

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

Reserved on: 22.04.2015
Date of Decision: 29.05.2015

+ CS (OS) No. 4095 of 2014

GOLF TECHNOLOGIES (P) LTD. & ANR. Plaintiffs

Through: Mr. Vikas Singh, Sr. Adv. with
Mr. Vivek Chib, Mr. Ajay Marwah,
Mr. Joby P. Varghese & Mr. Kailash Seth,
Advs.

versus

AXIS BANK LTD. & ORS. Defendants

Through: Mr. Salman Khurshid & Mr. Ashwini Mata,
Sr. Advs. with Mr. Suresh Dutt Dobhal,
Mr. S. Chaudhary, Mr. Raghav &
Ms. Gitanjali Kapoor, Advs. for D-1.

CORAM:

HON'BLE MR. JUSTICE NAJMI WAZIRI

NAJMI WAZIRI, J.

1. This is a suit challenging the measures taken by defendant No. 1 (hereafter '*Bank*') under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (for short '*SARFAESI*') Act, 2002 (hereinafter referred to as the '*Act*').
2. On 21.4.2015, after summons were issued, the Bank took a preliminary objection to the maintainability of the suit on the ground

that the appropriate remedy available to the plaintiffs is under Section 17 of the Act and that it was always open to the plaintiffs to have approached the Debts Recovery Tribunal (for short 'DRT') concerned for the reliefs sought in the present suit. Accordingly, the learned counsel for the parties were heard on the issue of maintainability of the suit.

Contentions

3. Mr. Ashwini Mata, the learned Senior Advocate for the Bank submits that the suit is not maintainable since: (i) Section 34 of the Act specifically bars the jurisdiction of a civil court, (ii) the appropriate remedy is to file an application before the DRT under Section 17 of the Act, (iii) the suit is nothing but an endeavour to block the process of recovery initiated by the Bank under the Act; (iv) that OA No.46/2015 before the DRT is already pending between the parties and the plaintiffs defences against the defendants action can be adequately dealt with in those proceedings and (v) this suit is nothing but forum shopping by the plaintiffs since they have initiated multiple proceedings and are creating complications in the recovery of debts due to the Bank.

4. He submits that the plaintiffs had first pursued a frivolous litigation by filing a writ petition before the Bombay High Court wherein they had challenged the orders dated 12.09.2014 and 03.01.2015 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai. The order of 12.09.2014 was passed under Section 14 of the Act for taking possession of the plaintiffs' secured asset(s) and by the latter order, the plaintiffs' application seeking recall of the earlier order was dismissed on the ground that after having passed the earlier order on 12.9.2014, the Magistrate had become *functus officio* and that the plaintiffs did not have any *locus standi* to challenge the same.
5. It is submitted that by an order dated 07.04.2015, the aforesaid writ petition was dismissed by a Division Bench on the ground that that a borrower does not have any *locus* to appear before the Magistrate under Section 14 of the Act since the procedure envisaged therein is non-adjudicatory in nature and that the borrower has an alternate remedy of filing an appeal under Section 17 of the Act. The operative part of the said order is reproduced as under:

“Be that as it may, in our view, this issue as to whether the amount was merely twenty per cent and whether the signatures of the petitioners' Directors were forged and whether the correspondence made by the bank with the petitioners was on a old letter head will have to be agitated in the proceedings

which are initiated by either parties before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act or RBBI (sic) ”.

6. The learned Senior Advocate for the Bank further submits that an SLP filed by the plaintiffs impugning the aforesaid order was withdrawn unconditionally, only to proceed with this suit. It is therefore, submitted that the observations of the Bombay High Court apropos appropriate remedy being available under Section 17 of the Act would be binding on the plaintiffs. It is also argued that the exception carved out by the Supreme Court in ***Mardia Chemicals Ltd. & Ors. v. Union of India & Ors.***¹ which was followed in ***Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Bank Corporation Ltd., (2009) 8 SCC 646***, for invoking the jurisdiction of civil courts on the ground of fraud is very limited and that it is the nature and character of fraud alleged which has to be seen.
7. The learned Senior Advocate for the Bank further submits that the plaintiffs’ case is that they had signed on blank papers which were subsequently filled in by the Bank, contrary to the understanding between the parties; that this is a standard/classic defence and proceedings Section 17 of the Act being original in nature, this ground

