

HIGH COURT OF CHHATTISGARH, BILASPURJudgment reserved on: 25-6-2019Judgment delivered on: 15-7-2019First Appeal No.492 of 2018

*{Arising out of judgment and decree dated 4-8-2018 passed by the
Additional District Judge (F.T.C.), Baikunthpur, District Koriya in Civil Suit
No.3A/2016}*

Smt. Radha Singh, W/o Dr. Mahendra Pratap Singh, aged about 65
years, (Occupation: Housewife, Caste Kshatriya), R/o Sarveshvari
Nagar, Shivaji Ward No.1, Baikunthpur, District Koriya (C.G.)

(Plaintiff)

---- Appellant

Versus

1. Madhusudan Tulsyan, S/o Shri Sajjan Kumar Agrawal, Aged about
35 years, R/o Mahalpara (Baikunthpur), P.S. & Tehsil Baikunthpur,
District Koriya (C.G.)

(Defendant No. 1(A))

2. Smt. Veenu Agrawal, D/o Shri Sajjan Kumar Agrawal, W/o Manoj
Agrawal, Aged about 38 years, R/o Near Tulsin-Manas Mandir,
Banaras, District Varanasi (U.P.)

(Defendant No. 1(B))

(Respondent No.1 & 2 substituted as Defendant No.1(A) & (B)
being legal representative of the original Defendant No.1 Smt. Tara
Devi Agrawal)

3. Sajjan Kumar Agrawal, S/o Puranmal Agrawal, Aged about 35
years, R/o Mahalpara (Baikunthpur), P.S. & Tehsil Baikunthpur,
District Koriya (C.G.)

(Defendant No. 2)

4. State of Chhattisgarh, Through Collector (Koriya), Baikunthpur,
District Koriya (C.G.)

(Defendant No. 3)

5. The Branch Manager, Central Bank of India, Manendragarh-
Ambikapur Road, Baikunthpur, District Koriya (C.G.)

(Defendant No. 4)

---- Respondents

For Appellant: Mr. Kshitij Sharma, Advocate.

For Respondent No.4 / State: -

Mr. Siddharth Dubey, Deputy Govt. Advocate.

For Respondent No.5 / Bank: -

Mr. Aditya Tiwari, Advocate.

Hon'ble Shri P.R. Ramachandra Menon, CJ and
Hon'ble Shri Sanjay K. Agrawal, J.

C.A.V. Judgment

Sanjay K. Agrawal, J

1. Invoking the appellate jurisdiction of this Court under Section 96 of the CPC, the appellant / plaintiff has filed this first appeal under Section 96 of the CPC, calling in question the legality, validity and correctness of the impugned judgment & decree dated 4-8-2018 passed by the Additional District Judge (FTC), Baikunthpur, in Civil Suit No.3-A/2016, by which the trial Court has dismissed the suit of the plaintiff herein answering preliminary question No.6 holding that the plaintiff's suit is barred by Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the SARFAESI Act').

[Parties will hereinafter be referred as per their status shown and ranking given in the plaint before the trial Court.]

2. The plaintiff herein filed a suit for specific performance of contract and permanent injunction with regard to the suit property shown in Schedule-A of the plaint stating inter alia that the plaintiff and defendants No.1 & 2 have entered into agreement to sale for the said suit land on a cash consideration of ₹ 5,50,000/- and ₹ 2,00,000/- and on 30-8-2010, defendants No.1 & 2 obtained ₹ 50,000/- and ₹ 50,000/- and executed the agreement to sale in favour of the plaintiff, but they failed to perform their part of contract, though the plaintiff is ready and willing to perform his part of contract and therefore appropriate decree be granted directing defendants No.1 & 2 to execute the sale deed in favour of the

plaintiff.

3. Defendants No.1 & 2 filed their written statement and admitted the fact of having obtained ₹ 50,000/- and ₹ 50,000/- towards advance amount for the sale of land in favour of the plaintiff, but further pleaded that the plaintiff did not make payment of remaining amount and therefore possession could not be delivered.
4. Defendant No.4 filed its separate written statement stating inter alia that defendants No.1 & 2 had mortgaged the suit land in favour of the Bank by equitable mortgage for obtaining loan and when they failed to pay the loan, proceedings were initiated under the SARFAESI Act and therefore the suit is barred by Section 34 of the SARFAESI Act.
5. The learned trial Court, in view of the pleadings of the parties, on 24-9-2016, framed the following preliminary issue with regard to bar of jurisdiction of the Court which states as under: -

प्रारंभिक वाद-प्रश्न	निष्कर्ष
क्या प्रस्तुत वाद किसी विधि से वर्जित है ? यदि हाँ तो प्रभाव ?	“हाँ”, वादी द्वारा प्रस्तुत वाद पत्र नामंजूर

