

N THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH.

103

CR No.4972 of 2014

Date of decision:13.11.2018

Mithlesh Devi

... Petitioner

versus

Bank of India

... Respondent

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH.

Present: Mr.N.D.Achint, Advocate, for the petitioner.  
Mr.Ranjan Lohan, Advocate, for the respondent  
...

AMOL RATTAN SINGH, J. (Oral)

1. Though, by this petition, the petitioner has challenged the order of the learned Additional District Judge, Gurgaon, dated 17.7.2014 (Annexure P-2), reversing, in an appeal filed by the respondent herein, the order of the learned trial Court granting an interim stay to the petitioner (plaintiff in the suit), on an application filed under Order 39 Rules 1 and 2 CPC, the primary question, in the opinion of this Court, would be the jurisdiction of the civil Court to entertain such a suit at all, in view of the statutory bar contained in Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act), read with sub section 1 of Section 17 of the said Act, by which the remedy with any owner against any action taken by a secured creditor, in respect of a property, is before the Debts Recovery Tribunal.

2. At the time when notice was issued in this petition on 31.7.2014, the following order had been passed:-

“This revision petition is filed by the plaintiff who is

alleged to have purchased the suit property from Laxmi Devi on 21.12.2009 and a mutation was sanctioned in that regard on 26.05.2010. When the respondent-bank tried to attach the property in dispute, the plaintiff came to know that Laxmi Devi had played a fraud upon her as she had mortgaged the suit property in favour of the bank as guarantor of her sons who had raised loan from the bank. Her application for temporary injunction was allowed by the Trial Court but the lower Appellate Court has reversed the order on the ground that the remedy lies with the petitioner to approach the Debts Recovery Tribunal under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

Counsel for the petitioner, while referring to a judgment of the Supreme Court in the case of **Mardia Chemicals Ltd. and others v. Union of India and others**, AIR 2004 Supreme Court 2371(1), has argued that the Civil Court would have the jurisdiction to look into the matter where there is a fraud played upon the secured creditor. It is submitted that the fraud has been played by Laxmi Devi along with her sons while not disclosing the bank that the property in dispute has already been sold to the petitioner on 21.12.2009 against a valuable sale consideration.

Notice of motion for 25.08.2014.

In the meantime, the respondents are restrained from attaching the suit property for recovery of any loan amount.”

3. Thereafter, arguments having been addressed at various stages, the issue had boiled down to what has been observed herein above, with Mr.Achint, learned counsel for the petitioner, naturally again relying upon the aforesaid judgment in the Mardia Chemicals Limiteds' case, wherein their Lordships have held as follows:-

“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 their 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 (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 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 (Eng.) 213 (Z49). 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 Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784).”

Thus Mr.Achint submits that with the petitioner having purchased the suit property from one Laxmi Devi vide a registered sale deed dated 21.12.2009, with a loan thereafter obtained by the sons of Laxmi Devi from the respondent bank on 26.5.2010 (5 months later), in fact a fraud has been played upon the petitioner by Laxmi Devi, possibly in collusion with the officials of the respondent Bank, because, he submits that it was the duty of the bank to first ensure that the property in question which was sought to be mortgaged by Laxmi Devi, to secure the loan granted by the bank to her sons, was free from all encumbrances, before the mortgagee, i.e. the bank, obtained the mortgage.

Hence, he submits that the ratio of the aforesaid judgment would apply on all fours to the present case.

4. Mr.Lohan, learned counsel for the respondent bank, on the other hand points to what has been observed by the appellate Court in its impugned order to the following effect:-

“In the instant case, *prima facie* the defendant bank had accepted Smt.Laxmi Devi, as guarantor, on receipt of original sale deed of the property in question pledged and it was the possible mode with the bank to ensure that Smt.Laxmi Devi was owner of the property in question. On the contrary, acceptance of plaintiff of sale transaction without receipt of original sale deed of the property in dispute from Smt.Laxmi Devi and getting the mutation sanctioned immediately on submission of status report of the property by banks' advocate and also approaching civil court immediately when Laxmi Devi presumably received notice u/s 13(2) of the Act, are the facts which prove hidden collusion between the two. Otherwise also, even if, there is any fraud played upon the plaintiff by Smt.Laxmi Devi in the sale transaction of suit property but for that secured creditor cannot be made to suffer financially for no fault of it.”

