharging its legal obligation of repaying the loan, it has only designed to put roadblocks in the recovery process on artificial, fanciful and imaginary ground. The Tribunal below did give to it a chance to repay the outstanding dues,

but instead of doing that, it hastened to file this appeal. The SARFAESI Act, 2002 has been passed by the Parliament to accelerate the pace of recovery of defaulting loans and mounting levels of non-performing assets of Banks and Financial Institutions by selling the secured assets without the intervention of the Court. The appellant has utterly failed to make out case of any relief in this appeal preferred against an interlocutory order which cannot be flawed at all. The S.A. is still pending before the Tribunal below.”

2.7 On 10th November, 2009, the plaintiffs filed a writ petition before this Court under Articles 226 and 227 of the Constitution, being Writ Petition (Civil) No.13143/2009, challenging the order of the DRAT. The arguments in the writ petition have been heard and the order has been reserved.

2.8 On 1st April, 2010, defendant No.3 has published the auction notice of the secured assets of the plaintiffs in the newspapers inviting bids for sale of the assets of the plaintiffs. In terms of the said auction notice, the bids are to be opened on 3rd May, 2010 at 3:30pm.

2.9 The plaintiffs have filed this suit for restraining defendant No.3 from taking any action under Section 13(4) of the SARFAESI Act on various grounds inter alia that defendant No.2 ceased to be a financial institution within the meaning of Section 4A(2)(ii) of the Companies Act, 1956 from the date the Central Government ceased to hold/control 51% paid up capital of defendant No.2; notification No.S.O.98(E) dated 15th February, 1995 became incapable

and invalid from the date Centre Government ceased to hold/control 51% paid up share capital of defendant No.2; defendant No.2 being neither a financial institution nor a securitisation/reconstruction company is not entitled as a purported assignee to invoke the provisions of the SARFAESI Act; there is fraud and collusion between defendants No.2 to 4; and the assignment deed dated 22nd January, 2009 is null and void.

3. **SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (SARFAESI ACT)**

3.1 Section 13 of the SARFAESI Act provides that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 any security interest created in favour of any secured creditor may be enforced, without the intervention of Court or Tribunal, by such creditor in accordance with the provisions of this Act.

3.2 Section 13 (2) of the Act contemplates that action by the secured creditor against the borrower may be initiated by a notice in writing calling upon him to discharge in full his liabilities within sixty days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under Section 13 (4) of the Act.

3.3 Section 13(4) of the Act, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

- (a) take possession of the secured assets of the borrower including the right of transfer by way of lease, assignment or sale for realizing the secured asset;
- (b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
- (c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;
- (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

3.4 Section 13(3) mandates to communicate to the borrower the details of the amount payable by him and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

3.5 Section 17 of the Act confers upon the borrower, aggrieved by any of the measures referred to in Section 13(4) by the secured creditor or his authorized officer, the right of appeal to the Debt Recovery Tribunal having jurisdiction in the matter, within forty-five days from the date on which measures had been taken.

3.6 Section 18 of the Act confers upon the person aggrieved by any order made by the Debt Recovery Tribunal under Section 17, the right of further appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of the Debt Recovery Tribunal.

3.7 Thus, the provisions regarding notice to the borrower, two appeals, restitution and compensation, contained in Sections 13, 17, 18 and 19 of the Act, sufficiently and adequately take care of the interest of the borrower against the action taken against him by the secured creditor under Section 13 of the Act.

3.8 Section 34 of the Act bars the Civil Court from entertaining any suit or proceedings in respect of any of the matters which the Debts Recovery Tribunal or the Appellate Tribunal is empowered under this Act. Further the Civil Court as well as any other authority are also barred from granting injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the SARFAESI Act.

3.9 **In Mardia Chemicals V. Union of India, AIR 2004 SC 2371**, the Apex Court held that no Civil Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which a Debt 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 the SARFAESI Act.

3.10 Under Section 34, the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine in respect of any action taken “or to be taken in pursuance of any

power conferred by or under this Act.” That is to say, the prohibition covers even matters which can be taken cognizance of by the DRT though no measures which can be so far been taken under Section 13(4). Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceedings thereof. The bar of Civil Court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under Section 13(4).

4. **CODE OF CIVIL PROCEDURE**

4.1 Order 7 Rule 11 (d) of the Code of Civil Procedure provides that plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

4.2 In **T. Arivandandam vs. T.V. Satyapal, AIR 1977 SC 2421**, the Hon’ble Supreme Court held that if meaningful, not formal reading of the plaint does not disclose a clear right to sue and if a clever drafting has created an illusion of a cause of action, the Civil Court should exercise the power under Order 7 Rule 11 of the Code of Civil Procedure to nip it in the bud at the first hearing. The findings of the Hon’ble Supreme Court in this regard are as under:-

“5.....The learned Munsif must remember that if on a meaningful -- not formal -- reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order VII Rule 11, C.P.C. taking care to see that the ground mentioned therein is fulfilled. And, if

drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order X, C.P.C. An activist Judge is the answer to irresponsible law suits. The trial Courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Ch. XI) and must be triggered against them. In this case, the learned Judge to his cost realized what George Bernard Shaw remarked on the assassination of Mahatma Gandhi "It is dangerous to be too good."

6. The trial Court in this case will remind itself of Section 35-A, C.P.C. and take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. In any view, that suit has no survival value and should be disposed of forthwith after giving an immediate hearing to the parties concerned."

5. FINDINGS

5.1 On a meaningful reading of the plaint, it is clear that the plaintiffs' challenge in this suit is to the auction proceedings of the secured assets of the plaintiffs by defendant No.3 in pursuance to the notice under Section 13(4) of the SARFAESI Act. However, by clever drafting, the plaintiff has tried to create an illusion of a cause of action. Prayers E & F are the main prayers challenging the action under Section 13(4) of the SARFAESI Act and prayers A, B, C, D and G are the grounds of challenge which have been made prayers in order to create an illusion of a cause of action.

5.2 The plaintiffs have availed the remedy of appeal under Section 17 of the SARFAESI Act before the Debts Recovery

Tribunal against the possession notice issued by defendant No.3 under Section 13(4) of the SARFAESI Act.

5.3 Against the order of the Debts Recovery Tribunal, the plaintiffs have also availed the remedy of second appeal before the Debts Recovery Appellate Tribunal under Section 18 of the SARFAESI Act.

5.4 Against the order of the Debts Recovery Appellate Tribunal, the plaintiffs have also filed a writ petition before this Court.

5.5 The jurisdiction of this Court is barred by Section 34 of the SARFAESI Act as this suit is in respect of matter which Debts Recovery Tribunal is empowered by SARFAESI Act to determine.

5.6 This suit is also barred by Section 13 of the SARFAESI Act as the security interest created by the plaintiffs has to be enforced by the creditor without the intervention of any Court in accordance with the provisions of the SARFAESI Act.

5.7 This suit is also barred by Sections 17 and 18 of the SARFAESI Act read with Section 41(h) of the Specific Relief Act, 1963 as the plaintiffs have availed the equally efficacious remedy of appeal to the Debts Recovery Tribunal and second appeal to Debts Recovery Appellate Tribunal.

5.8 The plaintiff's contention that the grounds raised in this suit were not raised in the appeals and the writ petition, is barred by the principles contained in Order 2 Rule 2 of the Code of Civil Procedure. The plaintiffs ought to have

included the whole of their claim in the appeals/writ petition and having omitted to take all the grounds, the plaintiffs cannot maintain this suit to urge the additional grounds..

5.9 This suit amounts to abuse and misuse of the process of law. It appears that the plaintiffs are indulging in forum shopping. Having filed the writ petition before this Court after two appeals, there is no occasion for the plaintiffs to file this suit.

6. CONCLUSION

This suit is clearly barred by Sections 13, 17, 18 and 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and, therefore, the plaint is rejected under Order 7 Rule 11 (d) of the Code of Civil Procedure.

I.A.Nos.5754-55/2010 and I.A.No.5757/2010

1. All the applications stand disposed of.
2. Copy of this order be given 'Dasti' to learned counsel for both the parties under the signature of Court Master.

MAY 03, 2010
aj/mk

J.R. MIDHA, J