¹ (2004) 4 SCC 311

too can well be agitated and tried before the DRT. It is further submitted that this defence has been taken only to block and delay the recovery proceedings initiated by the Bank; that if the mere allegation of forgery is allowed to form the basis of the maintainability of the suit, then it would defeat the very purpose of promulgation of the Act and Section 34 thereof would be totally frustrated, making the DRT's functioning absolutely redundant. It is submitted that there is nothing in the present case apropos the alleged fraud which cannot be examined by the DRT; that the expression "*any person*" used in Section 17(1) of the Act is of wide import since it takes within its fold, not only the borrower but also any other person who may be aggrieved by the measures taken under Section 13(4) of the Act; that the Tribunal as well as the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 of the Act and are required to decide the matters within a fixed time schedule. Lastly, it is submitted that the remedy available to an aggrieved person under Section 17 of the Act is both expeditious and effective.²

8. In support of his contentions, the learned Senior Advocate for the Bank relies upon the dicta of the Supreme Court in ***H.R. Basavaraj v.***

² United Bank of India v. Satyawati Tondon & Ors., (2010) 8 SCC 110.

Canara Bank, (2010) 12 SCC 458, paragraph 10 thereof, which reads as under:

“10. As regards the first issue that is with respect to the liability of the appellant guarantors, Basavaraj (since deceased) and his legal heirs, the argument made on behalf of the appellants was that the original surety, Basavaraj did not have the chance to verify the documents he had signed at the time of his entering into an agreement to become a surety. It was submitted that the dates mentioned in Exts. P-19 and P-20 were in fact inserted at a later date after the forms were signed by the surety. The arguments regarding the practice of the banks to make persons sign blank acknowledgments from beforehand in order to extend the time of limitation at the time of filing of suits seems to be without merit. Even if we acknowledge the fact that banks might be in a dominant position, there was absolutely no evidence to show that the Bank had in fact exercised its dominant power to force the surety into entering the contract that he ultimately did. If the appellant had been interested in insisting upon this matter then the least he could have done was to have entered the witness box and facilitated a method of clearing the air about it. Nor was there any explanation adduced at a later stage explaining the reason for the surety not entering evidence on his behalf. In the absence of any conclusive evidence to point to the entering of dates at a later stage, we cannot find any difficulty in rejecting the aforesaid contentions of the appellants.”

9. In reply, Mr. Vikas Singh, the learned Senior Advocate for the plaintiffs submits that plaintiff No.1 had borrowed Rs.50.00 crores from the Bank for development of a property; that at request of the plaintiffs, an amount of Rs.30.00 crores was released by the Bank into the plaintiffs' account of which Rs.27.00 crores was returned to M/s.

Tulip Telecom Limited (for short '*Tulip*'), a company engaged in the business of data connectivity in the field of telecom, which had earlier been borrowed from it; that the latter had expressed its desire to occupy extra space in the building which would be constructed and rentals *therefrom* were to be repaid to the defendants; that the loan amount carried a moratorium of twelve (12) months; that in the meanwhile, Rs.1,16,41,510/- (Rs.1.16 crores) was transferred by the Bank into its own Debt-Service Reserve Account (for short '*DSRA*') as margin towards future repayments.

10.He further submits that as per the continued practice of plaintiff No.1, the aforesaid transaction bore the signature of plaintiff No.2, i.e., Mrs. Sandeep Sagar only as that was the arrangement by virtue of the Board Resolution dated 20.9.2012; that plaintiff No.1 having repaid the borrowed amount of Rs.27.00 crores to Tulip, owed nothing further; and that the remaining Rs.20.00 crores was to be used exclusively for the project for which the loan had been obtained.

11.He also submits that a request letter dated 28.9.2012, seeking disbursement of balance amount of Rs.20.00 crores was honoured by the bank and was credited into plaintiff No.1's account, however, the same was debited back; that on 23.11.2012, plaintiff No.1 once again

sought release of the balance Rs.20.00 crores, however, the Bank kept stalling the request which tantamounts to denial of the said request; that in the meanwhile, on 3.12.2012, the Registered Office of plaintiff No.1 shifted from Sant Nagar, New Delhi to the present address, i.e., F-90/1, 2nd Floor, Okhla Industrial Area, Phase-I, New Delhi-110020; that later on, the plaintiffs became aware that an amount of Rs.20.00 crores had been transferred from their Term Loan Account to the Current Account and in turn, an amount of Rs. 19.89 crores had been transferred into the cash-credit account of Tulip, hence, the Bank was in criminal breach of trust and had prevented the plaintiffs from utilising the said amount for the project for which the monies had been borrowed.

