

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CR No.527 of 2013

Date of Order: 26.02.2018

Indiabulls Housing Finance Ltd

....Petitioner

Versus

Ravinder Kaur and another

....Respondents

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mrs. Kiran Bala Jain, Advocate for the petitioner.

Mr. Rajesh Sethi, Advocate for respondent No.1.

Mr. P.S. Ahluwalia, Advocate for respondent No.2.

AMIT RAWAL, J (ORAL)

Present revision petition is directed against the impugned order dated 01.12.2012 passed by learned Civil Judge (Sr. Divn.), Sangrur whereby an application filed under Order 7 Rule 11 CPC seeking rejection of the plaint at the instance of defendant No.2 has been dismissed.

It would be in the fitness of things to give brief facts of the matter.

Plaintiff-respondent No.1 instituted a suit claiming declaration to be owner in peaceful possession of the house measuring 489 sq. yards giving the description of the boundaries towards, East, West, North and South, comprising of Khewat no.372/355, 372, khatoni no.516 khasra nos.137//6/2min/2-7, 14/2/0-3, 16/1-7, (ii) 398 Sq. yards equivalent to 398/18815 share of land comprising of khewat no.510/510, 489, khatoni no.691 to 702 khasra nos.136//9/2min/2-0-6.00, 136//10/2min/0-9-1.50,

11/6-13, 12/1min/19-450, 20/1/4-4, 137//17min/4-0, 18/1/0.2, 196//10/2/0-9-1.50, 136/1min/0-13, 136//10/2/0-1404.40, 136//10/2min/1-16-1.80, 136//10/2min/0-17-6.75, 136//10/2/1-1, 136//9/2/1-18, 10/2min/0-12, 136//9/2min/0-8-3.00, 136//12/1min/1-5-7.50, 136//9/2min/1-0, 12/1min/1-6-6.00, 136//10/2min/0-10 and (iii) 23 sq yards equivalent to 23/1209 share comprising of land khewat no.610/392, khatoni no.831, 832 khasra nos.137//15/1min/1-9, 137//15/1min/0-11 situated at Bhawanigarh according to jamabandi for the year of 2008-09. It is stated that the said house is free from any type of encumbrances and not charged with any type of encumbrances whatsoever; with consequential relief of permanent injunction restraining the defendant No.2 from interfering into the peaceful possession as well as creating 3rd party right by auctioning or selling the said house on the premise that defendant No.1-Avinder Singh son of S. Bharpur Singh was owner of the house in dispute as per registered sale deed No.1640 dated 28.11.1996. Afore mentioned house was sold vide sale deed No.521 dated 29.05.2009 to the plaintiff and possession thereof was handed over to her. At the time of purchasing the house, defendant No.1 told the plaintiff that the original sale deed had been lost and on the basis of certified copy and believing his representation and assurance to be correct, the afore mentioned property was purchased. Even defendant No.1 had sworn an affidavit to this effect on 29.5.2009. Since defendant No.2 threatened to take possession of the house and denied the ownership of the plaintiff, the suit was preferred by the plaintiff.

Learned counsel for the petitioner submitted that the suit against the financial institution, namely M/s Indiabulls, in view of the provisions of Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 (for short “SARFAESI Act”) was not tenable as the jurisdiction of the Civil Court is barred. Napinder Singh along with his father-Avinder Singh/co-applicant had availed the loan facility of Rs.23,50,000/- and in lieu thereof the title of the property was mortgaged. The borrower defaulted the monthly instalment with interest. Accordingly, their account was declared as non-performing assets (NPA). A notice under Section 13 (2) of the SARFAESI Act was served upon the borrower on 23.3.2012 but the petitioner-Bank was astounded to receive a notice of the suit. It is, in these background that the application under Order 7 Rule 11 CPC was filed.

Learned counsel for the petitioner submitted that the petitioner was the secured creditor and the remedy, if any available for the plaintiff was before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act. In support, she has relied upon a judgment rendered by this Court on 02.8.2013 in CR No.4604 of 2013 but the trial Court committed a grave error while dismissing the application and if such type of practice is allowed to continue, no financial institution would be able to recover the amount, particularly when the property in dispute had been mortgaged.

