IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision-17.10.2018

1. **CR No.6095 of 2018(O&M)**

M/s Cholamandalam Investment and Finance Co. Ltd.

... Petitioner

Versus

Veena Aggarwal and others ... Respondents

2. **CR No.6500 of 2018(O&M)**

Veena Aggarwal ... Petitioner

Versus

M/s Cholamandalam Investment and Finance Co. Ltd. and others ... Respondents

CORAM:-HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Ms. Puja Chopra, Advocate
for the petitioner in CR No.6095 of 2018 and
for respondent No.1 in CR No.6500 of 2018.

Mr. Aayush Gupta, Advocate
for the petitioner in CR No.6500 of 2018 and
for respondent No.1 in CR No.6095 of 2018.

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<u>RAJ MOHAN SINGH, J.</u>

[1]. Vide this common order, CR No.6095 of 2018 titled M/s Cholamandalam Investment and Finance Co. Ltd. Vs. Veena Aggarwal and others and CR No.6500 of 2018 titled Veena Aggarwal Vs. M/s Cholamandalam Investment and Finance Co.

Ltd. and others are being disposed of. Since common question of law and facts are involved, therefore, the facts are being taken from CR No.6095 of 2018.

[2]. Both the revision petitions have been preferred against the order dated 18.08.2018 passed by Civil Judge (Junior Division), Ludhiana.

[3]. With the concurrence of the parties, date of hearing of CR No.6500 of 2018 was preponed as the decision of CR No.6095 of 2018 would have material bearing on the decision of CR No.6500 of 2018.

[4]. Plaintiff filed a suit for declaration to the effect that plaintiff is owner in possession of property bearing No.7-J, Sarabha Nagar, Ludhiana bearing M.C. No.B-XX-4494 measuring 500 sq. yards comprised in khasra No.560, khata No.1372, khatauni No.1508, P/1065 as per *jamabandi* for the year 2006-07 situated at village Sunet, Hadbast No.159, Sarabha Nagar, Tehsil and District Ludhiana as per boundaries shown in the plaint. Permanent injunction was also sought seeking to restrain the defendants from alienating the suit property and also dispossessing the plaintiff from the suit property.

[5]. Plaintiff pleaded that earlier husband of the plaintiff was owner of the suit land having purchased the same in the year 1992 vide sale deed dated 25.06.1992. Thereafter, construction was made. Adjoining property 6-J is owned by son of the plaintiff

namely Karan Aggarwal. Due to mutual love and affection and being members of the same family, intervening wall was removed and one house was built on both the plots. Later on, the relations amongst the parties became strained and the plaintiff started living in the property 7-J, whereas defendant No.2 Karan Aggarwal started living in separate annexe constructed over property No.6-J, Sarabha Nagar, Ludhiana. Plaintiff further pleaded that defendant No.2 fell into bad company and did not improve. Husband of the plaintiff disowned him by means of issuance of public notice in the newspaper dated 10.12.2010. Defendant No.2 was living separately during lifetime of husband of the plaintiff. Defendants No.2 and 3 took loan from defendant No.1 and in connivance with the officials of defendant No.1 forged and fabricated the loan documents thereby created the mortgage of the property of husband of the plaintiff by forging the signatures and by impersonation of late Sh. Rajinder Aggarwal and the plaintiff. Defendant No.2 laid hands on the original sale deeds in favour of late Sh. Rajinder Aggarwal and submitted the same with defendant No.1 for obtaining the loan. Husband of the plaintiff died on 06.07.2011 and thereafter, plaintiff inherited the property on the basis of Will dated 25.10.2010.

[6]. Plaintiff further pleaded that defendant No.1 sent a notice dated 28.09.2016 under Section 13(2) of Securitization and Reconstructions of Financial Asset and Enforcement of Security Interest Act, 2002 (hereinafter to be referred as

'SARFAESI Act') on the basis of loan availed by defendants No.2 and 3. It was alleged that loan was taken by the plaintiff and her husband along with defendants No.2 and 3. Defendant No.1 did not show any details. Plaintiff asked for supply of documents which were never supplied to the plaintiff. Plaintiff sent a registered legal notice dated 07.03.2017 calling upon the defendants to supply loan documents. After the said notice, plaintiff visited the office of defendant No.1 on 15.03.2017 and defendant No.1 showed the loan documents to the plaintiff and thereafter, factum of forgery came to the notice of the plaintiff. A criminal complaint filed by the husband of the plaintiff came to the notice of the plaintiff, wherein it was alleged that the fraud was committed by defendant No.2 and in fact, no loan was availed by late Sh. Rajinder Aggarwal. These facts were never disclosed by late Sh. Rajinder Aggarwal to the plaintiff as he never wanted the plaintiff to be emotionally hurt. With this background, the suit for declaration came to be filed. Along with the suit, list of documents relied upon by the plaintiff was also attached.

