

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ RFA(OS) 58/2015

% Decided on: 1st June, 2015

GOLF TECHNOLOGIES (P) LTD & ANR Appellant

Through Mr. Vivek Chib with Mr. Joby P.
Varghese Adv.

Versus

AXIS BANK LTD & ORS Respondent

Through Mr. A.M. Singhvi, Mr. A.K. Mata and
Mr. Subramaniam Prasad, Sr. Adv.
with Mr. Suresh Dobal, Adv.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

HON'BLE MR. JUSTICE V.P. VAISH

MUKTA GUPTA, J. (ORAL)

Caveat Nos. 600-601/2015

Learned counsel for the caveator enters appearance.

Caveats are discharged.

CM 10935/2015 (S.149 CPC)

Learned counsel for the appellant states that the requisite Court Fee has been deposited.

Application is thus disposed of.

CMs. 10932/2015, 10933/2015, 10934/2015 & 10936/2015

The applications are allowed, subject to just exceptions.

RFA(OS) 58/2015 & CM 10931/2015

1. Copy of the impugned order dated 29th May, 2015 has not been filed. However, learned counsel for the appellant has handed over the same to the Court which is taken on record.

2. The grievance of the appellant to the impugned order dated 29th May, 2015 is that the learned Single Judge of this Court in CS(OS) No.4095/2014 held that the suit was not maintainable. In the suit, the appellant challenged the measures taken by respondent No.1 Axis Bank Ltd. (hereinafter called “the bank”) under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (for short ‘SARFAESI’) Act, 2002 (hereinafter referred to as the “Act”).

3. Learned Single Judge dismissed the suit on the objections of the respondents regarding the maintainability of the suit in view of the remedy available under Section 17 of the Act. By the impugned order the following observations were made:-

24. From the aforesaid, the following legal propositions emerge propos the maintainability of a suit on the ground of fraud:
 - a. The exception carved out by the Supreme Court in ***Mardia Chemicals*** (supra) is a very limited exception. Like all exceptions, it has to be construed strictly.
 - b. The averments in the plaint have to be considered as a whole. A mere allegation of fraud cannot lead to the maintainability of a suit. The Court is duty bound to see if

the allegations of fraud are made only for the purpose of maintaining a suit.

c. Sufficiency of recourse under Section 17 of the Act would bar a suit.

28. This Court is of the view that if a standard classic defence, such as fraud by the Bank, is allowed to form the basis for maintaining a suit, then the provisions of the Act would become redundant, all the more so in the face of the express stipulation in Section 34 thereof. Moreover, if the test laid down in *V. Thulasi (supra)* and *State Bank of India (supra)* are applied to the present case, this Court would have no hesitation in holding that the present suit does not fall within the exception carved out by *Mardia Chemicals (supra)*. Indeed, the Court cannot be oblivious to whether the allegations of fraud and misrepresentation are made only for the purpose of creating cause of action, thereby leading to the maintainability of the suit.

29. This Court is also of the view that in the present case, the plaint does not aver any complicated facts leading to the case of fraud or how the measures adopted by the Bank are fraudulent/absurd/untenable. There is nothing in the plaint which would lead to the conclusion that the plaintiffs' case falls under the exception carved out by *Mardia Chemicals (supra)*, i.e., the plaintiffs' grievances ought to be determined in a suit. At this stage, it would be apposite to rely upon the judgment in *Authorised Officer, Kotak Mahindra Bank v. Brahmo Construction Pvt. Ltd., CRA No. 34/2015, decided on 16.04.2015*, wherein a learned Single Judge of the Bombay High Court held as under:

"14. In the instant case, as indicated above, the relevant averments in the plaint are in Paragraphs 6 11 and 12. The allegations in the said paragraphs have been made on the basis that the Defendant in the auction notice and in terms of the conditions of the

auction has not disclosed or suppressed the factum of there being an attachment of the Income Tax Department on the secured asset. The plaint does not contain any complicated facts leading to the case of fraud or how the action of the Defendant Bank is fraudulent. There are therefore no complicated issues of fact which are to be tried. It would have to be borne in mind that the auction was on "as is where is basis" and "as is what is basis". The intending participant in the said auction is therefore expected to make necessary inquiries if one can say so having regard to the general practice adopted at the time of auction. In fact in the instant matter the Plaintiff in Paragraph 6 of the plaint accepts the position that the attachment of the Income-Tax Department does not mean that there is a bar for the sale of the said property which is under attachment. It is in the said context that the maintainability of the suit was required to be considered by the Trial Court. If the test laid down in the judgment of the Division Bench of this Court in Jigishaben B Sanghavi's case (supra) and the judgment of the Division Bench of Madras High Court in V. Thulasi's case (supra) is applied, by taking the plaint as a whole the conclusion that is required to be drawn is that the instant suit does not fall within the exception carved out in Mardia Chemicals Ltd.'s case (supra)."