6. The learned trial Court by its impugned judgment held the suit to be barred by Section 34 of the SARFAESI Act placing reliance upon the decision of the Supreme Court in the matter of **Jagdish Singh v. Heeralal and others**¹ and answering the issue in affirmative, dismissed the suit.
7. Feeling aggrieved and dissatisfied with the judgment & decree of the trial Court, this first appeal has been preferred mainly on the ground that the trial Court is absolutely unjustified in holding that

¹ (2014) 1 SCC 479

the suit is not tenable and ignored the fact that there is agreement to sale in favour of the plaintiff which ought to have been taken cognizance of and the learned trial Court has committed grave illegality in dismissing the suit as barred by Section 34 of the SARFAESI Act.

8. The Central Bank of India has filed an application under Order 41 Rule 27 of the CPC stating inter alia that the suit property has been auctioned in exercise of power conferred under Section 13 of the SARFAESI Act read with Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 and the said suit property has been purchased by Shri Bhanu Kumar Pal on 30-9-2018.
9. Mr. Kshitij Sharma, learned counsel appearing for the appellant / plaintiff, would submit that the trial Court is absolutely unjustified in holding the suit is barred by Section 34 of the SARFAESI Act and it could not have been decided as a preliminary issue, as it requires recording of evidence and the plaintiff's evidence is based on the agreement to sale dated 30-8-2010 which has not been taken care of and the suit has been dismissed. Therefore, the judgment of the trial Court deserves to be set aside and the matter deserves to be remanded to consider the suit on merits.
10. Mr. Aditya Tiwari, learned counsel appearing for respondent No.5 Bank, would support the impugned judgment and submit that the suit land has already been auctioned and it has been purchased by the auction purchaser and the suit is barred by limitation in view of the provisions contained in Section 34 of the SARFAESI Act.
11. We have heard learned counsel for the parties and considered their rival submissions and also went through the records with utmost

circumspection.

12. The point for determination would be, whether the trial Court is justified in dismissing the suit holding it to be barred by Section 34 of the SARFAESI Act?
13. It is not in dispute that the suit property was mortgaged by means of equitable mortgage by defendants No.1 & 2 in favour of respondent No.5 Bank for obtaining a loan on 29-12-2014 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 SARFAESI Act, as defendants No.1 & 2 defaulted in making payment of advanced amount to the Bank and the proceeding continued and ultimately, after passing of the decree, on 30-9-2018, the sale has already been effected and sale certificate has been issued to the auction purchaser.
14. 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)."

15. 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.

(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).

(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.”

16. 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.

17. The Supreme Court in the matter of **Mardia Chemicals Ltd. and others v. Union of India and others**², 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 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 statutes, 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.

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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."

18. 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 Mardia Chemicals Ltd. (supra), it is transparently clear that jurisdiction of the civil court has expressly been taken away and interest of the aggrieved/affected 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.

19. In Jagdish Singh (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.

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.”

20. 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**³.

21. Reverting to the facts of the present case in light of the aforesaid authoritative pronouncements, it is vividly clear that security interest has been created by defendants No.1 & 2 in favour of respondent No.5 Bank and respondent No.5 Bank being secured creditor has proposed to proceed against the secured asset being the subject property and measures provided under Section 13(4) of the SARFAESI Act have been taken and the suit property / secured asset has been subjected to sale in favour of the auction purchaser

³ 2018 (10) SCJ 514

by the respondent Bank. Once security interest has been created in favour of the Bank as in this case, security interest has been created by defendants No.1 & 2 in favour of respondent No.5 Bank, thereafter any agreement to sale / transfer contrary to the provisions of the SARFAESI Act shall be void and such an agreement to sale would not be enforceable and will be hit by Section 34 of the SARFAESI Act and the civil court jurisdiction would be completely barred under Section 34 and against the measures taken by the respondent Bank being secured creditor under sub-section (4) of Section 13 of the SARFAESI Act, the aggrieved person has a right of appeal before the DRT or the Appellate Tribunal to determine whether there has been irregularity or illegality in taking the measures. As such, the learned trial Court is absolutely justified in holding the suit to be barred by Section 34 of the SARFAESI Act and rightly dismissed the suit invoking the provisions contained in Order 7 Rule 11(d) of the CPC in which we do not find any perversity or illegality warranting interference in exercise of appellate jurisdiction under Section 96 of the CPC. We do not find any merit in the first appeal as framed and filed and we dismiss the appeal leaving the parties to bear their own cost(s). However, dismissal of his suit and this appeal will not bar the appellant / plaintiff to avail the remedy under Section 17 of the SARFAESI Act.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Sanjay K. Agrawal)
Judge