12.Mr. Singh draws the attention of this Court to the following clause of the Loan Agreement:

“Clause 27(n) The company shall create a Debt Service Reserve Account (DSRA) at the time of disbursement to meet the debt service requirements for the ensuing three months principal and interest payment due to the Bank from the cash flows available after meeting the debt service obligations during the operational phase or; first such DSRA shall be created out of the disbursement from the TL. Further if by Nov 15, company is not able to lease out the space the DSRA shall be for one year.”

13.He submits that the requisite amount had been kept in DSRA, i.e. Rs.1,16,41,510/- (Rs.1.16 crores) and because of the moratorium of twelve (12) months, the first instalment towards repayment of the loan became due only in October, 2013; that however, since the Bank always intended to put plaintiff No.1's account into a mess, eventually leading to it being declared an NPA so that the Bank could invoke the provisions of the Act to attach the plaintiffs' property worth Rs.100-150 crores, the Bank initiated the recovery process before the learned Chief Metropolitan Magistrate. It is submitted that the surreptitious disbursement of Rs.19.89 crores to Tulip on 31.12.2012 was *mala fide* and amounts to fraud played upon the plaintiffs since by that date, the address of the plaintiffs had changed from Sant Nagar, East of Kailash, New Delhi to F-90/1, 2nd Floor, Okhla Industrial Area, Phase-I, New Delhi-110020. Therefore, it is argued, that the subsequent action by the Bank, proceeding under the provisions of the Act, based upon fraudulent acts can be determined only in a suit and not by the DRT in a proceeding under Section 17 of the Act; hence the suit is maintainable.

14.It is further submitted that the Bank's letter dated 11.12.2013 is evidence of fraud played upon the plaintiffs insofar as it claims that:

"In addition to the above, you No.2 executed 'Deed of Guarantee' thereby guaranteeing the due repayment of the credit facility along with interest and other charges payable by you No.1.

The aforesaid securities are "Secured Assets" within the meaning of Section 2(1)(zc) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002 (hereinafter referred to as "the Act").

The aforesaid Secured Assets are fully owned by you No.1, the addressee above named who is "Borrower" within the meaning of Section 2(1)(f) of the Act.

We state that despite having availed the aforesaid credit facility, you No.1 have committed various defaults in repayment of interest and principal amounts as per due dates. The said credit facility/your account is classified by the Bank as a Non-Performing Asset (NPA) on 29.8.2013, in accordance with the directions/guidelines issued by the Reserve Bank of India from time to time.

Having regard to your failure to meet your liability in respect of the said credit facility and classification of your account as NPA, we hereby invoke the provisions of Section 13 of the the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, and by this Notice issued under the provisions of Section 13(2) of the aforesaid Act and without prejudice to the Bank's rights arising from the various documents executed by you, we hereby call upon you No.1 & 2, jointly and severally, to make payment of an amount of Rs.53,82,37,385/- (Rupees Fifty Three Crore Eighty Two Lac Thirty Seven Thousand Three Hundred Eighty Five) being the amount due as on 10.12.2013

with further interest w.e.f. 11.12.2012 at contractual rate (i.e. base rate +2% p.a. present rate being 10.25%) and penal interest at 1% p.a. till the date of payment, being payable/compounded with monthly rests, within a period of 60 days from the date of this notice, failing which the Bank will be entitled to and may exercise all or any of the rights available to it under Section 13(4) and 15 of the Act in respect of the Secured Assets mentioned herein including takeover of the management of business of you No.1.”

15. The learned Senior Advocate for the plaintiffs relies upon **Mardia**

Chemicals Ltd. & Ors.(supra) which held that:

“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.””

