IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.11.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)Nos.2586 & 2587 of 2013
& M.P.Nos.1 & 1 of 2013

Canara Bank,
Rep. by its Senior Manager
SAF Branch
Coimbatore. .. Petitioner in both CRPs.

Vs.

1.P.Sellathal
2.K.Ponnusamy
3.R.palanisamy Gounder .. Respondents in CRP.(PD).No.2586 of 2013

1.P.Mylsamy
2.S.Ravi .. Respondents in CRP.(PD).No.2587 of 2013

PRAYER IN CRP.(PD).No.2586 of 2013: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the order and decretal order of the learned II Additional Subordinate Judge, Coimbatore, passed in I.A.No.431 of 2011 in O.S.No.1269 of 2010, dated 02.03.2013.

PRAYER IN CRP.(PD).No.2587 of 2013: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the rder and decretal order of the learned II Additional Subordinate Judge, Coimbatore, passed in I.A.No.122 of 2012 in O.S.No.233 of 2011, dated 02.03.2013.

For Petitioner : Mr.R.Rajesh
(in both CRPs.)

For Respondents : M/s.Ananda Gomathy Sivakumar
(in both CRPs.)

COMMON ORDER

The Civil Revision Petitions are filed to set aside the fair and decretal order dated 02.03.2013 made in I.A.No.431 of 2011 in O.S.No.1269 of 2010 and I.A.No.122 of 2012 in O.S.No.233 of 2011 respectively, on the file of the II Additional Subordinate Court, Coimbatore.

2. The petitioner in both the Civil Revision Petitions is the 5th defendant in O.S.No.1269 of 2010 and 6th defendant in O.S.No.233 of 2011 on the file of the II Additional Subordinate Court, Coimbatore. The respondents are the plaintiffs in both the suits. The respondents in both the Civil Revision Petitions have filed the above suit for declaration to declare the order dated 27.08.2003 passed by the Debt Recovery Tribunal, Coimbatore, in T.A.No.822 of 2002 is non est, ultra-vires and null and void, not binding on the suit properties, for a consequential permanent injunction restraining

the 7th defendant/Recovery Officer, Debt Recovery Tribunal, Coimbatore, from interfering with the respondents' peaceful possession and enjoyment of the suit properties by taking any action as against the suit properties by way of attachment or sale or otherwise and for a declaration declaring the alleged mortgage said to have been created by the 1st defendant in the suit with the petitioner. The petitioner filed applications in I.A.No.431 of 2011 in O.S.No.1269 of 2010 and I.A.No.122 of 2012 in O.S.No.233 of 2011 respectively, under Order VII Rule 11(d) of CPC for rejection of plaint.

3. According to the petitioner, the suits are not maintainable and the Civil Court has no jurisdiction in view of the bar of jurisdiction under Sections 18 and 20(1) of the RDDBFI Act, 1993. As per Section 20 (1) of the Act, the appeal is provided to Debt Recovery Tribunal and the Civil Court is not an appellate forum to hear the appeal against the orders of the Debt Recovery Tribunal so as to dismiss or modify the decrees passed by the Debt Recovery Tribunal.

4. The respondents in both the Civil Revision Petitions filed counter affidavits and submitted that they have purchased the suit property from the original owner and they are in possession and

enjoyment of the suit property. Their vendor did not create any equitable mortgage in favour of the petitioner. The officials of the petitioner in collusion with the promoters of M/S.Coimbatore Hatcheries, created and fabricated equitable mortgage, as though the original owner, the vendor of the respondent, created mortgage. On the complaint given by the 1st defendant in the suits, the original owner of the suit property, an FIR was registered on 02.11.2005 and a charge sheet dated 18.08.2007 is pending. Expert of the Forensic and Science Department Laboratory, Chennai, has given opinion that the alleged thumb impression in the deed of guarantee alleged to have been executed by the 1st defendant in the suits/ vendor of the respondents in favour of the petitioner is a forged one. The petitioner and promoters of M/S.Coimbatore Hatcheries played fraud and obtained decree in the Debt Recovery Tribunal. The fraud played by the petitioner and others can be proved only by the civil forum and the same cannot be decided by the Debt Recovery Tribunal. The respondents are third parties and they cannot approach the Debt Recovery Tribunal and Debt Recovery Appellate Tribunal. Thus, they prayed for dismissal of the applications.

5. The learned Judge considering the averments made in the

plaint, affidavit and counter affidavit, dismissed the applications.

6. Against the order of dismissal dated 02.03.2013 made in I.A.No.431 of 2011 in O.S.No.1269 of 2010 and I.A.No.122 of 2012 in O.S.No.233 of 2011 respectively, the petitioner has filed the present two Civil Revision Petitions.