30. In the facts and circumstances of the case, this Court is of the view that the issue of fraud sought to be raised in this suit can well be agitated in proceedings under Section 17 of the Act since the plaintiffs evidently fall in the category of "any person" thereof."

4. Learned counsel for the appellant contends that the fraud committed in the present case was of a nature which could not have been enquired into an appeal under Section 17 of the Act as the scope of the same was limited to

the measures to be taken. The fact that letter dated 31st December, 2012 seeking disbursement of balance amount of Rs.20 lakhs was a forged and fabricated document is evident from the fact that one of the signatories of the letter i.e. Mrs. Sandeep Sagar was not in Delhi on 31st December, 2012 and thus her signatures would only have been taken on a blank document. The fact that Mrs. Sandeep Sagar was absent from Delhi is fortified by the affidavit of Ms. Kanwaljit Kaur Gosain with whom she stayed at Chandigarh during this period. The letter dated 31st December, 2012 being a fabricated letter is further fortified by (i) the vertical spacing between the printed lines in the forged document reveals that the signatures were placed before the contents were printed on its face i.e. the signatures were placed on a blank letterhead; (ii) both signatories have denied that they placed their signatures on the letter after it was printed; (iii) the address of the plaintiff No.1 is wrongly mentioned; (iv) the transfer of Rs.19.89 crores violates the mandate of the sanction letter itself; (v) as per the sanction terms, only 60% of the loan could be disbursed in absence of completion of the listed milestones; (vi) Debt Service Reserve Account (DSRA) reserve was not created against the disbursement as done on 31st December, 2012 and (vii) the interest debits of October-November-December, 2012 were not adjusted first. The appellant filed a criminal complaint with the police station Okhla Industrial Area on which no action was taken and an FIR was not registered. On a complaint of the appellant under Section 156 (3) Cr.PC, registration of FIR has been directed and pursuant whereof FIR No. 737 of 2014 under Sections 420/467/468/471/120B/34 IPC has been registered. The petition of the officials of respondent bank seeking quashing of the FIR under Section 482 Cr.P.C. is pending before this Court.

5. It is further contended that in the application under Section 14 of the Act filed before the learned CMM, Esplanade, Mumbai seeking ex-parte order of attachment of the appellant's property, the fact that preliminary inquiry into offences of forgery and criminal breach of trust of Rs.19.89 crores punishable under IPC was pending before the Delhi Police was suppressed. In the garb of order dated 12th September, 2014 passed under Section 14 of the Act, respondent No.1 took over the symbolic possession of the data centre of appellant in November, 2014. Despite the appellant filing an application before learned ACMM he declined to recall its earlier order dated 12th September, 2014 stating that he was functus officio. The writ petition challenging the order of the learned ACMM was dismissed by the Bombay High Court whereafter a special leave petition was filed wherein for the reason that civil suit being CS(OS) 4095/2014 was already pending before this Court, the Supreme Court permitted the appellant to pursue suit.

6. In the absence of any injunction, the property of the appellant being plot No. 37 Central Road, MIDC, Mumbai admeasuring 2100 sq.mtr. at Andheri East would be auctioned on 1st June, 2015. The DSRA was not required to be utilized. As per the terms of disbursement of the loan the tenure of the loan was 138 monthly installments with a moratorium for a period of 12 months. It was further provided that no interest was required to be paid in case the property was not leased during the said period. Since the issue involved was mixed question of law and fact, the Court could not to have summarily dismissed the suit and under Order 14 Rule 2(b) CPC was required to take evidence. Reliance is placed on Mardia Chemicals Ltd. & Ors. Vs. Union of India & Ors. (2004) 4 SCC 311 to contend that the fraud

alleged was of a nature which could have been decided in a civil suit only and not in an appeal under Section 17 of the Act.