16. The learned Senior Advocate for the plaintiffs then contends that in ***Nahar Industrial Enterprises Ltd. (supra)***, the Supreme Court held that in terms of ***Mardia Chemicals Ltd. & Ors. (supra)***, the jurisdiction of civil courts can be invoked on the ground of fraud and misrepresentation since several other issues of complicated nature may arise. He further relies upon a judgment of this Court in ***Sadanand Properties Pvt. Ltd. & Ors. (supra)***, which held that:

“27. In fact, It was at the prima facie level itself the case of fraud set by the plaintiff was found to be apparent. Trial is over and final arguments have also been concluded. The Tribunal (before whom OA 16/2009 is pending) will not be able to go into the question of fraud; the prayer made in the present suit which is a prayer for a decree of declaration seeking declaration that the documents set up by the defendant be declared forged and fabricated qua the documents of the plaintiff may not be able to be answered by the Tribunal. At this stage it would also be unequitable to relegate the parties to that forum when admittedly the order of this Court dated 03.02.2010 has attained a finality and the Bank did not think it fit to challenge it.”

17.Mr. Vikas Singh then relies upon another judgement of this Court in

Smt. Davinder Kaur v. Punjab & Sind Bank and Ors. RFA No.

222/2013, decided on 29.07.2013 which held that:

“13. Be that as it may, I am of the opinion that though the learned Additional District Judge had not discussed the bar to the suit under Section 34 of the SARFAESI Act in detail in law but the jurisdiction of the Civil Court was barred to entertain a suit. Attention of the senior counsel for the appellant in this regard is invited to Mardia Chemicals Ltd. Vs. Union of India (2004) 4 SCC 311 where the Supreme court has clearly held that the jurisdiction of the Civil Court to entertain a suit with respect to matters qua which the jurisdiction has been conferred in the Debt Recovery Tribunal under Section 17 of the Act, is barred. Though the Supreme Court while holding so has carved out an exception of fraud but the senior counsel for the appellant in spite of attention being invited to the said exception has not pleaded or argued that the present case falls in the said exception.

14. The argument on the contrary is, that since the action taken by the respondent No.1 Bank with respect to its secured asset being a property bearing a number different from the

property of the appellant/applicant is illegally directed against the property of the appellant, the remedy of civil suit is available.”

18.He further relies upon a judgment of this Court in ***Ashok Kumar Raizada v. The Bank of Rajasthan & Anr.***, CS(OS) 1730/2010, **decided on 09.012.2013** which held that the suit was maintainable on the issue of fraud as alleged by the plaintiff therein. He then relies upon ***Ritu Gupta & Anr. v. Usha Dhand & Ors.***, CS (OS) 188/2011, **decided on 19.11.2013.**

Analysis

19.The limited issue before this Court is whether the nature of fraud, as alleged by the plaintiffs, could form the basis of maintainability of the present suit under the exception carved out by the Supreme Court in ***Mardia Chemicals*** (supra). In effect, it has to be determined whether this suit would be maintainable against measures taken under Section 13 of the Act.

20.Under Section 34 of the SARFAESI Act, jurisdiction of civil courts is barred. It reads as under:

“34. Civil Court not to have jurisdiction.— No Civil Court shall have jurisdiction to entertain any Suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or

other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

21.It is evident that the bar of jurisdiction is twofold. Firstly, civil courts shall not entertain any suit or proceeding in respect of any matter which a DRT or the Appellate Tribunal is empowered by or under the Act. Secondly, 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 order conferred under the SARFAESI Act or the RDDB Act. However, as per *Mardia Chemicals* (supra), jurisdiction of civil courts can be invoked only when the action of the secured creditor is alleged to be fraudulent or his claim so absurd and untenable.

22.At this juncture, reference to a few judicial precedents is necessary. A Division Bench of the Madras High Court in *V. Thulasi v. Indian Overseas Bank* (2011) 8 Mad LJ 441, Justice R. Banumathi, writing the judgement for the Bench, held as under:

“29. 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 case, 2004 (2) CTC 759 (SC) : 2004 (4) SCC 311. Pointing that Court has duty to see if such allegations of fraud are thrown just for the purpose of maintaining a Suit, in Punjab National Bank v. J. Samsath

Beevi, 2010 (3) CTC 310, Justice V. Ramasubramanian held as under:

