IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

NOTICE OF MOTION NO.1981 OF 2015
WITH
NOTICE OF MOTION NO.1887 OF 2015
IN
SUIT NO.2823 OF 2009

Smt Susheela w/o Shri U.K. Nambiar ... Applicant
and
SBI Global Factors Ltd. ... Plaintiff
v/s
M/s Minar International Ltd. and others ... Defendants

Mr Dhaval Patil i/b M/s K. Ashar and Co. for Plaintiff.
Mr Mathews Nedumpara for Defendant No.3 / Applicant.
Mrs S.V. Golatkar, Master (Admn.), Court Receiver present.

CORAM : B.P. COLABAWALLA, J.

DATE : NOVEMBER 30, 2017

P.C.:

1. This Notice of Motion has been filed seeking the following reliefs :-

> "(a) that this Hon'ble Court be graciously pleased to declare that the above suit filed by the Plaintiff is void, that this Hon'ble Court is a coram non judice and, at any rate, the Plaintiff is duty bound to opt between the various forums of which it has taken

recourse to even while it is assumed,not conceded, that the Plaintiff is entitled to all remedies and there is no question of any inconsistency of the remedies;

(b) that this Hon'ble Court be graciously pleased to stay of all further proceedings in the above suit till this Hon'ble Court is pleased to decide its own competence, nay, jurisdiction to embark upon the inquiry any further;

(c) that this Hon'ble Court be graciously pleased to grant an injunction restraining and prohibiting the Plaintiff and its principal State Bank of India from proceeding any further in furtherance of the measures taken by it under section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002 / enforcement of the decree obtained by it under section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 as also even the Debt Recovery Tribunal / Recovery Officer from proceeding any further since they are a Court subordinate to this Hon'ble Court and this Hon'ble Court is competent to grant such an injunction.

(d) that this Hon'ble Court be pleased to pass any other order as the nature and circumstances of the case may require."

2. Mr Nedumpara, learned counsel appearing on behalf of Defendant No.3 submitted that in the facts of the present case, the Plaintiff first instituted the present Suit for recovery of the alleged amounts due to it under a trade finance facility. Thereafter, this very Plaintiff also filed a Company Petition seeking winding up of

Defendant No.1 Company. The 1st Defendant Company was directed to be wound up by the Company Court vide its order dated 16th March 2012. Mr Nedumpara submitted that it did not stop there. The State Bank of India and which is the parent Company of the Plaintiff went a step further and instituted an Original Application in the Debt Recovery Tribunal, Mumbai invoking section 19 of the Recovery of Debts and Bankruptcy Act 1993 and obtained a decree against the Defendants. Thereafter, the State Bank of India also invoked the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002.

3. Mr Nedumpara submitted that the scenario thus emerging was that there were four proceedings namely, (i) invoking the unlimited jurisdiction of this Court by filing Suit No.2823 of 2009 (the present Suit); (ii) Company Petition No.376 of 2012; (iii) Original Application No.265 of 2011 filed in the Debt Recovery Tribunal, Mumbai by State Bank of India and which Tribunal is vested only with limited jurisdiction and (iv) proceedings under section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act 2002. Mr Nedumpara

submitted that the Plaintiffs cannot be allowed to pursue its claim in different forums as was sought to be done in the present case. According to Mr Nedumpara, the doctrine of estoppel was a fundamental principle of law. It was founded on the principle of equity as also in public interest. Mr Nedumpara submitted that it is in public interest that there is finality to litigation which is possible only where multiplicity of proceedings is not permitted. This concept of finality is well settled and now in fact also been incorporated in the Code of Civil Procedure, 1908 and more particularly set out in sections 10 to 13 thereof as well as sections 38 to 41 of the Specific Relief Act 1963. It is in these circumstances that Mr Nedumpara submitted that the Plaintiffs ought to have elected which procedure they wanted to follow for recovery of its dues. In this regard, Mr Nedumpara submitted that there are four kinds of election - (1) election between rights; (2) election between remedies; (3) election between estate and (4) election in procedure. Mr Nedumpara submitted that the term 'remedy' is commonly misunderstood as procedure or forum and whereas the party can have multiple remedies, it has to choose one procedure / forum. He submitted that in the facts of the present case, the Plaintiff had invoked the jurisdiction of the Company Court and therefore, having done so, the present Suit could not have been filed and this Court is therefore coram non judice. The Plaintiff cannot be allowed to invoke the forum of the Company Court and thereafter file the present Suit and invoke jurisdiction of this Court in its Ordinary Original Civil Jurisdiction. For all these reasons, Mr Nedumpara that submitted this Notice of Motion be allowed in terms of the prayer clauses therein and which have been reproduced earlier.