7. Learned counsel for the respondent states that the very contention of the appellants that forgery is evident on the face of the document and no trial is required to demonstrate the same, fortifies the respondent's stand that the issue can be decided in an appeal under Section 17 of the Act and no civil suit is maintainable. The appellants owe around 2000 crores to the debtors. The contention that no interest was payable till this time in view of the moratorium and the property having not been leased out is incorrect in view of the statement of accounts at page 350 of the paper book which shows that interest is being deducted from September, 2012 onwards regularly. The plea of fraud has been taken after more than 1 year after the interest had been deducted from DSRA Account. Even the decision of the Bombay High Court holds that only an appeal under Section 17 of the Act was maintainable and the said order has attained finality in view of the Special Leave Petition having been withdrawn. The appellants do not dispute the signatures on the document and it is only stated that blank signed documents were taken which have been filled later thus no fraud can be alleged. Even accepting the version of the appellants, the same would not amount to fraud of a nature which can be determined after leading evidence in a civil suit only and not in an appeal under Section 17 of the Act.

8. Heard learned counsel for the parties.

9. The only issue for consideration before this Court is whether the appellant has alleged a fraud of the kind which cannot be inquired into in an

appeal under Section 17 of the Act. Section 17 of the Act provides as under:-

“17. Right to appeal.- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.-: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as

it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.”

10. Section 13 of the Act provides for enforcement of security interest created in favour of any secured creditor without the intervention of the court or tribunal, by such creditor in accordance with the provisions of the Act where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset.

11. The case of the appellant is that Tulip Telecom Ltd. was incorporated in 1992 under the Indian Companies Act, 1956 and Golf Technologies (P) Ltd. on 13th February, 2003. The turnover of Golf Technologies (P) Ltd. was around Rs.600 crores per year. Golf Technologies acquired a valuable plot of land of 2100 sq.mtr. at Andheri East, Mumbai to build a data center on the land. Since Tulip Telecom was already running a data centre nearby the Golf Technologies plot, it advised Golf technologies to use the plot to build a data center and offered that it would lease a substantial part of the building itself for its own use as data center for its customers provided Gold Technologies built the building as per Tulip Telecoms' designs and specifications. Tulip Telecom agreed to advance Golf Technologies a loan of Rs.27 crores approximately to be partly paid back over a period of time and partly to be adjusted in future lease rentals. Accordingly, Tulip telecom made available to Golf Technologies advance of approximately Rs.27 crores. Axis Bank seeing the business with Tulip Telecom sanctioned a debt facility of Rs.80 crores consisting of Rs.30 crores cash-credit (as a "fund-based" limit) and Rs.50 crores LC Limit/bank guarantee limit (as a "non-fund based" limit). The facility was secured by primary securities (stocks, book

debts, etc.) with only a joint charge on collateral securities worth around 3500 crores which charge was shared with 12 other lenders to Tulip Telecom where the total exposure of all the banks was around Rs.2600/- crores. Thus, the case of the appellant is that practically Axis Bank was holding no real or substantive collateral securities for its advance to Tulip Telecom.

12. The appellants further claim that since Tulip Telecom was facing temporary cash crunch, it asked Golf Technologies to either handover possession of the data center in a short time of around 8 weeks or return the money advanced to it. The promoters of Gold Technologies expressed their inability to do either, as the completion of the building was to take around six more months and there was no chance of Golf Technologies picking up advance lease-rental from its future lessees. Thus Golf Technologies took a loan of Rs.50 crores from Axis Bank to repay Tulip Telecom its advance of Rs.27 crores and to use Rs.23 crores to finish its building also so that it could place it on rent/lease. According to Golf Technologies it was a clear understanding that the source of repayment of loan was lease rentals which would accrue to Golf Technologies upon completion of its building. It is the case of the appellants that in order to repay Tulip Telecom, documentation of loan was done hurriedly and Mrs. Sandeep Sagar Appellant No.2 executed singly the documents by signing three letter heads without involvement of the second director. The officer of the bank with fraudulent and dishonest intention, surreptitiously removed these signed letter heads from the file of the Golf Technologies without their knowledge or permission and thus committed the offence of theft. One of these letter heads turn out to be blank and was subsequently used by the Axis Bank to forge and insert a forged and

