IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 23.01.2020	Pronounced on: 03.02.2020

Coram::

The Honourable Dr.Justice G.Jayachandran

Application Nos.8498 & 8499 of 2019
in C.S.No.945 of 2017

1. Mr.K.Raghu Rama Krishna Raju,
New No.20 (Old No.129),
Chambers Road,
Nandanam, Chennai – 600 035. ... Applicant/3rd Defendant in A.No.8498 of 2019

2. M/s.Ind Barath Power Infra Limited,
New No.20 (Old No.129),
Chambers Road,
Nandanam, Chennai – 600 035. ... Applicant/2nd Defendant in A.No.8499 of 2019

/versus/

A.No.8498 of 2019

1. M/s.IL and FS Financial Services Limited,
No.498, Karumuttu Centre,
3rd Floor, South Wing, Anna Salai,
Nandanam, Chennai – 600 035. ... 1st Respondent/Plaintiff

2. M/s.Ind Barath Powergencom Limited,
No.498, Karumuttu Centre,
3rd Floor, South Wing, Anna Salai,
Nandanam, Chennai – 600 035. ... 2nd Respondent/2nd Defendant

3. M/s.Ind Barath Power Infra Limited,
New No.20 (Old No.129), Chamiers Road,
Nandanam, Chennai – 600 035. ... 3rd Respondent/3rd Defendant

4. M/s.Tamil Nadu Generation and Distribution Corporation Limited,
10th Floor, NKPRR Maligai,
No.144, Anna Salai,
Chennai – 600 002. ... 4th Respondent/4th Defendant

A.No.8499 of 2019

1. M/s.IL and FS Financial Services Limited,
No.498, Karumuttu Centre,
3rd Floor, South Wing, Anna Salai,
Nandanam, Chennai – 600 035. ... 1st Respondent/Plaintiff

2. M/s.Ind Barath Powergencom Limited,
New No.20 (Old No.129),
Chamiers Road,
Nandanam, Chennai – 600 035. ... 2nd Respondent/2nd Defendant

3. Mr.K.Raghu Rama Krishna Raju,
New No.20 (Old No.129),
Chamiers Road,
Nandanam, Chennai – 600 035. ... 3rd Respondent/3rd Defendant

4. M/s.Tamil Nadu Generation and Distribution Corporation Limited,
10th Floor, NKPRR Maligai,
No.144, Anna Salai,
Chennai – 600 002. ... 4th Respondent/4th Defendant

Prayer in Application No.8498 of 2019:-

Judge's summons under Order XIV Rule 8 of Original Side Rules read with order VII Rule 11 of the Code of Civil Procedure Code, 1908 read with Section 151 of C.P.C

(i). To reject the plaint in C.S.No.945 of 2017 under Order VII, Rule 11 of the Code of Civil Procedure, 1908.

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(i). To reject the plaint in C.S.No.945 of 2017 under Order VII, Rule 11 of the Code of Civil Procedure, 1908.

For Applicant in all cases	:	Mr.N.L.Rajah, Senior Counsel for Mr.C.Arun Kumar.
For R1 in all cases	:	Mr.Menon
For R2 in all cases	:	Mr.Anirudh Krishnan

COMMON ORDER

These two applications were taken out by the 2nd and 3rd defendants to reject the plaint filed, for recovery of money by the Non-Banking Finance Institution.

2. The plaintiff is a Non-Banking Finance Company, which has agreed to extend financial assistance upto Rs.50 crores (Rupees Fifty crores), to the 1st defendant for its business of generation of Electricity using coal based on Thermal Power Plant located at Tuticorin, TamilNadu, against the identified invoices/Bills raised by the 1st defendant on the 4th defendant, which is one of its customers. The plaintiff issued its offer letter to the above effect on 30.11.2015. The 1st defendant accepted the offer and the Board of Directors of the 1st defendant through its authorised person and returned the signed copy of the plaintiff's letter of offer.

3. On 31.11.2015, the 2nd & 3rd defendants executed Letters of Guarantee in favour of the plaintiff, guaranteeing due payment/repayment of all amounts due and payable by the 1st defendant to the plaintiff. A pledge agreement was executed between the Plaintiff, 1st and 2nd defendants in terms of which 102,701,538 equity shares of face value Rs.10/- each held by the 2nd defendant in the 1st defendant, were pledged in favour of the Plaintiff as security for repayment of the facility. On 01.12.2015, the plaintiff and 1st defendant entered into a Line of Credit Agreement. As per the terms of the agreement, the 1st defendant executed a Demand Promissory Note in favour of the Plaintiff for an amount of Rs.50 crores. The 2nd defendant also executed a Power of Attorney on 31.12.2015 in favour of the plaintiff to deal with the pledged shares. On 03.05.2016, the 2nd defendant registered the charge under the pledge Agreement dated 31.12.2015, in favour of the plaintiff with the Registrar of Companies, Chennai.

