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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment Pronounced on: 19.08.2019

+ CS(COMM) 1105/2018

SANJEEV KUMAR KAKKAR & ORS Plaintiffs

Through Mr.Jaspreet Singh Kapur, Adv.

versus

TATA CAPITAL HOUSING FINANCE
LIMITED & ORS.

..... Defendants

Through Mr.Sanjeev Singh, Adv. for D-1

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

IA No.14561/2018

1. This application is filed under Order 7 Rule 11 CPC on behalf of defendant No. 1 for rejection of the plaint.
2. The plaintiffs have filed the present suit seeking cancellation of the agreement dated 25.02.2016 executed between the plaintiffs and defendant No.1 for a loan amount of Rs. 3 crores. A permanent and mandatory injunction in favour of the plaintiffs is also sought for return of the original property papers of the property bearing No. 147, Engineers Enclave, Pitampura, Delhi. Other connected reliefs are also sought.
3. The case of the plaintiffs is that the plaintiffs and defendants No. 2 and 3 have been in business relation for a long time. Defendants No. 2 and 3 are functioning as direct selling agents and have arranged various loan for the plaintiffs in the past. In January 2016, it is pleaded, defendants No.2 and 3 approached plaintiff No.1 and induced him to take a loan of Rs. 3 crores

from defendant No.1 i.e. Tata Capital Housing Finance Ltd. The plaintiff agreed to the request of the said defendants.

4. It is pleaded that for the purpose of getting the loan sanctioned, defendants No. 2 and 3 brought a bunch of loan papers to the office of plaintiff No.1 and got them signed from the plaintiffs. Defendants No. 2 and 3 also took the original title papers of the property situated at Engineers Enclave, Pitampura, Delhi for keeping them with the Bank as a collateral security. It is stated that defendants No. 2 and 3 thereafter informed the plaintiffs that the loan has been sanctioned and asked them to start paying monthly instalments to defendant No.1. It is an admitted fact that the plaintiffs have paid monthly instalments from April 2016 till September 2016. It is however pleaded that no loan was released by defendant No. 1 to the plaintiffs.

5. It is stated that subsequently, on enquiry from the Bank Manager of defendant No. 1, the plaintiffs were shocked to know that defendant No. 1 Bank had credited the loan amount of Rs.3 crores into the account of defendants No. 5 and 6. It is stated that the plaintiffs are not aware about the identity of defendants No. 5 and 6. On confrontation with the officials of the bank, the plaintiffs were informed that they had themselves in writing requested defendant No. 1 to credit the loan amount in the bank account of defendants No. 5 and 6.

6. It is the case of the plaintiffs that a huge fraud has been perpetrated upon the plaintiff by defendants No. 2 to 6 in connivance with the officials of defendant No. 1. Reliance is placed on the terms of the loan agreement to contend that the loan amount was to be disbursed only to the borrowers and hence, it is pleaded that the loan amount could not be credited into the

account of a third person.

7. The plaintiffs plead that they have made several complaints to various police functionaries and also filed an application under Section 156(3) of Cr.P.C. praying for issuing orders/directions to the SHO Economic Offence Wing, New Delhi to register an FIR. The plaintiffs have denied that they signed any document which grants authority to defendant No.1 to credit the loan amount into the bank account of defendants No. 5 and 6. It is pleaded that a perusal of the customers' copy of the loan agreement would show that the plaintiffs signatures have been obtained on various loan papers without having filled in complete necessary information and some columns in the loan agreement have been left in blank. Hence, it is pleaded that the plaintiffs have not availed of any loan facility and are not liable to pay any amount to defendant No. 1. Fraud, cheating and criminal conspiracy amongst the defendants is apparent. It is further pleaded that the property in question that is said to have been mortgaged to defendant No. 1 in Pitampura has a value for more than the outstanding loan amount. Hence, the present suit.

8. Defendant No. 1 has filed the present application under Order 7 Rule 11 CPC. It has been pointed out in the application that there is a statutory bar under Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (SARFAESI Act) and that the plaintiffs have a statutory remedy under Section 17 of the SARFAESI Act to approach the Debt Recovery Tribunal (DRT). It is further stated that the plaintiffs have already availed of the remedy by filing a petition under Section 17 (1) of the SARFAESI Act before the DRT, New Delhi before filing of the present suit. Hence, it is pleaded that the suit is

liable to be rejected on account of the bar contained in the SARFAESI Act.

9. It is further pointed out that in terms of the loan agreement, the loan amount was disbursed on 25.02.2016 to defendant No. 5 & 6 after receiving Home Equity Sanction letter dated 19.02.2016 from plaintiff No. 1. Plaintiff No. 1 has paid initial instalments from April 2016 to September 2016 and have said to have stopped paying instalments since October 2016. Hence, a demand notice was sent on 09.03.2018 which was served upon the plaintiffs calling upon the plaintiffs to pay a sum of Rs.3,06,93,616/-(Rupees Three Crores Six Lakhs Ninety Three Thousand Six Hundred Sixteen only). Defendant No. 1 is also said to have taken symbolic possession of the mortgaged property under Section 13(4) of the SARFAESI Act by notice dated 13.06.2018.

10. In the reply filed by the plaintiffs to the present application, reliance is placed on the judgment of the Supreme Court in the case of ***Mardia Chemicals Ltd.& Ors. vs. Union of India & Ors., 2004(4) SCC 311*** to plead that an exception has been carved out and that the jurisdiction of the civil court can be invoked where the action of the secured creditors is fraudulent. Reliance is placed on various averments made in the plaint to plead that the defendants have defrauded the plaintiffs and have unlawfully and illegally obtained the original title papers of the property in question. Hence, it is stated that the suit is not barred under the SARFAESI Act.

11. I may first refer to the statutory provisions in this regard.

12. As per the statutory scheme after issuance of appropriate notice under Section 13 (2) of the SARFAESI Act, in case the borrower fails to discharge his liability, the secured creditor can take recourse to Section 13 (4) of the Act and take steps to recover the secured debt in any manner stated. Section

17(1) provides a right of appeal to any person (including borrowers) aggrieved by any of the measures taken under Section 13(4) by the secured creditor. An application may be filed before the concerned DRT having jurisdiction. Section 17 (3) provides that the DRT if after examining the facts and circumstances of the case and the evidence produced comes to a conclusion that the measures taken under section 13(4) by the secured creditors are not in accordance with the provisions of the Act and the Rules made thereunder, it may by order declare the steps taken by the secured creditor as invalid and restore possession of the secured assets to the borrower.

13. Section 13(4) and section 17 of the SARFAESI Act, 2002 read as follows:

13(4) In case the borrower fails to discharge his liability in full 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 for 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 for the debt:

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 for the debt.

(c) appoint any person (hereafter 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 the secured creditor, so much of the money as is sufficient to pay the secured debt.

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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 matter 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.

Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of Section 17.

[(1-A) An application under sub-section (1) shall be filed

before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,—

(a) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made

thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

(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 sub-section (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) or 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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14. Section 34 of the SARFAESI Act, 2002 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 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).”

15. It is apparent from the above statutory provisions that any person who is aggrieved by any of the measures taken under section 13(4) by the secured creditors, such person has a remedy before DRT under Section 17 of the Act. Section 34 of the Act states that no civil court shall have jurisdiction to entertain any suit in respect of any matter which a DRT or the Appellate Tribunal is empowered under the Act.

16. The Supreme Court in the case of *Mardia Chemicals Ltd. vs. Union of India and Ors.(supra)*, however, carved out an exception to the jurisdiction of the Civil Court in paragraph 51 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 his 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.”

17. However, would the facts of this case as stated in the plaint warrant a conclusion that Section 34 of the SARFAESI Act has no application to these proceedings in view of the observations of the Supreme Court in *Mardia Chemicals Ltd. v. Union of India(supra)*. I may look at some of the judgments of this court.