4. On the other hand, Mr Patil, learned counsel appearing on behalf of the Plaintiff submitted that the arguments canvassed by Mr Nedumpara do not hold any merit. He submitted that as far as the loan given by the State Bank of India on the one hand, and the trade finance facility granted by the Plaintiff to the Defendants on the other, are two separate transactions. The State Bank of India, for recovery of its loan, had filed Original Application being Original Application No.65 of 2011 in the Debt Recovery Tribunal for recovery of its dues. On the other hand, the Plaintiff has filed the present Suit for recovery of its dues under the trade finance facility. He submitted that there was no question of the Plaintiff going to the D.R.T. as according to the

law as it stood when the Suit was filed, the Plaintiff was a non-banking finance Company and not a bank as contemplated under the provisions of the Recovery of Debts and Bankruptcy Act 1993. He therefore submitted that there was no question of this Court being coram non-judice on this ground. Even as far as the argument of invoking section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 is concerned, Mr Patil submitted that initiation of proceedings under the said Act was done by State Bank of India and not by the Plaintiff herein. It is therefore factually incorrect for Mr Nedumpara to submit that the provisions of the SARFAESI Act 2002 have been invoked by the Plaintiff to contend that this Court is coram non-judice. In any event, Mr Patil submitted that even if the Plaintiff was entitled to invoke the provisions of the SARFAESI Act 2002, especially after the amendment of 2016, the same would not preclude or in any way affect the jurisdiction of this Court to entertain the present Suit. In this regard, he placed reliance on the decision of the Supreme Court in the case of Transcore v/s Union of India, reported in AIR 2007 SC 712. He submitted that this decision clearly lays down the law that a Bank or a Financial Institution can file an Original Application for recovery of its dues and at the same time, invoke the provisions of SARFAESI Act 2002. Placing reliance on this decision, Mr Patil submitted that the law laid down in the aforesaid decision would also squarely apply to the facts of the present case. In these circumstances, Mr Patil submitted that there was no merit even in this contention.

5. As far as filing of the winding up petition is concerned, Mr Patil submitted that it is now well settled that the party can invoke the provisions of the Companies Act seeking winding up of the Company and also file a Suit for recovery of its dues. He submitted that it is now a well settled principle that winding up proceedings are not a recovery proceeding in law. The recovery proceedings can only be initiated by filing a Suit like it is done in the present case or filing an Original Application before the D.R.T. Merely because, the Plaintiff had invoked the jurisdiction of the Company Court seeking winding up of the Defendant No.1 Company does not in any event affect the jurisdiction of this Court to entertain the present Suit. In any event, Mr Patil submitted that the Company Court had jurisdiction only qua the Company. The winding up petition that was

filed was only against Defendant No.1. In the present Suit, the claim is also made against Defendant Nos.2 to 5 in their capacity as guarantors. In addition, Defendant No.2 has also been sued as mortgagor. These Defendants, namely Defendant Nos.2 to 5, were not parties before the Company Court and therefore there is no question of any election as far as these Defendants are concerned.

6. Over and above this, Mr Patil submitted that the reliefs that are now sought for in this Notice of Motion were already sought for by this very Defendant viz. Defendant No.3, in an earlier Notice of Motion being Notice of Motion (L) No.1757 of 2013. This Notice of Motion was disposed off by this Court vide its order dated 9th April 2014 (G.S. Patel J.). After this Notice of Motion (L) No.1757 of 2013 was dismissed by this Court, the order therein was again challenged by filing another Notice of Motion (L) No.989 of 2014. This Notice of Motion was also dismissed by this Court on 6th May 2014. He submitted that the exact arguments that are canvassed before me today were also canvassed before this Court in both these Notices of Motion. He submitted that the orders passed in these Notices of Motion have not been challenged and the Defendants, and in

particular Defendant No.3, cannot be allowed to canvass the same arguments over and over again. He submitted that this Notice of Motion has been filed only to delay the proceedings and to thwart the order passed by this Court on 14th September 2015 under which certain properties of Defendant No.2 were ordered to be sold by private auction. For all these reasons, Mr Patil submitted that there is no merit in this Notice of Motion and the same be dismissed with compensatory costs.

