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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (Art. 227) No.405 of 2019

Dena Bank, Through Branch Manager, Makhija Bhawan, Jawahar Nagar, Raipur, Tahil & District Raipur (C.G.). [Now the Dena Bank has been amalgamated with Bank of Baroda having its Head Office at Mandvi, Baroda, Gujarat].

(Non-applicant
Defendant No.4)
---- Petitioner

Versus

1. Ashish Chandrakar, S/o Late Than Singh Chandrakar, Aged about 32 years, R/o Chandrakar Agricultural Farm, Keshari Bagicha Road, Bhathagaon, Raipur, Tahsil & District Raipur (C.G.)

2. Anil Chandrakar, S/o Late Than Singh Chandrakar, Aged about 27 years, R/o Chandrakar Agricultural Farm, Keshari Bagicha Road, Bhathagaon, Raipur, Tahsil & District Raipur (C.G.)
(Plaintiff No. 1 & 2)

3. M/s Mahamaya Rice Mill, Through Partner – Smt. Sarita Chandrakar, W/o Sukesh Chandrakar, R/o Keshari Bagicha Road, Bhathagaon, Raipur, Tahsil & District Raipur (C.G.)
(Non-applicant No.1
Defendant No.1)

4. Sukesh Chandrakar, S/o Late Narsingh Chandrakar, R/o Keshari Bagicha Road, Bhathagaon, Raipur, Tahsil & District Raipur (C.G.)
(Non-applicant No.2
Defendant No.2)

5. Khem Chandrakar, S/o Late Narsingh Chandrakar, R/o Keshari Bagicha Road, Bhathagaon, Raipur, Tahsil & District Raipur (C.G.)
(Non-applicant No.3)

4. State of Chhattisgarh, Through Collector, District Raipur (C.G.)
---- Respondents

For Petitioner: Mr. Vinod Deshmukh, Advocate.
For Respondent No.2: Mr. Manoj Paranjpe, Mr. Prasoon Agrawal and Mr. Anurag Singh, Advocates.
For Respondent No.4 / State: -
Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

02/08/2019

1. The petitioner herein is defendant No.4 before the trial Court. Its

application filed under Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act') has been rejected by the trial Court finding no merit feeling aggrieved against which this writ petition under Article 227 of the Constitution of India has been preferred.

2. Learned counsel for the petitioner / defendant No.4 would submit that the trial Court is absolutely unjustified in holding that the suit is not barred by Section 34 of the SARFAESI Act, as, admittedly, the suit was filed on 11-10-2017 after the mortgaged property in favour of the Bank was auctioned under the provisions of Section 13 of the SARFAESI Act on 19-9-2017 as such, the suit is ex facie barred under Section 34 of the SARFAESI Act.

3. Learned counsel for the plaintiffs would support the impugned order.

4. I have heard learned counsel for the parties and perused the material available on record with utmost circumspection.

5. In a suit filed for declaration of title and permanent injunction for holding that the plaintiffs / respondents No.1 & 2 herein namely Ashish Chandrakar & Anil Chandrakar, respectively, are title holders of the suit land and they have ⅓ share with defendant No.3 – Khem Chandrakar and the Bank be restrained from interfering with the possession of the suit property, the defendant Bank filed an application under Section 34 of the SARFAESI Act that the suit property was mortgaged for taking loan by M/s. Mahamaya Rice Mill and Sukesh Chandrakar on 8-1-2016 and the account became non-performing asset on 31-1-2017 and therefore in accordance with the provisions contained in Section 13(4) of the SARFAESI Act, possession was taken and auction was held on 19-9-2017 and sale

certificate has also been issued on 17-11-2017, therefore, suit has been filed only to frustrate the auction and as such, it is hit by Section 34 of the SARFAESI Act, which was replied, but the trial Court rejected the application against which this writ petition has been filed.

6. At this juncture, it would be appropriate to notice Section 34 of the SARFAESI Act which reads as follows: -

> "**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 by 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. Section 13 of the SARFAESI Act, to the extent relevant, reads thus:

> "**13. Enforcement of security interest**.—(1) Notwithstanding anything contained in section 69 or section 69A 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.
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> (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).
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> (3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.
>
> (3A) If, on receipt of the notice under sub-section (2) the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall

communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.

(4) In case the borrower fails to discharge his liability in fully within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale of realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt.

(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay secured creditor, so much of the money as is sufficient to pay the secured debt.”

8. From a careful reading of the above provisions of the SARFAESI Act, the Scheme of the SARFAESI Act, broadly, appears to be that the Financial Institutions shall not be unnecessarily subjected to lengthy and arduous procedure for recovery of monies lent by them to the borrowers. In fact, there are several other statutes, covering different financial institutions (e.g., State Financial Corporation Act) for

expeditious recovery of debts. The reasons are mainly two-fold – firstly, the borrowers may be trying to delay or evade repayment of the amounts borrowed from the Financial Institutions/Banks and secondly, money of the Financial Institutions/Banks is the money of the public. Therefore, while dealing with public money, particularly for the purpose of recovering the money, lent by such Financial Institutions/Banks, stringent measures have to be permitted and for that purpose, statutory sanctions have been accorded to such institutions. Precisely that is the reason why the procedural law under the Civil Procedure Code, i.e. filing of a suit in a civil court was expressly barred under the SARFAESI Act. The impact and seriousness of such step is more visible from the language employed in Section 34 of the SARFAESI Act while debarring the ordinary civil courts from granting any orders of injunction. Obviously, this is intended only to safeguard the public money, despite which, it is common knowledge that the Banking Institutions are unable to effect recoveries of the money lent to borrowers at the expected rate and pace.