18. A Division Bench of this court in the case of *Ram Prakash Mehra v. Union Bank of India & Ors., MANU/DE 4139/2011* was dealing with a case in which there was a dispute regarding title of the mortgager of the said

property. It appeared that one Krishan Gopal deposited a sale deed executed on 05.01.1979 with the Sub-Registrar, Delhi in respect of a loan granted by the Union Bank of India to S.K.Trading Company of which Krishan Gopal Sharma was alleged to be the proprietor thereof. The registration particulars as per sale deed dated 05.01.1979 of the suit properties were the same as of the sale deed dated 05.02.1966 wherein one Jai Narain Seth conveyed his half share in the suit plot to the co-owner Sh.Sharan Jeet Singh. The plaintiffs were the successors of the title flowing from Sh.Sharan Jeet Singh. In those facts, the Division Bench held as follows:

“25. By the time the mortgage was created on 21.12.1989, possession of the plot was with Rajesh Khurana and issue would arise pertaining to his possessory rights being a deemed notice of his interest in the property to the bank when the mortgage was created on 21.12.1989 by Krishan Gopal Sharma.

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27. A serious issue, pertaining to a serious fraud arises on the facts stated herein-above and we dwell no further lest we prejudice either party at the trial as our endeavour is to note the rival facts and see whether an issue pertaining to a fraud of a serious kind arises for consideration in the suits filed by the appellants.

28. Indeed, if the appellants prove at the trial, the sale deed dated 5.2.1966 the same would evidence Jai Narain Seth being left with no title in the subject property. With reference to the registration particulars of the sale deed dated 5.1.1979, which are the same as those of the sale deed dated 5.2.1966, upon proof thereof, the apparent fraud could be brought to light and this may include either lack of due diligence or complicity of an officer of the bank inasmuch as a proper due diligent search of the record of the Sub-Registrar Delhi would have made known to the bank that the sale deed dated 5.1.1979 was a fraudulent

document.”

In the above facts the Division Bench further held that the suit would not be barred by law.

19. However, a Co-ordinate Bench of this court in the case of *Neha Aggarwal vs. PNB Housing Finance Ltd. & Ors., 2016 (158) DRJ 286* on a similar plea noted as follows:-

“22. The aforesaid exception carved out by the Supreme Court has led to persons interested in defeating the actions of the banks and financial institutions under the SARFAESI Act inundating the civil courts with pleadings to bring their cases within the exception aforesaid. Unless the civil courts, before entertaining any such suits, scrutinize the pleadings in the plaint carefully, the same will result in Section 34 of the SARFAESI Act being rendered illusory and thereby also frustrating the very objective of enactment of SARFAESI Act. Supreme Court in *Mardia Chemicals supra* carved out an exception, if I may humbly so opine, only in respect of claims by a mortgagor of the action of the secured creditor to be fraudulent. Though the Supreme Court chose not to expand as to what facts may qualify for an action of the mortgagee to be called fraudulent, an inkling thereof is evident from the reference therein to the two decisions *supra* of the Madras High Court. The claim of the mortgagor therein was of the power to sell under Section 69 of the Transfer of Property Act, 1882 being exercised by the mortgagee contrary to the terms of the mortgage i.e. a mortgagee seeking to do what it was not entitled to do under the terms of mortgage. However we are herein concerned with a claim of the appellant/plaintiff to title to the mortgaged property adversely to the title professing which the mortgagor had created the mortgage. Such a claim, in my view would not qualify within the exception carved out by the Supreme Court and would be within the jurisdiction of the DRT under Section 17 of the SARFAESI Act and hence the jurisdiction of the civil court would be barred with respect thereto. It has been held by the Division Bench of this Court in *Onil Sadh Vs. Federal Bank Ltd. MANU/DE/3449/2015 : (2015)*

224 DLT 556 that the claim to the mortgaged property adversely to the mortgagor or the mortgagee can be made only before the DRT under Section 17 and not before the civil court. The exception carved out by the Supreme Court in *Mardia Chemicals supra* is available in my humble opinion only when the bank or financial institution is perpetuating a fraud in the enforcement of the mortgage like as before the Madras High Court i.e. of exercising the rights as mortgagee contrary to the terms of the mortgage.

23. In this respect, the claim of the appellant/plaintiff herein is similar to that of the plaintiff in *Jagdish Singh supra*. The claim of the appellant/plaintiff therein also was of the mortgagor having no right to mortgage and thus the auction thereof being bad and which claim was held by the Supreme Court to lie before the DRT only and the jurisdiction of the civil court being barred with respect thereto. Merely because in making such a claim fraud is alleged in the creation of the mortgage would not oust the jurisdiction of the DRT or come within the exceptions carved out in *Mardia Chemicals supra*.

24. Division Bench of High Court of Madras in *V. Thulasi Vs. Indian Overseas Bank MANU/TN/1939/2011* : , in this regard has held that by clever and astute drafting, the plaintiff may create an illusion of cause of action by trying to bring civil suit within parameters laid down in *Mardia Chemicals supra* but it is the duty of the Court to see if such allegations of fraud are thrown just for the purpose of maintaining a suit and if finds so, to throw out the plaint as keeping the same pending frustrates the Banks compelling them to agree to one time settlements.”

20. Hence, every dispute between the mortgagor and the bank or a third party cannot be taken out from the ambit of Section 34 of the SARFAESI Act. The exception provide in *Mardia Chemicals Ltd. v. Union of India*(supra) only pertains to a fraudulent act of the secured creditor.

21. The Supreme Court in the case of *Bhaurao Dagdu Paralkar v. State*

of Maharashtra & Ors., (2005) 7 SCC 605 defined ‘fraud’ as follows:

“10. A “fraud” is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another’s loss. It is a cheating intended to get an advantage. (See *S.P.Chengalvaraya Naidu v. Jagannath*)”

22. In my opinion the facts in this case are not much disputed. The plaintiffs admit to have applied for a loan of Rs. 3 crores and also admits to have given the original title papers of the property in Pitampura as a security for the proposed loan. It is also an admitted fact that from April 2016 till September 2016, six instalments have been paid by the plaintiffs to defendant No. 1 as per the repayment schedule agreed upon. The bone of contention is a communication dated 22.06.2016 said to have been written by plaintiff No. 1 agreeing to disbursement of the loan amount to defendant No. 6. The plaintiffs claim that they have never given any such request dated 22.06.2016 to defendant No. 1 to disburse the loan amount to defendant No.6 /defendant No. 5 to 6. It is pleaded that this is a created document in as much as the loan is said to have been sanctioned on 19.02.2016 and is said to have been disbursed in the account of defendants No. 5 and 6 on 24.02.2016.

23. Do the facts as stated in the plaint lead to a conclusion that an egregious fraud has been committed by the secured creditor to warrant a conclusion that this court would have the jurisdiction to try the present suit. Some of the relevant facts, at the cost of repetition are that the plaintiff admits to having applied for a loan. It is admitted that the plaintiffs gave the

title papers as a security for the loan. The plaintiff also admits having paid six instalments for repayment of the loan totalling a sum of Rs.21,02,742/-. It is pleaded that this repayment of loan was done in good faith believing that the disbursal of the loan would follow soon. The essential dispute centres around as to whether the plaintiff executed the communication dated 22.6.2016 whereby they have allegedly agreed to disbursal of the loan in favour of defendant No.6. The plaintiff denies execution of any such document or any other document whereby defendant No.1 could disburse the loan to defendant No.5 and 6. In my opinion, the plaint essentially pleads seriously disputed questions of fact. It is quite clear that such disputed question of fact would not mean that a civil court could assume jurisdiction over such suits.

24. In my opinion, this court would not have jurisdiction to entertain the present suit in view of section 34 of the SARFAESI Act.

25. It is also an admitted fact that the plaintiffs have approached the DRT by filing a petition under Section 17 of the DRT Act. The plaintiff would be free to raise all their contentions in respect of their pleas as noted above before DRT. In my opinion, this court would not have jurisdiction to adjudicate the present suit. The present application is allowed.

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The suit is dismissed with liberty to the plaintiffs to take all steps to challenge the action of defendant No. 1/other defendants as permissible under law.

**JAYANT NATH
(JUDGE)**

AUGUST, 19, 2019

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