7. I have heard learned counsel for the parties at length and perused the papers and proceedings in the present Suit. I have perused the prayers in Notice of Motion (L) No.1757 of 2013. Prayer clause (a) inter alia prays that this Suit be dismissed as not maintainable as this Court is coram non judice by virtue of the order passed by this Court dated 16th March 2012 in Company Petition No.376 of 2010. This Notice of Motion was dismissed by this Court vide its order dated 9th April 2014. The order passed by this Court on 9th April 2014 is reproduced hereinbelow :-

> "1. I have heard Mr Nedumpara, learned counsel for the applicant, at some length. The applicant is original 3rd defendant. The notice of motion is for dismissal of the suit and also for recall of three orders passed in plaintiffs'

notice of motion No.985 of 2013 in this suit. The justification for these two prayers is, simply put this that this Court does not have jurisdiction to try the suit in the first place.

2. Mr Nedumpara's first argument is that since Company Petition No.376 of 2010 has already been filed by the plaintiffs against the 1st defendant – Company, without leave under section 446 of the Companies Act, 1956, the suit is incompetent. What Mr Nedumpara overlooks is that by an order dated 21st October 2013 such leave was in fact granted. It has not been revoked. Even in the present notice of motion, there is no prayer made for recall of that order granting leave under section 446.

3. Mr Nedumpara's second argument is that since the plaintiff is a subsidiary of the State Bank of India, it is, for that reason, covered by the Recovery of Debts Due to Banks and Financial Institutions Act 1993 (RDDB Act) and it must bring its action only in the Debt Recovery Tribunal and nowhere else. This argument elides the fact that the plaintiff is, and this is categorically stated in the plaint, a non-banking financial company. It does not fall within the definition of a 'bank' under section 2(d) of the RDDB Act.

4. But Mr Nedumpara is far from done. Unsurprisingly, he has yet another string to his bow, yet another Latin-maxim-tipped arrow in his quiver. Now he states that on the 'principles of estoppel of a cause of action', the suit itself does not lie. He bases this submission on his reading of Code of Civil Procedure, 1908, particularly sections 10 and 11 and Orders 1 and 2, read with provisions of the Specific Relief Act. I understand his submission to mean that where thee are two proceedings, it is only the first of these that can be pursued. In other words, Mr Nedupara suggests that if any party has filed a Company petition for winding up under Sections 433 and 434 of the Companies Act, 1956, a civil suit is incompetent. Regrettably, the law is against Mr Nedumpara. This position has been well settled by a very long catena of decisions.

> 5. For all Mr Nedumpara's eloquence, his submissions only amount to so much sound and fury, signifying nothing. The notice of motion is dismissed."

8. This order has admittedly not been challenged before the appellate forum. Instead, this order was challenged once again by filing another Notice of Motion being Notice of Motion (L) No.989 of 2014. This Notice of Motion was also dismissed by this Court by order dated 6th May 2014. Paragraphs 8 and 9 of this order read as under :-

> "8. The challenge in Notice of Motion (L) No.989 of 2014 is to my order of 9th April 2014. By that order I permitted a sale of certain immovable properties belonging to the 2nd defendant. It is alleged that there are errors apparent on the face of the record. This is a matter that is in the nature of a review. The grounds for review are limited. The first argument made is that there is violation of principles of natural justice.
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> 9. The second argument raised in the present Notice of Motion is that the suit is barred because the plaintiffs have adopted proceedings under the RDDBFI Act and SARFAESI Act. I have already dealt with these arguments and rejected them in a separate order. There is no law that prevents the petitioners from invoking multiple remedies if all these are available to it. The argument that the petitioners must elect only one of several alternative remedies, or having chosen one are estopped from prosecuting any other is not one that I can accept. There is no error apparent on the face of the record. Mr Nedumpara's submission that the question of election is

> not sought to be applied to a remedy but to a procedure seems to me to be a distinction without a difference. A creditor like the present plaintiff may have several procedures and remedies available to it. These may even be under different statutes and different forums. It is settled law that the filing of a civil suit does not bar a Company Petition for winding up or applications under the RDDBFI Act or the SARFAESI Act. The plaintiff can pursue one or more, or even all of them simultaneously and in parallel. Each operates in its own universe, in its own judicial and legislative silo. The defendants also have a simple answer to this barrage of permissible litigations in different courts; they merely have to pay the plaintiff/petitioning-creditor, and all these litigations will end. This the 3rd defendant is unwilling to do. Shorn of all the gossamer webs of forensix nicety that Mr Nedumpara with his uncommon predilection for mots juste in Latin weaves, the heart of the matter is this; the 1st defendant has a liability to the plaintiffs; the 2nd and 3rd defendants are guarantors. None of them wishes or intends to pay the plaintiff. They only seek to occupy an ever-expanding universe of faux jurisprudential theorizing. There is no substance to this motion. It is also dismissed."