“8. But at the same time, the Court has a duty to see, if such allegations of fraud are thrown, just for the purpose of maintaining a Suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. If by clever drafting, the Plaintiff creates an illusion of a cause of action, the Court is duty bound to nip it in the bud. To find out if it is just a case of clever drafting, the Court has to read the Complaint, not formally, but in a meaningful manner. So is the dictum of the Apex Court in T. Arivandandam v. T.V. Satyapal, 1977 (4) SCC 467. It was again reiterated by the Court in I.T.C. Ltd. v. Debts Recovery Appellate Tribunal, 1998 (2) SCC 70, by holding that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or creation of an illusion in the Complaint can certainly be unravelled and exposed by the Court while dealing with an Application under Order 7, Rule 11(a).

9. A Court is obliged to see if the allegations of fraud and collusion made in the Complaint, are themselves a product of “fraud and collusion” between the family members of the borrowers, so as to escape liability and save the secured assets, somehow or the other. In the recent past, there is a sudden spurt in the number of Civil cases filed against the actions initiated by Banks and Financial Institutions, either under the 1993 Act or under the SARFAESI Act, 2002. All these cases fall under 3 or 4 categories viz.—

(i) Cases filed by strangers claiming that their properties are brought to sale on the basis of forged documents or certified copies of documents submitted by borrowers to Banks

(ii) Cases filed by guarantors claiming that they never signed letters of guarantee or offered their properties as securities

(iii) cases filed by close relatives of borrowers such as spouses, children, brothers and sisters, claiming that they have a share in the properties mortgaged by the borrowers and that they were never aware of and they never gave consent to the properties being offered as securities, and

(iv) cases filed by third parties claiming that the properties were sold to them by the borrowers or guarantors by suppressing the creation of the mortgage and that they are bona fide purchasers for value without notice of the encumbrances.

10. It is not very difficult for a seasoned litigant or an intelligent lawyer to draft the Plaint in such a manner as to make a secured asset, come within anyone of the above 4 categories, by a clever drafting of the Plaint, thereby creating an illusion of fraud, collusion, misrepresentation and the like. Today, with the advancement of technology, the creation of an illusion and the creation of a virtual world are both possible. The moment the Civil Suit is taken on file, the proceedings before the Debts Recovery Tribunal or under the SARFAESI Act, 2002 gets slowed down. This results in two consequences viz., (i) out of frustration, the Banks agree for one time settlements, or (ii) third party rights get created by taking advantage of the situation. Therefore, the Courts have a greater responsibility to scan the pleadings and see if the allegations of fraud and collusion made in the Plaint are actually a product of fraud and collusion between the borrowers and those making such claims.”

We fully endorse the above views of the learned Single Judge.”

23. Similarly, in ***State Bank of India v. Jigishaben B. Sanghavi & Ors.***³,

a Division Bench of the Bombay High Court held as under:

“21A. These observations of the Supreme Court emphasize that the exception which is carved out is a limited exception. Like all exceptions, this exception must be strictly construed. A borrower or a third party cannot be permitted to defeat or to render nugatory the provisions of the Act merely by a stray reference to an allegation of fraud or, as in the present case, by an averment in paragraph 15 of the plaint of "a systematic fraud". The entirety of the plaint has to be construed.

³ Appeal No.244/2010 in Chamber Summons No.907/2008 in Suit No.1076/2005 decided on 8.12.2010

Essentially, in the present case, the averments in the plaint are that: (i) The HUF was a co-owner/tenant in common of the residential flat; (ii) The Bank has taken recourse to proceedings for recovery to which the HUF was not a party; (iii) The Plaintiffs had, in the course of the recovery proceedings, raised an objection before the Recovery Officer to the tenability of the action taken by the Bank; (iv) The Bank had taken recourse to its remedy under the Securitization Act without awaiting the result of the objection raised by the Plaintiffs; (v) The action under Section 13(2) was initiated in disregard to the provisions of the Securitization Act; (vi) The mortgage executed by the Second, Third and Fourth Defendants was defective because the original Share Certificates were not with the Bank; (vii) The First Defendant had no security interest and no secured assets and, therefore, was not entitled to invoke the provisions of Sub-section (4) of Section 13 against the right claimed by the HUF; (viii) A 'systematic fraud' was played by the First Defendant to pressurise the Plaintiffs; and (ix) There was an absence of legal necessity which would vitiate the mortgage alleged to have been created by the Second Defendant as Karta of the HUF. The reliefs which are sought in the suit have already been adverted to earlier. These averments, when construed in their entirety, would reveal that the grievance which the Plaintiffs have in the suit is in respect of the validity of the mortgage which is alleged to have been executed by the Second Defendant as Karta of the HUF and of the tenability of the action adopted by the Bank under the Securitization Act, so as to meet the interest of the HUF claimed in the residential flat. The Plaintiffs as third parties have sufficient recourse to challenge the lawfulness of the action of the Bank by invoking their remedies under Section 17. Thus, clearly within the meaning of Section 34, a suit in respect of any matter which the Tribunal is empowered by or under the provisions of Section 17 to determine is barred. The suit, therefore, in our view, was clearly barred by Section 34. The stray reference to an allegation of fraud in paragraph 15 of the Plaint is not sufficient to bring the case within the scope of the exception carved out by the Supreme Court in Mardia Chemicals.

*22. The error, with respect, in the judgment of the Learned Single Judge is that the Court has not construed the ambit of the provisions of Section 34 or of the recourse which is available under Section 17 to a third party, such as the Plaintiffs, against a measure taken under Section 13(4). The Learned Single Judge referred to the decision of the Supreme Court in **Mardia Chemicals**. We are of the view that the reasons which weighed with the Learned Single Judge in holding that the averments contained in the plaint fall within the purview of the exception carved out are erroneous for the reasons which we have already indicated earlier.”*

24. From the aforesaid, the following legal propositions emerge apropos 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.

25. On a meaningful reading of the plaint as a whole, it appears that in sum and substance, the plaintiffs' case is that the letter dated 31.12.2012 was not issued by them and that it was fraudulently created by the Bank, hence the transfer of monies from the plaintiffs' account to M/s. Tulip Telecom Limited was wrong and the said amount was depleted from their account only to classify it as an NPA. This according to the plaintiffs amounts to fraud and would form the basis of the maintainability of the present suit.

26. This Court is mindful that the aforesaid allegation referring to signatures on blank letter heads is a standard/classic defence. Hence, it is needs to be seen whether the aforesaid allegation can be adjudicated only in a civil court.

27. In the present case, the monies, i.e., Rs. 20 crores had clearly been credited from the plaintiffs' Term Loan Account to their Current Account. Thereafter, Rs. 19.89 crores was transferred to Tulip. By any standard of reckoning an amount of Rs.19.89 crores is not small and transfer of such amounts would send alarm bells ringing for any account holder especially like the plaintiffs, whose annual turnover is in the range of Rs.600.00 crores. Bank too are known to be especially careful about high-value accounts and the transaction made therein.

It is the plaintiffs' own case that they detected the act of fraud, as alleged, about five (5) months later. In fact, it is rather odd and indeed unbelievable that the plaintiffs were not aware of such a large sum of money having been debited from their account without their knowledge and that too for a few months thereafter.

The learned counsel for the plaintiffs refers to pages 85 to 90 (in Part III) that the first payment of Rs.30.00 crores was received on 25.9.2012, therefore, the moratorium would extend till October, 2013. An amount of Rs.1,16,41,510/- was available in the DSRA of the plaintiffs as is reflected from the current account statement on 25.9.2012. He submits that this amount was sufficient to service the loan till October, 2013.

Mr. Mata, the learned Senior Advocate for the defendant-Bank disputes this contention with reference to the Bank's Sanction Letter. He submits that the moratorium was only to the extent of repayment of the principal amount, nevertheless the loan would have to be serviced from the day monies were disbursed to the borrower as per the terms of the contract. He refers to the statement of the plaintiffs which shows that an amount of Rs.5,91,781/- was paid towards servicing the loan for a period of ten (10) days on 29.9.2012.

Similarly an amount of Rs.29,89,128/- was paid to the Bank on 30.11.2012 together with penal interest. An amount of Rs.60,58,508/- was paid by the borrower on 31.12.2012. On the same date an additional amount of Rs.20.00 crores was disbursed to the borrower. Hence, the amount towards servicing of loan every month was in the range of Rs.50.00 lacs approximately, which is reflected in the first entry in this regard on 31.1.2013 when an amount of Rs.51,28,433/- became payable. He submits that the DSRA was insufficient to service the loan.