[7]. Defendant No.1 filed an application under Order 7 Rule 11 CPC for rejection of the plaint on the ground the Civil Court jurisdiction is barred under SARFAESI Act. The filing of the suit was claimed to be a counter blast against the proceedings initiated by respondent No.1 under SARFAESI Act for recovery of loan amount.

[8]. The application was dismissed by Civil Judge (Junior Division), Ludhiana vide order dated 18.08.2018.

[9]. I have heard learned counsel for the parties.

[10]. Learned counsel for the petitioner in CR No.6095 of 2018 vehemently submitted that the plea of fraud taken by the plaintiff is illusionary inasmuch as that the factum of loan availed by defendants No.2 and 3 has not been denied by the plaintiff who are son and daughter-in-law of the plaintiff. Learned counsel further submitted that the pleadings made in para No.4 if read in conjunction with the police complaint filed by the husband of the plaintiff on 20.12.2010 would show that the husband of the plaintiff pleaded in the police complaint that his signatures were obtained by his son on blank papers under duress in the year 2002 and later on, he misused the blank papers on 17.09.2002, but the complaint was filed only on 20.12.2010 and the said complaint came to be noticed by the plaintiff only after the death of her husband on 06.07.2011. Plea of fraud has been intentionally incorporated just to project the case to be not covered under SARFAESI Act.

[11]. Learned counsel also submitted that when the pleadings are drafted in a clever manner and the same have created illusion of a cause of action, then the Court can interfere under Order 7 Rule 11 CPC. Learned counsel submitted that jurisdiction of SARFAESI Act cannot be ousted. Learned counsel

relied upon ***<u>Mardia Chemicals Ltd. etc. Vs. Union of India and others, 2004(2) RCR (Civil) 665</u>*** and submitted that Sub Section (1) of Section 13 of the SARFAESI Act begins with non-obstante clause and bars the jurisdiction of Civil Court under Section 34 of the Act. It begins with "Notwithstanding anything contained" under Section 69 of the Transfer of Property Act any secured interest can be enforced without intervention of the Court or Tribunal. Jurisdiction of Civil Court is barred only to the limited extent of application of English mortgage. Jurisdiction of the Civil Court can be invoked only to a very limited extent where 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.

[12]. Learned counsel further submitted that for the measures taken against the loanee in terms of Section 13(4) of the SARFAESI Act, they cannot approach to the Civil Court. Under Sub Section 2 of Section 13 of the SARFAESI Act, it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under Sub Section (4) of Section 13 of the SARFAESI Act. After service of notice, if the borrower raises any objections or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons

for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the DRT under Section 17 of the SARFAESI Act. Against the measures taken under Sub Section (4) of Section 13 of the SARFAESI Act, borrower has a right to file an appeal/petition under Section 17 of the SARFAESI Act before the DRT. The Tribunal in exercise of its ancillary powers has the jurisdiction to pass appropriate order subject to the condition as may be imposed by the Tribunal. The requirement of deposit of 75% of the amount claimed before entertaining an appeal/petition under Section 17 of the SARFAESI Act was held to be invalid and was liable to be struck off. Civil suit can be maintained within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English Mortgage enforceable without intervention of the Court. By referring to the ratio of aforesaid judgment, learned counsel submitted that the borrower would get reasonable fair deal and opportunity to get the matter adjudicated upon before the DRT and the plaintiff cannot maintain the civil suit. In addition to the aforesaid grounds, learned counsel submitted that if clever drafting of the plaint has created the illusion of a cause of action, the powers under Order 7 Rule 11 CPC can be invoked in order to unveil the curtain.

[13]. Learned counsel also relied upon ***HDFC Bank Limited Vs. M/s Gee Kay International and others, 2013(1) RCR (Civil) 589*** and submitted that plaint can be rejected under Order 7 Rule 11 CPC even after framing of issues when the matter is posted for evidence. The reliance was placed on the decision of the Hon'ble Apex Court in ***ITC Limited Vs. Debts Recovery Appellate Tribunal, 1998(1) RCR (Civil) 391***. Learned counsel further placed reliance upon ***State Bank of India Thanesar Vs. Santosh, 2010(43) RCR (Civil) 223*** and ***Jagdish Singh Vs. Heeralal and others, 2014(2) PLR 649***. Learned counsel further submitted that in Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter to be referred as 'DRT Act'), there is no provision to exclude jurisdiction of Civil Court, but under SARFAESI Act, there is a specific provision to exclude the jurisdiction of Civil Court in terms of Section 34 of the SARFAESI Act.

[14]. At this stage, the Court has to see whether application under Order 7 Rule 11 CPC is liable to be accepted or in case of illusion of a cause of action, it should be nipped in the bud at the time of first hearing by examining the parties under Order 10 CPC.