9. Even this order dated 6th May 2014 has not been challenged by any of the Defendants. In these circumstances, I find considerable force in the argument canvassed by Mr Patil that this is another Notice of Motion that is filed for identical reliefs. In answer to this, Mr Nedumpara submitted that nothing precluded the Defendants from filing the present Notice of Motion as there is no estoppel of law. I am unable to agree with this submission. This is

not a question of estoppel of law. Even according to Mr Nedumpara there has to be finality to litigation. If this argument is accepted, then it would be against public interest as the same party would be allowed to agitate the same grievances over and over again without there being any change in circumstances. That surely cannot be permitted. The exact same reliefs were sought for by Defendant No.3 in Notice of Motion (L) No. 1757 of 2013 as well as in Notice of Motion No.989 of 2014. This is now a third Notice of Motion seeking the exact same reliefs. This being the case, I find that Mr Patil is perfectly correct in his submission that no relief can be granted to the Plaintiff considering that two orders are passed by this Court against the Defendants and which have not been challenged and have attained finality.

10. Even otherwise, I find that the submission of Mr Patil on the question of election has considerable force. In the facts of the present case, the Plaintiff has not initiated any proceedings for recovery other than the present Suit. The proceedings that have been initiated in D.R.T. are not by the Plaintiff but by the State Bank of India. Those proceedings are separate and independent proceedings

for recovery of the dues of the State Bank of India. This being the case, it would be incorrect to equate the proceedings that are filed in the D.R.T. by the State Bank of India as one and the same as proceedings that are filed in this Court by the present Plaintiff. I find that this argument would equally apply with reference to the proceedings initiated under the provisions of the SARFAESI Act. Firstly, the Plaintiff has not initiated any proceedings under the SARFAESI Act. Secondly, even if any proceedings under the SARFAESI Act were initiated by the Plaintiff, the same would make no difference to the jurisdiction of this Court to entertain the present Suit as held by the Supreme Court in the case of Transcore (supra). The Plaintiff does not have to elect to initiate proceedings under the SARFAESI Act or initiate proceedings for recovery. Both can be initiated at the same time. This being the case, there is no question of any election as held by the Supreme Court in the case of Transcore (supra).

11. Lastly, I find that Mr Patil is absolutely correct in his submission when he states that a winding up proceeding is a completely different proceeding from one for recovery. A winding up

proceeding proceeds on the basis that the Company is unable to pay its debts and therefore ought to be wound up. It is not a recovery proceeding in which a decree can be passed in favour of the Plaintiff. Once the Company is wound up, the order of winding up enures for the benefit of all the creditors. The Official Liquidator, depending on the assets available with the Company, has to make payment to the creditors on a pro-rata basis. In a Suit for recovery of money, after hearing the parties, if the Court is satisfied, passes a decree and the same is executable under the provisions of the Civil Procedure Code, 1908. This being the case, I do not find that it is correct on the part of Mr Nedumpara to contend that because the Plaintiff has filed a winding up petition against the Defendant No.1 Company and which has culminated into a winding up order, this Court would become coram non-judice. In any event, the present Suit is not only against the Defendant No.1 Company (which has now been wound up) but also against Defendant Nos.2 to 5 who are guarantors. It is not even the case of Mr Nedumpara that the Company Court can exercise jurisdiction with reference to Defendant Nos.2 to 5 who are individuals. This being the position, I do not think that by filing a winding up petition against the 1st Defendant Company, this Court would lose jurisdiction not only against the Defendant No.1 Company (now in liquidation) but also against Defendant Nos.2 to 5. This would, in my opinion, be contrary to all the principles of law.

12. In view of the foregoing discussion, I find no merit in this Notice of Motion. It is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

(B.P. COLABAWALLA, J.)