The learned counsel for the plaintiffs submits that the defendant No.1-Bank played a fraud upon the plaintiffs by not deducting the appropriate amount for the DSRA for servicing Rs.20.00 crores, which were released subsequently. He submits that the defendants are seeking to make capital of their own default of the terms of the agreement, that if they have failed to deduct requisite amount for the DSRA apropos subsequent disbursement of Rs.20.00 crores then the borrower cannot be held liable for the lack of immediate availability of funds for servicing of the loan amount.

The borrowers/plaintiffs were declared NPA on 29.8.2013 and the proceedings before the learned Chief Metropolitan Magistrate was held thereafter.

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.

31. Furthermore, there is no force in the contention of advanced on behalf of the plaintiffs that the DRT is not empowered to determine the issues sought to be agitated in the present suit. It is not as if the remedy provided under Section 17 of the Act is illusory. The expression ‘*evidence produced by the parties*’ occurring in Section 17(3) would include all such which can be produced by the plaintiffs to show that the measures taken by the Bank under Section 13 were not in conformity with the provisions of the Act. It has been so held in *V. Thulasi (supra)*.

32. This Court is of the view that the Supreme Court in *Mardia Chemicals (supra)* has emphasised that only to a limited extent, the jurisdiction of civil courts can be invoked. This import of the sentence is evident from the expression that recourse to civil courts will only be to a very limited extent, i.e., only when 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.

33. The learned Senior Advocate for the plaintiffs had relied upon a number of judgments in support of the maintainability of the suit. However, in this Court's opinion, they are distinguishable on facts and cannot be relied upon. In ***Chandru v. K. Nagarajan*, (2012) 3 CTC 785**, a Division Bench of the Madras High Court, in the context of Section 34 of the Act, held that "*Courts have a duty to see whether genuine grounds have been made out to attract the jurisdiction of the Civil Court. No generalisation could be made as to when a Civil Suit is maintainable or when the jurisdiction of the Civil Court is ousted. In the facts and circumstances of each case, it is to be examined whether there is genuine grievance to be redressed in the Civil Court.*"
34. In ***Sadanand Properties*** (supra), the suit was held to be maintainable since a prima facie satisfaction apropos fraud was recorded when the Bank's application under Order VII, Rule 11 of the CPC was dismissed. The said order had not been challenged and had attained finality. It was observed that it would be inequitable to relegate the parties to the Tribunal when trial was over and final arguments had also been concluded. In ***Ashok Kumar*** (supra), a person had two separate sale deeds for the same property and separate mortgages had been created in favour of two defendants in the suit while the plaintiff

therein had also claimed ownership in the said property. Furthermore, some other person had also claimed title to the suit property and an FIR had been registered. Hence, the facts of the case were considered fairly complicated for it to fall under the exception carved out by the Supreme Court in *Mardia Chemicals Ltd. & Ors.* (supra). Lastly, in *Ritu Gupta* (supra), the loan was based upon mortgage of title deeds but the title deeds forming the basis of such mortgage themselves were questioned as being fraudulent. The defendants/Banks therein had also disputed that the sale deeds executed by defendant No.1 therein in favour of her sons were prima facie bad in law. However, in the present case, the allegation of fraud is premised only on the letter dated 31.12.2012, which allegedly authorised the Bank to transfer an amount of Rs.19.89 crores to Tulip. The allegation is simply of signatures on blank letter heads which was allegedly misused by the Bank. It is a standard classic defence and no fraud had taken place as in the cases discussed hereinabove. There are no complicated facts leading to the allegation of fraud. Therefore, the plaintiffs' grievances could well be agitated before the Tribunal in a proceeding under Section 17 of the Act.

35. In the context of the preceding discussion this Court is of the view that the ground of fraud raised by the plaintiff can be duly addressed in proceedings under Section 17 of the SARFAESI Act, 2002 and the said plea of fraud, in the peculiar facts and circumstances of the case, does not fall in the exception carved out in *Mardia Chemicals* (supra). Therefore, the suit is not maintainable and is accordingly, dismissed.

MAY 29, 2015
b'nesh

NAJMI WAZIRI, J.