4. As per the agreement, two bills raised by the 1st defendant for the power purchased by the 4th defendant from the 1st defendant were discounted. The plaintiff paid Rs.18 lakhs (15+3) to the 1st defendant. Similarly, four bills raised by the 1st defendant on the Group Captive Consumers(GCC) were discounted and Rs.32 lakhs (3.5+11.5+5.5+11.5) paid by the plaintiff. In all, the 1st defendant discounted with the plaintiff invoices/bills value of Rs.53,15,92,357/- and the plaintiff paid a sum of Rs.50 crores under the Credit Agreement dated 01.12.2015.

5. On 18.11.2016, the 1st defendant instructed Group Captive Consumers(GCC) to pay the due on the invoices directly to the plaintiff. However, no payments were received by the plaintiff from any of the GCC's. On 26.05.2017, the 1st defendant requested for roll-over of the facility. In principle sanction for roll-over was issued to the 1st defendant on 01.06.2017.

6. On 20.06.2017, the plaintiff wrote to 4th defendant to make payment of Rs.20.49 crores, being the amount payable under the two invoices that had been discounted with the plaintiff by the 1st defendant. Though 4th defendant had approved and passed those invoices, no payment was made to the plaintiff. Meanwhile, the plaintiff came to know that for the default in payment by the 1st defendant to its supplier of coal to the Thermal Power Plants, suits were filed and restrain order was obtained prohibiting the

4th defendant from disbursing any money payable to the 1st defendant to the extend of their suits claim. Though, the plaintiff have a priority of charge over the money payable by the 4th defendant to the 1st defendant, the amounts of the invoices discounted by the 1st defendant with the plaintiff were now sought to be diverted/paid to the other creditors. Hence in the suits (C.S.Nos.189/2017, 302/2017 and 402/2017), the plaintiff has filed intervention application.

7. On 23.08.2017, the plaintiff issued a notice to the defendants 1 to 3, notifying, an Event of Default has occurred in the Facility extended to the 1st Defendant vide Credit Agreement dated 01.12.2015 and called upon the 1st defendant to repay the entire principle outstanding by close of business on 28.08.2017. In response, the 1st defendant stating reasons for non payment and requested to revoke the recall of the Facility and continue with the same as per the original sanction terms of the Credit Agreement. Accordingly, the plaintiff and the 1st defendant entered into a Supplemental Agreement for roll-over of the facility for a further period of six months effective from 03.06.2017 upto 03.12.2017.

8. In the meanwhile, the 1st defendant in spite of its admission that, the plaintiff have the first charge of the receivables of the 1st defendant due for payment by the 4th defendant, instead of protecting the interest of the plaintiff and seeking for raising of the prohibitory orders, entered into a Memorandum of Compromise with the creditor and consented to continue the prohibitory order passed against the 4th defendant. Thus, the security created by the 1st defendant in favour of the plaintiff has been encumbered and diminished without the knowledge and consent of the plaintiff.

9. In the above said factual background, suit has been filed for the following relief:

(a) For recovery of a sum of Rs.51,23,68,651/- (Rupees Fifty one crores Twenty Three Lakhs Sixty Eight Thousand Six Hundred and Fifty one only) from the 1st to 3rd Defendants, which is limited to a sum of Rs.20,49,32,514/- (Rupees Twenty Crores Forty Nine Lakhs Thirty Two Thousand Five Hundred and Fourteen only) from the 4th Defendant, together with interest at 18% per annum on Rs.50,00,00,000/- (Fifty Crores only) (Limited to Rs.20,49,32,514/- (Rupees Twenty Crores Forty Nine Lakhs Thirty Two Thousand Five Hundred and Fourteen only) as regards the 4th Defendant), from the date of the plaint till the date of realization, to be recovered, inter alia, through sale of the pledged shares set out in Schedule - B to the Plaint.

(b). Direct the Defendants 1 to 4 herein to pay cost of the suit to the plaintiff; and (c). for such further or other reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case.

10. This suit is now sought to be rejected on the ground that, the instant suit is barred by law. According to the defendants 2 and 3, who are the applicants herein, the plaintiff has been notified as one of the Non-Banking Financial Companies (NBFC) by the Central Government vide notification in S.O. No. 2641 (E) dated 05.08.2016. By virtue of this notification, the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as "SARFAESI Act"), will apply in relation to the claims raised by the plaintiff. Therefore, the plaintiff has to pursue his remedy only in accordance with the provisions of the SARFAESI Act. Section 34 of the said Act, oust the jurisdiction of Civil Court. While there is express bar under statute to file civil suit, under Order VII Rule 11 of C.P.C., the plaint has to be rejected.

