In the High Court of Judicature at Madras

Dated : 11.11.2020

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Original Side Appeal Nos.231, 242, 243 & 245 to 247 of 2020
& CMP.Nos.11634, 11986, 12075, 12079, 12092 & 12101 of 2020

M/s.Ind Bharat Power Infra Ltd.,
rep.by its Managing Director ...Appellant in OSA.No.231 of 2020 & R4 in OSA.246/2020/ R3 in OSA.245/2020

M/s.Ind Bharat Power Infra Ltd.,
Chennai-35 ...Appellant in OSA.No.242 of 2020 & R3 in OSA.Nos.243, & 247 of 2020

Vs

1. IL & FS Financial Services Ltd., Chennai-35. ..R1 in all the OSAs.

2. M/s.Ind Bharat Thermal Power Ltd., Chennai-35. ..R2 in OSAs. 231, 245 & 247 of 2020 & R3 in OSA.No. 246/2020

3. Mr.K.Raghu Rama Krishna Raju ..R3 in OSAs. 231 & 242 of 2020; R4 in OSA.245/2020 & appellant in OSA.Nos.243 & 247/2020 & R2 in OSA. No.246/2020

4.Mr.K.Bharat ..R4 in OSAs. 231 & 247 of 2020 & R5 in OSA.No. 245 of 2020 & appellant in OSA.246/2020

5.M/s.Sriba Seabase Pvt. Ltd., Chennai-35. ..R5 in OSA.No 231 of 2020 & appellant in OSA.245/2020 & R5 in OSA. Nos.246 & 247 of 2020

6.M/s.Tamil Nadu Generation & Distribution Corporation Ltd., Chennai-2. ..R6 in OSAs. 231, 245 to 247 of 2020 & R4 in OSA.Nos 242 & 243 of 2020

7.M/s.Ind Bharat Power Gencom Ltd., Chennai-35 ..R2 in OSAs. 242 & 243 of 2020

APPEALS under Order XXXVI Rule 11 of the Original Side Rules read with Clause 15 of the Letters Patent against the common order dated 03.2.2020 made respectively in A.No.8506/19 in C.S.No.950 of 2017, A.Nos.8499/19 and 8498/19 in C.S.No.945 of 2017, A.Nos.8508, 8502 & 8504 of 2019 in C.S.No.950 of 2017.

For Appellants in all the appeals : Mr.N.L.Rajah, SC for Mr.C.Arunkumar

COMMON JUDGMENT

(Judgment was delivered by T.S.Sivagnanam,J)

We have elaborately heard Mr.N.L.Rajah, learned Senior Counsel appearing on behalf of Mr.C.Arun Kumar, learned counsel on record for the appellants.

2. These appeals have been filed by the defendants in two suits challenging the common order passed in the applications filed under Order VII Rule 11 of the Civil Procedure Code (for

short, the Code) to reject the plaints in C.S.Nos.945 and 950 of 2017.

3. The respective defendants filed the applications for rejection of plaints on the ground that the said suits were barred in terms of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act) and in this regard, referred to Section 34 of the Act, which states that 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 (for brevity, the RDDB & FI Act). Further, the defendants referred to Section 35 of the SARFAESI Act, which states that the provisions of the SARFAESI Act override other laws.

4. The applications were resisted by the plaintiff by filing a counter and by referring to Section 31(b) of the SARFAESI Act, which provides that the SARFAESI Act shall not apply to pledge of movables and some of security a pledge of shares and hypothecation of receivables. It has been further stated that if the provisions of Section 34 of the SARFAESI Act will have to be read in the context of any action taken under Sections 13 to 19 of the SARFAESI Act, such actions can be challenged only as per the provisions of the SARFAESI Act and not in a civil court. It has also been stated that the first respondent may enforce their security interest in accordance with the SARFAESI Act or under the RDDB & FI Act.

5. The learned Single Judge, by the impugned common orders, after hearing the parties, dismissed all the applications and imposed cost of Rs.2.5 lakhs on each of the applicants.