He further points to the fact that that Court duly considered the ratio of the judgment in Mardia Chemicals Limited, to observe that in the said case while interpreting the provisions of Sections 13, 17 and 34 of the SARFAESI Act, the Supreme Court had also observed that the bar on the jurisdiction of the civil Court applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal other than those in which measures had been taken under sub section 4 of Section 13 of the said Act.

5. Having considered the arguments, though that Court eventually went on to hold that the claim of the bank was neither contended (by the

petitioner-plaintiff) to be absurd and untenable, nor was there anything which could show that the act of the bank was fraudulent, in my opinion, whether the petitioner was defrauded by Laxmi Devi and her sons in collusion with any officials of the bank, or whether it was actually the bank that was defrauded due to any collusion between the petitioner and Laxmi Devi and her sons (as has been contended by Mr.Lohan), is something which is still to be proved; with an effective remedy available to both parties to plead their respective cases in that regard before the Debts Recovery Tribunal, as per sub section 1 of Section 17 of the SARFAESI Act.

Mr.Lohan has specifically pointed out from the afore quoted paragraph of the impugned order, to submit that in fact the mutation in respect of the sale deed executed in favour of the petitioner by Laxmi Devi, was sanctioned only on 26.5.2010, i.e. the same day as the bank sanctioned the loan to Laxmi Devis' sons after obtaining a mortgage on the suit property, on that very date. Thus, his contention, to repeat, is that the mutation not having been sought till 5 months after the sale deed, and having been sanctioned on the date that the bank had actually sanctioned the loan, fraud was actually played upon the bank and not upon the petitioner, with the bank having seen a clear revenue record as regards the suit property.

However, even having noticed the aforesaid contentions, nothing on merits is stated by this Court with regard thereto as to who was defrauded by whom, with that issue to be taken up before the Debts Recovery Tribunal.

6. Sub sections 1 and 4-A of Section 17, and Section 34 of the SARFAESI Act, are reproduced as under:-

**“17 Application against measures to recover secured debts.**

(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 manner within forty-five days from the date on which such measures had been taken:

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

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(4-A) Where--

(i) any person, in an application under sub-section(1), claims any tenancy or leasehold rights upon the secured asset,the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under subsection (2) of Section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) of sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.”

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**“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).”

7. While dealing with the issue on the jurisdiction of the civil Court in terms of a property rented out by the landlord, as had been secured qua a loan granted by a bank, this Court had occasion to consider the provisions of sub section 4(A) of Section 17 and Section 34 of the SARFAESI Act and had held in that case (Karan Arora vs. Ashwani Mehta and others, 2018(4) RCR (Civil) 273), while referring to a judgment of the

Supreme Court in M/s Sree Anandhakumar Mills Limited vs. M/s Indian Overseas Bank and others, (Civil Appeal Nos.7214-7216 of 2012, decided on 3.5.2018), that jurisdiction of the civil Court was obviously barred under Section 34 of the SARFAESI Act, with an alternative remedy available with the tenant, before the Debts Recovery Tribunal, in terms of sub section 4-A of Section 17 of the said Act.

8. Paramateria in the case of an owner, is sub section 1 of Section 17 and therefore, with that judgment of this Court having become final upto the Supreme Court, with SLP(C) no.22389 of 2018 filed by the petitioner in that case having been dismissed, I see no reason to entertain this petition.

Consequently, the petition is dismissed but in the circumstances, with no order as to costs.

9. Since the petitioner has a remedy before the Debts Recovery Tribunal, for her to take a plea of fraud as is alleged to have been committed upon her, with the bank obviously also having the same remedy to air its grievance of the fraud contended to have been played upon it, the bank would not enforce the debt by way of the property in question, for a period of one month from today, within which the petitioner is at liberty to approach the Debts Recovery Tribunal, if she so wishes.

If the petitioner does not approach the Debts Recovery Tribunal within 30 days from today, the interim stay granted hereinabove by this Court, in her favour, shall stand automatically vacated.

13.11.2018

pk

Whether speaking/reasoned

Whether Reportable

**( AMOL RATTAN SINGH )**  
**JUDGE**

Yes/No

Yes/No