mala fide “Transfer Instruction” of a colossal sum of Rs.19.89 crores on 31st December, 2012 and even before the formalities of mortgage could be completed, Axis Bank commenced disbursement to the current account of Golf Technologies without any lawful mortgage in existence. On the written request of Golf Technologies, a partial amount of Rs.30 crores were released by Axis Bank from its Term Loan Account out of which around Rs.27 crores were paid to Tulip Telecom. When the Golf Technologies sought disbursement of balance Rs.20 crores it was apprised that on 28th September, 2012 Axis Bank Limited disbursed Rs.20 crores from the Term Loan Account to Current Account which fact was unknown to Golf Technologies. On 2nd October, 2012 there was detailed discussion between Col. H.S. Bedi the second director of Golf Technologies and Anil Aggarwal, defendant No.2. Only on 15th January, 2014 it came to the knowledge of the directors of Golf Technologies that Axis Bank had released a sum of Rs.20 crores of loan surreptitiously from Golf’s Term Loan account to its current account and immediately transferred Rs.19.89 crores out to the cash-credit account of Tulip Telecom Ltd. Thus, valuable property of Rs.19.89 crores of money of the Golf Technologies entrusted in the dominion and care of Axis Bank in criminal breach of the trust was misappropriated by Axis Bank and its officers by transferring it to the cash-credit account of Tulip Telecom for their own benefits on the strength of forged “Letter of Instruction” dated 31st December, 2012.

13. In Mardia Chemicals Ltd. (supra) followed in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation (2009) 8 SCC 646 the Supreme Court held that the jurisdiction of Civil Court on the

ground of fraud played is limited and depends on the nature and character of fraud alleged. It was held-

“50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken “or to be taken in pursuance of any power conferred under this Act”. That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. 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 proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, 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 his 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. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned

Attorney General as well appearing for the Union of India, namely, V. Narasimhachariar [AIR 1955 Mad 135] , AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

“22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: Adams v. Scott[(1859) 7 WR 213, 249] . I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary: Law of Mortgages, Vol. II, 4th Edn., p. 784.)”

59. We may like to observe that proceedings under Section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court in Ganga Bai v. Vijay Kumar[(1974) 2 SCC 393] where in respect of original and appellate proceedings a distinction has been drawn as follows: (SCC p. 397, para 15)

“There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless the suit is barred by statute one

may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

14. As noted above, admittedly the alleged letter of instructions dated 31st December, 2012 was signed by Mrs. Sandeep Sagar the Director of Golf Technologies appellant No.2 though it is claimed that blank signed letter head was stolen. From the facts noted above, nature of fraud alleged is not of a kind that the same could not be decided in an appeal under Section 17 of the Act and only a civil suit was maintainable. The learned Single Judge rightly relied upon the decision of Division Bench of Madras High Court in V. Thulasi v. Indian Overseas Bank (2011) 8 Mad LJ 441 to note that by clever and astute drafting, the Plaintiff might create an illusion of cause of action by trying to bring Civil Suit within the parameters laid down by the Supreme Court in Mardia Chemicals (supra) however it is the duty of the Court to see if such allegations of fraud are thrown just for the purpose of maintaining the suit.

15. Learned counsel for the appellants has emphasized on the observation of learned Single Judge that allegation referring to signatures on blank letter heads is a standard/classic defence. The said observations have not been made by the learned Single Judge in isolation but on the facts of the present case seeing all the attendant

circumstances and the fact that transfer of Rs.19.89 crores was not a small amount and after the said transfer the appellants would have been alerted and immediately taken action however, they refrained to do so and belatedly took this plea.

16. Faced with this situation, learned counsel for the appellants contends that in view of Order XIV Rule 2 CPC a mixed question of law and fact could not be decided as a preliminary issue. Indubitably while deciding the issue, the learned Single Judge has not gone into the defence of the respondents but looked at the probability of the allegations of fraud as alleged by the appellants on the basis of their averments and documents and held that the civil suit was not maintainable, which finding cannot be faulted.

17. In view of the aforesaid discussion, we find no merit in the present appeal and the same is dismissed. The application for stay is also dismissed.

(MUKTA GUPTA)
VACATION JUDGE

(V.P. VAISH)
VACATION JUDGE

JUNE 01, 2015
‘v mittal’