[15]. So far as the first aspect is concerned, it can be seen that ***Mardia Chemicals Ltd. etc. case (supra)*** was also considered in ***Nahar Industrial Enterprises Ltd. Vs. Hong***

Kong & Shanghal Banking Corporation, 2011(7) RCR (Civil) 95 to the extent of observation that in ***Mardia Chemicals Ltd. etc. case (supra)***, it was held that even in such situation, the provision of Civil Court can be invoked. The aforesaid direction even if taken to be *obiter* of the Hon'ble Apex Court is binding on the High Court. It is a settled principle of law that at the stage of consideration of application under Order 7 Rule 11 CPC, only averments in the plaint are to be seen. No other documents can be seen except the plaint, whether it discloses cause of action or not. Debts Recovery Tribunal cannot be treated to be a Civil Court as the same is having limited jurisdiction. It cannot pass decree of declaratory relief and cannot decide the plea of fraud which is exclusively under the domain of Civil Court. Debts Recovery Tribunal can only comment upon measures taken under the SARFAESI Act. It cannot comment upon the fraud, nor it can give findings of fraud as the same require regular procedure to be adopted in civil procedure before the Civil Court. In ***Nahar Industrial Enterprises Ltd. case (supra)***, it was held that jurisdiction of the Civil Court is plenary in nature and Civil Court is entitled to decide the respective claims of the parties in a suit unless the same is ousted expressly by a statute or by necessary implication. A *casus omissus* cannot be supplied by the Court to oust jurisdiction of the Civil Court.

[16]. This Court while deciding ***CR No.4598 of 2016*** titled ***Udaibir Singh Vs. Punjab National Bank and others*** on

13.12.2017 has also considered that Section 17 of the SARFAESI Act deals with only the measures to be taken under the said Act and the DRT under the Act can only comment upon the measures taken by the Bank under the Act. If the controversy is beyond the scope of measures taken by the Bank in strict sense, Section 9 of the Civil Procedure Code would apply and the Civil Court has got all the jurisdiction to try the suit. The said decision was rendered by this Court after placing reliance upon ***Nahar Industrial Enterprises Ltd. case (supra), Arasa Kumar and another Vs. Nallammal and others, 2004(4) CTC 261 (Madras)*** and ***Jagdish Singh Vs. Heera Lal and others, 2014(1) SCC 479***. The order of this Court in aforesaid ***Udaibir Singh's case (supra)*** was challenged before the Hon'ble Apex Court in SLP (C) No.3372 of 2018 and the same was dismissed vide order dated 16.02.2018.

[17]. The second leg of argument can be appreciated in the context of pleadings of the plaint which are claimed to be illusionary. In ***Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. M/s Ponniamman Educational Trust represented by its Chairperson/Managing Trustee, 2012(3) RCR (Civil) 811***, the Hon'ble Apex Court has considered the aforesaid controversy and held that if clever drafting of the plaint has created the illusion of cause of action, it should be nipped in the bud at the time of first hearing by examining the parties under Order 10 CPC.

[18]. Order 7 Rule 14 CPC deals with production of documents on which plaintiff sues or relies. Plaintiff has asked for production of documents from respondent No.1. The prayer was declined and the same is subject matter of CR No.6500 of 2018. Order 10 CPC prescribes that at the time of first hearing of the suit, the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are made in the plaint and as are not expressly or by necessary implication admitted or denied by the parties against whom there are made. The Court shall record such admission and denial. The first hearing of the suit comes after framing of issues whereafter the suit is posted for trial. The said hearing cannot be earlier than that of date fixed for preliminary examination of parties and settlement of issues. First date of hearing does not mean day of returning summons or returnable date, but the day on which the Court applies its mind to the case.

[19]. As per ratio laid down in ***Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman's case (supra)***, the parties can be relegated to the stage of first date of hearing by examining the parties under Order 10 CPC and thereafter, if something survives for filing of application under Order 7 Rule 11 CPC, defendant can resort to the said provision in accordance with law.

[20]. By taking note of all the attending facts and circumstances of the case, I am of the view that at this stage, instead of deciding the revision petition at the strict threshold under Order 7 Rule 11 CPC, the defendant can be relegated to the stage of Order 10 CPC just to counter the illusion of cause of action on the basis of material on record. Before that action, defendant No.1 would produce the required documents as required by the plaintiff and thereafter, at the first date of hearing, the Court would proceed in terms of Order 10 CPC and thereafter, defendant/petitioner may resort to lawful criteria as permissible to the petitioner under the law.

[21]. For the reasons recorded hereinabove, CR No.6095 of 2018 is disposed of and CR No.6500 of 2018 is allowed. Impugned order dated 18.08.2018 passed by Civil Judge (Junior Division), Ludhiana assailed in CR No.6500 of 2018 is hereby set aside. Normal consequences to follow.

(RAJ MOHAN SINGH)
JUDGE

17.10.2018
Prince

Whether Reasoned/Speaking Yes/No

Whether Reportable Yes/No