Per contra, learned counsel for respondent No.1/plaintiff submitted that there was apparent collusion between the petitioner-complainant and defendant No.1 as both of them had been in hand and gloves with each other for malafide intention to commit fraud against the plaintiff, who is the bonafide purchaser of house bearing No.168, situated in Ward No.5, Preet Nagar, Bhawanigarh for consideration without notice. Affidavit dated 29.5.2009 executed by Avinder Singh before the Executing

Magistrate, Bhawanigarh has been attached as Annexure R.1/2 with the written reply. Avinder Singh and his son Napinder Singh with the malafide intention in connivance with the Branch Manager of the Company obtained financial assistance and the property i.e a house constructed in the back portion and two shops, was mortgaged with the petitioner Company and was received in exchange by Avinder Singh son of Bharpur Singh from Vinod Kumar son of Roshan Lal vide registered exchange deed dated 25.5.1999 but neither the house /premises belonging to the plaintiff is situated in Ward No.4 nor falls in New Grain Market and in fact the premises of the plaintiff is a part of Ward No.5, Preet Nagar, Bhawanigarh as per photographs Annexure R.1/5. For, inquiry made by respondent No.1-plaintiff, it came into light that the house is situated in Grain Martket, which was mortgaged by Avinder Singh with the petitioner and was further sold to Smt Monika Goyal vide sale deed No.3202 dated 22.2.2012 in connivance with the local branch manager of the Company and that the vendee of sale deed dated 22.2.2012 is a relative of the recovery Branch Manager of the petitioner-Company. An application was thereafter submitted to the Naib Tehsildar in this regard and after physical verification, it was found that the house belonging to the plaintiff is not a part of New Grain Market Bhawanigarh and is in fact situated at a distance of about 40 karams i.e 220 ft from the New Grain Market Bhawanigarh vide report Annexures R.1/6-A. With regard to the possession, a reference has been made to Annexures R.1/7 to R.1/10 i.e ration card, election identity card and the electricity bill etc. On having acquired the information about the alleged fraud, respondent No.1-plaintiff lodged an FIR No.57 dated 5.5.2012 under Sections 420,447,511 IPC at Police Station Bhawanigarh, District Sangrur. In those proceedings,

Avinder Singh was arrested from the International Airport, New Delhi as he intended to flee away from the Country. After dismissal of the bail application, he moved CRM.No.M-34482 of 2013 before this Court and this Court vide order dated 24.10.2013 while granting interim bail noticed that Avinder Singh owed a sum of Rs.35 lacs to the financial Institution against loan of Rs.23,50,000/- and a sum of Rs.18,46,322/- had already been paid till that date. He also relied upon the order dated 07.11.2013 that the petitioner had undertaken to pay another sum of Rs.15 lacs including interest within one year. In support of his contention, he submitted that a Tribunal was constituted with a specific purpose although no power is vested with it qua declaration and that such power is vested only with the Civil Court. In support, he relied upon a judgment of Hon'ble Supreme Court reported as **Nahar Industrial Enterprises Ltd Vs. Hong Kong & Shanghai Banking Corporation 2011 (7) RCR (Civil) 95** by submitting that the present revision petition deserves dismissal.

I have heard learned counsel for the parties and appraised the paper book. There is no force in the contentions of learned counsel for the petitioner. The maintainability of the suits had been a point of debate before various Courts and it ultimately reached Hon'ble the Supreme Court in **United Bank of India, Calcutta Vs. Abhijit Tea Co Pvt Ltd 2000 (7) SCC 357**. The provisions of sub-section 6 of Section 19 of Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "1993 Act") enables the defendant to claim set off or set up counter claim in view of the amount being recovered by the Bank. In case the Bank initiated steps to recover the amount before the DRT under the 1993 Act, respondent No.1-plaintiff would have right to set up counter claim as the jurisdiction of

the Civil Court was expressly barred but the question again came for debate in **Nahar Industrial Enterprises's case (supra)** wherein the provisions of Section 24 of 1993 were pressed into service for transfer of the suit before the Tribunal by treating it as counter claim and the provisions of Sections 96 and 20 of 1993 Act impose an onerous condition of payment of 75% by the affected party. In case of proceedings initiated by financial institutions for preferring as appeal, it was held that for such types of suits particularly fraud, as sought to be projected before this Court, the jurisdiction would only vest with the Civil Court.

It would be apt to reproduce relevant provisions of Section 13 & 34 of the SARFAESI Act which empowers the creditor to move an application for recovery of the debt and the same reads as under:

“ 13(1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.” Section 13 (2) of the SRFAESI Act requires issuance of notice to the borrowers, which reads as under:- “13 (2) 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, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).”