6. The first and foremost issue, which we need to take into consideration, is the manner, in which, the Court has to consider an application under Order VII Rule 11 of the Code. The settled legal principle is that while considering the applications under Order VII Rule 11 of the Code, the Court is not required to take into consideration the defences set up by the defendants in their written statement or other documents. Further, the question as to whether the plaint discloses any cause of action or whether it is barred by any law is to be decided by looking at the averments contained in the plaint itself and not the defences set up in the written statement.

7. Mr.N.L.Rajah, learned Senior Counsel has referred to the relevant paragraphs in the plaints and submits that the attempt

of the plaintiff is to enforce the guarantees, which have been executed by the appellants and which are in the form of corporate guarantees and personal guarantees and this cannot be done in a suit before a civil court, as the same are security interests created in favour of the plaintiff – financial institution. The learned Senior Counsel further submits that the learned Single Judge dismissed the applications for rejection of plaints by solely relying upon Section 31(b) of the SARFAESI Act without noticing the fact that the plaints had been cleverly drafted to bring within the scope of recovery by invoking corporate and personal guarantees.

8. As pointed out earlier, we are required to examine the plaint as it is, while considering the application under Order VII Rule 11 of the Code and we cannot test as to whether the plaint discloses a cause of action by considering the defences that are raised or that may be raised by the defendants. Therefore, on a reading of the prayer sought for the in the suits, we are of the prima facie view that what the plaintiff seeks to proceed against is the shares, which have been pledged by the defendants.

9. The submission of the learned Senior Counsel appearing on behalf of the appellants is that the plaintiff need not come to court for sale of the shares, as the required documentation has already been executed and the power of attorney has been given and above all, the first defendant submitted to the decree.

10. In our considered view, this issue cannot be decided at this juncture, as facts have to be gone into and it is also to be examined as to whether the plaintiff seeks to not only sell the shares, but also to proceed based on the guarantees executed in their favour. It is too early for this Court to express any opinion and the defendants/ appellants should be well advised to raise such defences, which are open to them on facts as well as in law by filing a written statement. Therefore, we find that at the very threshold, the plaints cannot be rejected and more particularly bearing in mind the settled legal position, which needs to be taken note of while considering the applications under Order VII Rule 11 of the Code. Having come to such a conclusion, we have to necessarily dismiss the appeals.

11. Mr.N.L.Rajah, learned Senior Counsel appearing on behalf of the appellants submits that the learned Single Judge ought not to have imposed cost of Rs.2.5 lakhs on each of the applicants, who had filed the applications for rejection of the plaints.

12. In our considered view, filing an application under Order VII Rule 11 of the Code cannot be prevented by a court and the Court can consider as to whether such an application is

sustainable or not. Given the facts and circumstances, we are of the opinion that this is not a fit case where cost should have been imposed on the appellants/ applicants before the learned Single Judge. In fact, there is an observation made by the learned Single Judge that the appellants's move is a dubious design to delay the lawful process by filing the applications devoid of merits. In our considered view, there is no material to come to such a conclusion that filing of such applications for rejection of the plaints is a dubious design. Furthermore, we find that there is no such allegation made by the first respondent - plaintiff in the counter affidavit filed in the applications under Order VII Rule 11 of the Code.

13. For the foregoing reasons, while dismissing the appeals, we are inclined to interfere with that portion of the order passed by the learned Single Judge imposing costs on the appellants. In fact, cost has been imposed at the discretion of the Court and therefore, we are not required to hear the first respondent - plaintiff on the said issue.

14. In the result, the above original side appeals are dismissed by confirming the common orders passed by the learned Single Judge. However, the cost imposed on each of the appellants stands set aside. It is made clear that it is well open to the defendants to raise all issues in the suits by filing a written statement. Equally, the first respondent - plaintiff is entitled to raise all contentions in support of their claim. Consequently, all pending connected CMPs are also dismissed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

RS
To
The Sub Assistant Registrar
Original Side, High Court Madras-104.

+6ccs to Mr.C.Arunkumar, Advocate, Sr.No. 36708

OSA.No.231 of 2020
etc. cases

SSD(CO)
RMP(22/01/2021)