9. The Supreme Court in the matter of **Mardia Chemicals Ltd. and others v. Union of India and others**[1], while upholding the constitutional validity of the SARFAESI Act, has made certain important observations with regard to jurisdiction of civil court which read thus: -

> "34. Some facts which need be taken note of are that the Banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through Courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing

1 (2004) 4 SCC 311

which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction the part of the Government in creating Debt Recovery Tribunals and appointing Presiding Officers for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that step taken towards securitization of the debts and to evolve means for faster recovery of the NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another expert committee was constituted then alone the impugned law was enacted. Liquidity of finance and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

36. In its Second Report, the Narasimhan Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimhan Committee deals about legal and legislative framework and observed:

> '8.1 A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries....'

One of the measures recommended in the circumstances was to vest the financial institutions through special statues, the power of sale of the asset without intervention of the court and for reconstruction of the assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the Banks or financial institutions has been attracting the attention and the matter was considered in depth by the committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimhan Committee, yet another committee was constituted headed by Mr Andhyarujina for bringing out the needed steps within the legal framework. We are, therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor it is a matter to be gone into by the Courts to test the legitimacy of such a measure relating to financial policy.

80. … … …

1. … … ...

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, 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."

10. Thus, on a close reading of the above provisions of the SARFAESI Act

quoted herein-above and the observations made by the Supreme Court in **<u>Mardia Chemicals Ltd.</u>** (supra), it is transparently clear that jurisdiction of the civil court has expressly been taken away and interest of the aggrieved/effected person like the plaintiff in this case has been protected by providing a right to appeal under Section 17(1) of the SARFAESI Act by way of approaching the Debts Recovery Tribunal.

11. In **<u>Jagdish Singh</u>** (supra), the Supreme Court considered the provisions contained in Section 34 of the SARFAESI Act and it has been held that Section 34 ousts jurisdiction of civil courts "in respect of any matter" which DRT or Appellate Tribunal is entitled to determine, while Section 13(4) deals with measures for enforcement of security interest. It was further held that the expression "in respect of any matter" in Section 34 also take in measures provided under Section 13(4) and consequently, "any person" aggrieved against any "measures" can approach DRT or Appellate Tribunal and not civil court. Civil court has no jurisdiction in such matters and suit for partition would not be maintainable in a situation where the proceeding under the SARFAESI Act had been initiated and remedy lies under Section 17 of the said Act. It was observed as under: -

> "24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the

> Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.
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> 25. We are of the view that the civil court jurisdiction is completely barred, so far as the "measures" taken by a secured creditor under sub-section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal, to determine as to whether there has been any illegality in the "measures" taken. The Bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondents 6 to 8 (*sic* Respondents 1 to 5) have been crystallised, before creating security interest in respect of the secured assets.
>
> 26. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has the jurisdiction to examine as to whether the "measures" taken by the secured creditor under sub-section (4) of Section 13 of the Securitisation Act were legal or not. In such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs."

12. The principle of law enunciated in **Jagdish Singh** (supra) has been followed with approval by Supreme Court in the matter of **M/s. Sree Anandhakumar Mills Ltd. v. M/s. Indian Overseas Bank and others**[2].

13. It is not in dispute that the suit property was mortgaged by M/s. Mahamaya Rice Mill and Sukesh Chandrakar who was also defendant No.2 in that suit, for obtaining loan on 8-1-2016 and it was a secured asset within the meaning of Section 2(zc) of the SARFAESI Act. During the pendency of suit, proceedings were initiated under the

2 2018 (10) SCJ 514

SARFAESI Act. Since M/s. Mahamaya Rice Mill and defendant No.2 defaulted in making payment of advanced amount to the Bank, the proceeding under the SARFAESI Act continued and the account was declared non-performing asset and thereafter, possession was taken on 16-5-2017 and it was auctioned as per the SARFAESI Act and the rules made thereunder on 19-9-2017 and on 17-11-2017, sale certificate has been issued. In the meanwhile, suit was filed by plaintiffs Ashish Chandrakar & Anil Chandrakar – respondents No.1 & 2 herein, respectively, stating that they have also joint interest over the suit land with Khem Chandrakar – defendant No.3 and Sukesh Chandrakar – defendant No.2, who has mortgaged the land in favour of the Bank, has no valid title to mortgage the land in favour of the Bank and sought declaration of title, joint possession and permanent injunction. Once security interest has been created by Sukesh Chandrakar – defendant No.2 in the suit, in favour of the Bank and the petitioner Bank being secured creditor has proceeded and taken measures under Section 13(4) of the SARFAESI Act and the suit property has been subjected to auction sale in favour of the auction purchaser – M/s. Tirupati Rice Industries on 19-9-2017 and sale certificate was issued on 16-11-2017. The instant suit by respondents No.1 & 2 being the plaintiffs to declare that they are also title holders along with defendant No.2, would be clearly hit by Section 34 of the SARFAESI Act, as such, only to frustrate the measures taken, the suit has been filed.

14. Accordingly, the impugned order is set-aside and the application under Section 34 of the SARFAESI Act read with Order 7 Rule 11 of the CPC is allowed. The suit as framed and filed is dismissed being barred by Section 34 of the SARFAESI Act. However, the plaintiffs /

defendants No.1 & 2 are at liberty to avail the remedy available under Section 17 of the SARFAESI Act.

15. The writ petition is allowed to the extent indicated herein-above. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma