Reserved on : 17.09.2020

Delivered on : 03.11.2020

A.No.1031 of 2020
in
C.S.No.715 of 2019

P.T.ASHA, J.,

This application for rejecting the plaint has been moved by the defendant Bank.

Case of the plaintiffs:

2. Considering the fact that the application is one for rejecting the plaint, it is necessary to briefly extract the averments contained in the plaint. The respondents / plaintiffs who had taken a housing loan from the Applicant Bank has filed this suit for redeeming the mortgage created as security for the said loan.

3. The respondents who are husband and wife would contend that they had approached the 1st applicant for a home loan of Rs.37,00,000/- for which they had offered the property that they had proposed to purchase as security. On 16.03.2017, a medium term loan was sanctioned, which was repayable in 180 equated monthly instalments of Rs.34,572/- each and the payment was to commence from April 2017. The plaintiffs / respondents had also sought for a Top-up of the term loan of Rs.1,16,75,000/- and on the same day i.e., 16.03.2017, the 1st applicant had sanctioned the amount which was also repayable in 180 equated monthly instalments of Rs.1,14,104/- each commencing from April 2017. The mortgage deed was created in respect of the said property and memorandum evidencing the deposit was also registered. The property which was the subject matter of the mortgage was the flat bearing No.3, First Floor, Plot No.7, D.No.19, Veeraperumal Lane (also known as Bangaru Ammal Street) Mylapore, Chennai -600 004.

4. The respondents would submit that till April 2019 they were regularly paying the EMIs and from May 2019, since the 1st respondent had become unemployed, they were unable to pay the amounts. Therefore, the respondents decided to sell the property and clear the entire outstanding loan which on that day was a sum of Rs.1,44,26,247/-.

5. The respondents would submit that they had also received an offer from a prospective borrower for purchasing the schedule property at a sum of Rs.1,80,00,000/-. The respondents addressed a letter dated 01.07.2019 to the 1st applicant seeking their consent for the sale and also for undertaking to discharge the entire loan and requesting the bank to issue a no objection certificate.

6. On 04.07.2019, the respondents had entered into the agreement of sale with one Mr.T.Viswanathan and Mrs.M.Vasumathi to sell the schedule property for a sum of Rs.1,80,00,000/-. The respondents would state that

Rs.1,09,62,722/- was deposited directly to the account of the respondents with the 1st applicant bank. On 05.07.2019, another sum of Rs.12,40,611/- was deposited and on 06.07.2019, a sum of Rs.22,22,914/- was deposited, totalling the entire due of Rs.1,44,26,247/- was deposited by the proposed purchaser into the respondents' account with the 1st applicant Bank. The respondents therefore requested the 1st applicant to return the documents.

7. However, to the shock and surprise of the respondents, the said request was turned down since the 1st applicant had received written instructions from their head office in letter dated 12.04.2017 that the account should be kept on hold even if the amount is fully paid up. In the light of the above, the purchaser had backed out and the entire amount was returned back to him. The applicants by their action had deliberately turned the account into an NPA. Thereafter, on 04.10.2019, there were letters from the 1st applicant asking the respondents to regularise their account, failing which legal action was threatened. Such a contention was raised by the Applicant after they had prevented the respondents for exercising the right

to redeem the mortgage.

8. On 23.10.2019, a notice was issued by the respondents to the 1st applicant condemning their action and stating that they are not willing to sell the property by auction as it would fetch a very low amount. In these circumstances, the respondents have come forward with the above suit.

Application to reject the plaint:

9. On receipt of the notice in the above suit, the applicants have come forward with an application to reject the plaint on the ground that under Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, herein after referred to as the RDDBFI Act and Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court to deal with the issue raised in the suit has been totally ousted. The applicants would contend that the respondents had stood as guarantors for the loan borrowed by M/s.Oceanic Tropical Fruits Private Limited and M/s.Oceanic Edibles International Limited, from SBI, CBI and ICICI Banks. The accounts had

been classified as Non Performing Assets (NPA) on 26.11.2013, 20.08.2013 and 28.08.2013 respectively. Towards this loan, the property of the respondents at Bheemasena Garden Street had been offered as collateral security. Since the amount had not been paid, the bank had instituted recovery proceedings before the DRT II, Chennai in O.A.No.344 of 2015 to recover a sum of Rs.227,20,59,666/-.

10. On 14.03.2019, the OA was allowed and the applicants had initiated proceedings before the NCLT. The respondents herein had obtained the housing loan which is the subject matter of the instant suit during the pendency of O.A.No.344 of 2015.

Counter to reject the plaint application:

11. The respondents have filed a counter inter alia contending that proceedings under the SARFAESI Act has been initiated only after the suit had been filed by the respondents, along with the injunction application. The applicant bank had only issued a notice under Section 13 (2) of the

SARFAESI Act, for which a detailed reply had been sent by the respondents and to date no response had been received from the applicant bank with reference to the said notice. Further, as on date there was no lis pending before the Debts Recovery Tribunal and possession notice under Section 13 (4) of the SARFAESI Act, had not been issued. As a result of which, the respondents cannot either initiate any proceedings under Section 17 of the SARFAESI Act or move any application in the proceedings in O.A.No.344 of 2015 as the same has been ordered.

12. The respondents would submit that the application before the DRT under Section 19 of RDDBFI Act, can only be moved by the Bank or Financial Institutions. Borrowers/Third Parties do not have any right to file an application under Section 19 of RDDBFI Act.

13. The respondents would submit that neither is this property the subject matter of the OA nor has it been attached in any proceedings. The respondents had, through their prospective purchaser, tendered the entire

amount to the bank in exercise of their right of redemption. The applicant bank who originally received the said amount, later returned the same and consequently the buyer had also withdrawn his offer. The respondents would highlight the fact that this loan had been given to them only after the company had defaulted in the payment of their loan and O.A.No.344 of 2015 had been initiated by the 1st applicant. The contention of the applicant bank that they have a general lien in respect of all the properties of the respondents is without any legal basis. The respondents therefore sought for the dismissal of the said application.

Submissions:

14. Mr.M.L.Ganesh, learned counsel appearing for the applicant bank would contend initially that the very relief sought for is one which falls within the exclusive jurisdiction of the DRT. He would submit that the proceedings initiated by them in O.A.No.344 of 2015 have attained finality, as against which there is no appeal by the respondents. He would also contend that the suit has been instituted after the SARFAESI proceedings

being initiated. He would argue that under Section 171 of the Contract Act, the applicant bank has a general lien on the goods that has been offered as a security. He would further submit that under Section 13 (3) of the SARFAESI Act, the respondents are under an obligation to furnish particulars of the other properties or assets owned by the respondents, in case the security already offered is not sufficient to meet the debt. This Section has been inserted by Act 44 of 2016.

15. Likewise, under Section 25 of the RDDBFI Act, the Recovery Officer on receipt of copy of the certificate under Sub-Section (7) of Section 19 can proceed to recover the amount of debt under various modes prescribed therein. One of which is taking possession of "*any other property of the defendant*".

16. The learned counsel has relied on the following Judgements:

(i) ***2018 (5) CTC 225*** - Authorized Officer, State Bank of India Vs. Allwyn Alloys Private Limited.

(ii) ***MANU/SC/0638/2018*** - Sree Anandhakumar Mills Ltd Vs. Indian Overseas Bank and others.

(iii) ***MANU/TN/0959/2018*** - R.Subramanian Vs. The Hongkong and Shanghai Banking Corporation Ltd. and others.

(iv) ***2017 (5) CTC 198*** - Bank of Baroda, Chennai Vs. R.Subramanian and others.

(v) ***2017 (5) CTC 302*** - Central Bank of India and others Vs. Gomathiammal.

(vi) ***2014-1-L.W.108*** - Jagdish Singh Vs. Heerlal and others.

(vii) ***MANU/TN/3290/2011*** - State Bank of India Vs. Minor Krithaanyaa rep. by its mother / guardian, G.Rekha.

(viii) ***MANU/TN/1939/2011*** - V.Thulasi Vs. Indian Overseas Bank

(ix) ***MANU/SC/0541/2010*** - United Bank of India Vs. Satyawati Tondon and others.

(x) ***MANU/SC/1004/2013*** - Standard Chartered Bank Vs. Dharminder Bhohi and others.

(xi) ***MANU/TN/1517/2012*** - Sri Chandra and S.Chitra Vs.

K.Nagarajan and others.

17. Per contra, Mr.C.Ramesh, learned counsel appearing for the respondents would contend that the suit schedule property was offered as a security for the home loan that had been taken by the respondents from the 1st applicant bank. The arrangement letter dated 16.03.2017 would show that a home loan of Rs.37,00,000/- was being provided to the respondents for taking over the housing finance loan originally issued by LIC HFL in respect of No.3, First Floor, VV Villa Rams Flats, Old Door No.13, New Door 19, Plot No.7, Veeraperumal Lane, Bangarummal Street, Mylapore, Chennai 600 004.

18. On the same day, the home loan is also topped-up for Rs.1,16,75,000/- and the security of the Veeraperumal Lane property is extended to this loan as well. The arrangement letter clearly stipulates that loan is a personal home loan. The deposit of title deeds is only with reference to this property. Nowhere in the sanction letter was it mentioned

that the property is offered as collateral for the borrowals of the company, M/s.Oceanic Tropical Fruits Private Limited and M/s.Oceanic Edibles International Limited.

19. He would further argue that the proceedings in OA.No.344 of 2015 has come to an end and there are no proceedings that are now pending before the Debts Recovery Tribunal, Chennai. The respondents had sought to redeem the mortgage for which purpose they had managed to get an offer for the purchase of their property and in pursuance of this agreement had also deposited the entire amount to the 1st applicant bank.

20. The respondents would further submit that their suit had been filed on 20.11.2019 and only thereafter the applicants had proceeded to issue the Section 13 (2) notice under the SARFAESI Act on 25.11.2019. He would argue that no application can be filed by the borrower before the DRT as Section 19 of the RDDBFI Act contemplates the filing of an application only by the Bank or Financial Institution. The learned counsel

would submit that he has invoked the powers of the Civil Court under Section 60 of the Transfer of the Property Act, for enforcing the plaintiffs / respondents right of redemption and further Section 37 of the SARFAESI Act does not in any manner bar the filing of the suit before the Civil Court. The learned counsel has relied on the following Judgements in respect of his case:

*"i) **(2006) 5 SCC 72** – Indian Bank Vs. ABS Marine Products (P) Ltd.*

*ii) **2011 (2) CTC 465** – State Bank of India Vs. Jayanthi*

*iii) **(2011) 2 Cal LT 525** – VCK Share and Stock Broking Services Ltd. Vs. Bank of Rajasthan Ltd.*

*iv) **(2015) 4 Cal LT 108** – Housing Development Finance Corporation Limited (HDFC Ltd.) and another Vs. Dorjee Dolma Bhutia and others.*

He would therefore submit that the application filed by the applicant bank is totally unsustainable and is liable to be dismissed.

Discussion:

21. The application for rejecting the plaint has been filed on the grounds:

(i) That the provisions of Section 18 of RDDBFI Act; and

(ii) Section 34 of the SARFAESI Act ousts the jurisdiction of the Civil Court.

To appreciate the issue it is necessary to extract the above provisions:

22. Section 18 of the RDDBFI Act reads as follows:

"18. Bar of Jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17."

23. Section 34 of the SARFAESI Act would read 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).”

The applicants therefore contend that in the light of the provisions under Section 18 of the RDDBFI Act and Section 34 of the SARFAESI Act, the suit filed by the respondents has to be rejected.

24. The following definitions under the SARFAESI Act would also have a bearing in deciding the issue on hand:

> *Section 2 (zb) "security agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor;*
>
> *Section 2 (zc) "secured asset" means the property on which security interest is created;*
>
> *Section 2 (zd) "secured creditor" means any*

bank or financial institution or any consortium or group of banks or financial institutions and includes— (i) debenture trustee appointed by any bank or financial institution; or (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;

Section 2 (ze) "secured debt" means a debt which is secured by any security interest;

Section 2 (zf) "security interest" means right, title and interest of any kind whatsoever *upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;*

25. The suit in question has been filed invoking the provisions of Section 60 of the Transfer of property Act, for redeeming the property mortgaged by the respondents with the 1st applicant Bank on 05.04.2017. Section 60 of the Transfer of Property Act would read as follows:

"60. Right of mortgagor to redeem.—At any time after the principal money has become 1[due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee

(a) to deliver 2[to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee],

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and

(c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been

effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by 3[decree] of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except 4[only] where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor"

26. In exercise of this right, it is an admitted fact that, the respondents had through the prospective purchaser deposited the entire amounts due

into their account with the 1st applicant bank. Further, on instructions from their head quarters the amount has been returned to the proposed buyer. The applicant bank has prevented the respondents from exercising the rights available to them under Section 60 of the Transfer of Property Act. The entire amount due towards the loan was deposited with the Applicant Bank which the Bank returned thereby preventing the respondent from exercising their right of redemption. On one hand the Applicant Bank would prevent the respondent from exercising their right of redemption and on the other declare the loan as NPA.

27. It is seen that as on date there are no proceedings pending before the DRT and the applicant bank has also not initiated proceedings under Section 13 (4) of the SARFAESI Act. Third party / borrower can approach the DRT under the provisions of SARFAESI Act, only in case where the Bank has initiated proceedings under Section 13 (4) of the Act, read with Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002, by filing an application under Section 17 of the SARFAESI Act.

28. The arguments put forward by the counsel for the Applicant that Section 34 of the SARFAESI Act is a bar for entertaining the instant suit is fallacious for the following reasons:-

(a) After issuing the notice under Section 13 (2) of the Act on 25.11.2019 no further proceedings has been initiated.

(b) The property which is the subject matter of this suit has not been mortgaged or offered as security to the Applicant Bank for the dues of the Company which is the subject matter of OA.No.344 of 2015.

(c) The account in question by the action of the Bank in returning the amount deposited by the prospective purchaser has been classified as NPA. The respondent had come forward to clear the entire outstanding which has been refused by the Applicant Bank.

(d) By no stretch of imagination can the suit properties be termed a security interest for the loans borrowed by the Companies in the absence of any security agreement in respect of the suit property for that loan.

29. Therefore in the absence of the pendency of any application before the DRT by the bank or in the absence of further proceedings under Section 13, the respondents / plaintiffs are left with no other option except to institute the suit. In fact, the suit has been filed even before the bank had initiated the SARFAESI proceedings. In the Judgement of the Division Bench of this Court reported in ***2011 (2) CTC 465 - State Bank of India Vs. Jayanthi and others,*** the facts and issue in that case were more or less similar to the facts of the present case. In that Judgement the Bench had held that when the contract / mortgage has been created for a specific purpose and for a specific loan and the contract is self contained, then the terms and conditions of that contract was binding on both the borrower as well as the Bank mutually. Once the deposit of title deed through which a mortgage deed is created for a specific loan, then the bank cannot exercise general lien as provided under Section 171 of the Contract Act, in respect of that property.

30. Admittedly, O.A.No.344 of 2015 filed by the 1st applicant has been allowed and the loan that has been given to the Companies is under a totally different contract, whereas in the present case the loan that had been extended to the respondents is a housing loan and a reading of the agreement would clearly show that the respondents had intended to create a security only with reference to the housing loan and no other loan.

31. Therefore, the retention of the documents by the bank appears to be without any legal basis. In fact, the letter that has been addressed by the Retail Assets Central Processing Centre of the applicant bank to the 2nd applicant would contain a statement that the borrowers have extended their personal guarantee, therefore the properties are being attached. This statement is categorically denied by the respondents who would state that the security was offered only for the housing loan and the documents filed along with the plaint would also clearly and categorically prove the said statement.

32. The apart, the respondents cannot approach the DRT in the absence of any proceedings being initiated under Section 13 (4), read with Rules 8 and 9 of the said Rules. The Judgements relied upon by the respondents are cases where proceedings were pending before the DRT. The right of redemption having been granted to mortgagor under the provisions of the Transfer of Property Act, the bank cannot try to obstruct the exercise of that right of the Borrower by filing a suit totally overlooking the fact that it is only the Bank and Financial Institutions who can move the application under Section 19 and not the borrowers or other third parties. The main issue which is involved in the instant suit is the right of redemption of the plaintiff which is an issue to be considered by a Civil Court.

33. Further, while considering an application for rejecting the plaint, the Court is only directed by the contentions raised in the plaint and the connected documents and nothing more. A conjoint reading of the two

clearly makes out a cause of action for filing the suit and therefore the application for rejecting the plaint is dismissed.

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P.T.ASHA, J.,

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Pre-delivery Order in
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