Sub section (4) of Section 13 empowers the secured

creditors to proceed against the borrowers for recovery of the debt and certain measures have been provided, which he/it could take against the borrowers. On issuance of such notice, the borrowers or any third person, affected by such notice, could file the objections under Section 17 of the SRFAESI Act, which reads as under:-

“17 (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 measures had been taken.”

On filing of the objection, the Debt Recovery Tribunal would consider, whether any of the measures referred in Sub Section 4 of Section 13 of the SRFAESI Act taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the Rules made thereunder. Sub Section 5 also empowers the Debt Recovery Tribunal to decide the application filed by the borrowers or any such person, as expeditiously as possible. Thereafter, the appeal has been provided under Section 18 of the SRFAESI Act, to be filed by a person lodging objections under Section 17 of the Act. A specific bar has been created upon the Civil Court not to intervene in any such matters and grant any injunction by enacting Section 34 of the SRFAESI Act, which reads as under:-

“Section 34 – Civil Court not to have jurisdiction – No Civil Court shall have jurisdiction to entertain any suit or proceedings 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).”

In the present suit, the plaintiff has sought the following reliefs:

“ It is therefore, prayed that the suit may kindly be decreed with costs and the decree for declaration to the effect that the plaintiff is the owner and is in peaceful possession as owner of the house measuring 489 sq yards situated at Bhawanigarh as fully mentioned in the head note of the plaint and the said house is free from any type of encumbrances and not charged with any type of encumbrances whatsoever may be, further the alleged encumbrances, as is being alleged by the defendant no.2, if any, are not binding on the plaintiff and or the house in dispute under the ownership of the plaintiff and the same have got no effect on the title of the plaintiff in respect of the house mentioned above and the defendant no.1 is liable to the same may kindly be passed in favour of the plaintiff and against the defendants;

Further decree for permanent injunction restraining the defendant no.2 and/or its servants, employees, agents, attorneys or any other persons authorized by the defendant no.2 from interfering in the peaceful possession of the plaintiff of the house fully mentioned above, further restraining the defendants and its above mentioned persons from selling, auctioning or otherwise alienating the above said house in any manner, also restraining the defendant no.2 from charging any alleged encumbrances in any manner on/from the house fully mentioned prejudicial to the title of the plaintiff may kindly be passed in favour of the plaintiff and against the defendants. Costs of the suit may kindly also be awarded. Any other relief to which the plaintiff may be deemed entitled may kindly

also be granted.”

On conspectus of the observations rendered by the Hon'ble Apex Court in United Bank of India, Calcutta (supra), Nahar Industrial Enterprises Ltd. (supra) and relief claimed in the suit, I am of the view that nature of the suit would not fall within the expression “counter claim”, whereby, the respondents, herein, have sought relief of reduction in the rate of interest or some adjustment of the amount. Essentially, the claim in the suit was with regard to certain transaction being sham, null and void and as well as the scope of execution of the bank guarantee owing to demise of bank guarantor.

There is another aspect of the matter. Sub-section 11 of Section 19 of 1993 Act, also empowers the Tribunal to relegate the party to set up a counter claim or set off in the civil suit. For the sake of brevity, sub-section 11 of Section 19 of 1993 Act, reads thus:-

“ (11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit”

In Nahar Industrial Enterprises Ltd., it has been held that the Tribunal would not be a civil Court. It envisioned that in case of dismissal of the suit (to be treated as counter claim) as per the arguments of learned counsel for the petitioner, the aggrieved party would have to avail the remedy under Section 20 of 1993 Act, i.e., by filing an appeal before the Appellate Authority which cannot be entertained without payment of 75% amount. Though discretion to relax has been given but in my view,

relegating the respondent-plaintiffs to Tribunal by treating their suit as counter claim would be horrendous task. The claim of the Bank in petition under Section 19 would only entitle them to claim the amount on the basis of outstanding debt as per the statement of account/balance sheet, whereas, both the reliefs are totally opposite to each other, therefore, cannot be decided by the Tribunal by treating it to be counter claim.

As an upshot of my findings, I am of the view that the order under challenge is perfectly legal and justified, much less, the same cannot be said to have been passed without jurisdiction.

Accordingly, while upholding the order under challenge, revision petition is dismissed.

February 26, 2018
manoj

(AMIT RAWAL)
JUDGE

Whether speaking/reasoned: Yes/No
Whether Reportable : Yes/No