7. The learned counsel for the petitioner as well as the learned counsel for the respondents reiterated the averments made in the affidavit, counter affidavit, reply affidavit and grounds of revision filed in this Court.

8. In support of his contention, the learned counsel for the petitioner relied on following judgements:

(i) ***2010 (3) CTC 310 (Punjab National Bank, represented by its Manager v. J.Samsath Beevi):***

> *"9. A Court is obliged to see if the allegations of fraud and collusion made in the plaint, 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 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. .. .. 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."*

(ii) **2011 (3) CTC 801 (V.Thulasi v. Indian Overseas Bank, Sowcarpet branch):**

"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.*

30. In the present case, plaintiffs seek for a declaration that the alleged guarantee created in the plaintiff's name for the loan advanced to the 1st defendant is null and void and seeks for permanent injunction restraining the defendants from proceeding against the plaintiff or the plaint schedule property. The plaintiff has brought out the averments in the plaint to bring property. The plaintiff has brought out the averments in the plaint to bring the suit within the purview of the exception carved out by the Supreme Court in ***Mardia Chemicals Ltd, Vs. Union of India, 2004 (2) CTC 759***

> ***(SC): 2004 (4) SCC 311.*** *In determining whether such a plea has to be accepted, the plaint as a whole has to be read. In* ***Popat and Kotecha Vs. State Bank of India Staff Association, 2005 (4) CTC 489: 2005 (7) SCC 510,*** *the Supreme Court held that plaint averments cannot be compartmentalised or dissected, nor can the averments be read in isolation. As pointed out earlier, the limited exception, which is carved out by the Supreme Court is whether the action of the secured creditor is so absurd and untenable that it would not require any probe, what so ever."*

9. The learned counsel for the respondents produced a copy of the order passed by the Division Bench of this Court dated 01.11.2011 made in W.P.Nos.9233 & 9486 of 2011. The respondents herein have filed the above writ petitions for issuance of writ of Mandamus directing the Recovery Officer, Debts Recovery Tribunal/6th and 7th respondent therein to defer the sale of the property situated at Survey Nos.472 and 488, Sanganur Village, pursuant to the decree of the DRT, Coimbatore, in T.A.No.822 of 2002 until disposal of the civil suits in O.S.Nos.1269 of 2010 and

233 of 2011 on the file of the Subordinate Court, Coimbatore and C.C.No.661 of 2007 on the file of the Judicial Magistrate's Court, Coimbatore, respectively.

10. The respondents herein who are the petitioners in the writ petitions made very same averments, which are made by them in the present suits. The petitioner herein, who is the 5th and 6th respondent in W.P.Nos.9233 and 9486 of 2011 respectively, made the same averments in the writ petitions as that of the averments in the present interlocutory applications and submitted that the Civil Court has no jurisdiction to entertain the suits.

11. The Division Bench of this Court considering the rival contentions made by the Senior counsel for both the parties, held as follows:

> *"6. .. .. As the issues are to be adjudicated and the decision could be rendered only on the basis of evidence, expressing any opinion on the issue of either fraud or impersonation or whether the mortgage created by the said kalikutty in favour of the bank is legal or not is a matter to be adjudicated in the civil suits and for that*

matter, in the criminal case as well, the writ Court is not the proper forum for such adjudication, as these issues cannot be decided in the writ petitions on taking evidence. In that view of the matter, we refrain from expressing any opinion on the averments made by the petitioners, which are controverted by the respondent-bank as well and leave these issues to be decided in the proper forums, namely, the criminal Court as well as the Civil Court in the pending proceedings. .. .. "

The Division Bench of this Court took note of the pendency of the present suits held that civil forum is a proper forum to decide the issue. The Division Bench also directed the learned Subordinate Judge to dispose the interlocutory applications, which were pending at that time, within fifteen days after notice to both the parties.

12. In view of the fact that the Division Bench of this Court held that the issue of either fraud or impersonation or whether mortgage created by the 1st defendant M.C.Kallikutty Gounder, vendor of the respondents herein, in favour of the Bank is legal or not is a matter to be adjudicated in the civil suits and in criminal case and the applications filed by the petitioner for rejection of

plaint on the ground that the Civil Court has no jurisdiction are devoid of merits and are not maintainable.

13. In the result, both the Civil Revision Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petitions are dismissed.

09.11.2017

Index : Yes/No

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To

The II-Additional Subordinate Judge, Coimbatore,

V.M.VELUMANI, J.

sji/kj

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