11. In response to the Applications to reject the plaint, the plaintiff has filed common counter with the below averments.

The ouster of Civil Court jurisdiction in toto under section 34 of the SARFAESI Act is not correct. Section 13 (1) of the said Act, enables the secured creditor to enforce the 'security interest' without the intervention of the Court or tribunal, notwithstanding anything contained in Section 69 or 69-A of the Transfer of Property Act. Therefore, the plaintiff has the option to enforce the security interest created in its favour against the borrower namely the defendants 1 to 3. Further, it is contended by the plaintiff that, section 31(b) of the Act, application of the SARFAESI Act in respect of 'pledge of moveables'. In this case, the 1st and 2nd defendants have pledged 102,701,538 shares of face value Rs.10/- each held by the 2nd defendant in the 1st defendant company. The detail is set out in Schedule 'B' of the plaint and the relief sought for is recovery of the money payable through sale of the pledged shares set out in the schedule 'B' of the plaint. Hence, the application has to be dismissed.

Point under consideration:- Is whether Section 34 of the SARFAESI Act, bar the present suit ?

12. Soon after SARFAESI Act, came into force, its constitutional validity was questioned. Particularly, vires of Sections 13, 15 and 34 of the said Act were tested in ***Mardia Chemical Limited and others Vs. Union of India and others (AIR 2004 SC 2371=2004 (4) SCC 311).*** In this judgment the Hon'ble Supreme Court, while upholding the validity of the provisions of the Act, except sub-section (2) Section 17, observed as under:-

"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

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 Debt 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 at 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."

13. In ***Jagdish Singh Vs. Heeralal and another (AIR 2013 SC 371)***, the Hon'ble Supreme Court that, while considering the scope of Section 34 of the SARFAESI Act, extracting the observation of the Hon'ble Supreme Court made in *Mardia Chemicals case* proceeded to say, *"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 borrowers 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 realizing 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. 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."*

14. Thus, the law as interpreted by the Apex Court in *Mardia Chemicals* cited supra and followed in *Jagdish Singh* case is that, the Civil Court jurisdiction is not totally barred in case of dispute between a notified Non-Financial Banking Company and the Creditor. The bar under Section 34 of the Act, will get attracted when the secured creditor on the secured assets, resort to any one of the measures envisaged under sub-Section 4 of Section 13, to secure the borrower's debt. In such circumstances, the person aggrieved can exercise his statutory right of appeal to DRT under section 17. In other words, if the secured creditor does not proceed against the secured assets or does not resort to any one of the measures envisaged under Section 13(4) of the Act, the Civil Court jurisdiction is not ousted under Section 34 of the Act.

15. Section 34 of SARFAESI Act, the provision which oust the Civil Court jurisdiction reads as below:-

Section 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.

16. Section 13(4) of the Act, provides four options to a secured creditor as measures to recover a secured debts of the borrower. Before resorting to any one of the four measures, the secured creditor has to cause a statutory notice under Section 13 (2) of the Act, calling upon the borrower to discharge in full his liabilities, within 60 days from the date of notice.

17. To understand, whether in this case, the plaintiff has laid the suit to recover a secured debts and resorted to any one of the four measures contemplated under section 13(4), it is necessary to know what the expressions 'secured creditor', 'secured asset', 'secured debt' and 'secured interest' mean and defined under the SARFAESI Act.

(zc) "secured asset" *means:- the property on which security interest is created-*

(zd) "secured creditor" *means:-*

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);

(ii) debenture trustee appointed by any bank or financial institution; or

(iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or

(iv) debenture trustee registered with the Board appointed by any company for secured debt securities; or

(v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.

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

(zf) "security interest" *means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes:-*

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset;

18. The plaintiff is a 'secured creditor' and it is not a disputed fact. The loan advanced by the plaintiff to the 1st defendant also undoubtedly a 'secured debt'. However, the statute has defined the expression 'secured debt' as debt which is secured by any secured interest. Under this Act, the expression 'secured interest has a restricted meaning. Right, title or interest of any kind specified in Section 31 are excluded from the meaning of 'security interest'.

Section 31 of the SARFAESI Act reads:

> *Section 31:* ***Provisions of this Act not to apply in certain cases:-*** *The provisions of this Act shall not apply to-*
>
> *a). A lien on any goods, money or security given by or under the Indian Contract Act, 1872, or the Sale of Goods Act, 1930 or any other law for the time being in force.*
>
> *b). A pledge of movables within the meaning of Section 172 of the Indian Contract Act. 1872*

19. Now reading of Sections 13(4), 31 & 34 along with the meaning of the relevant expressions employed in the Act, Pledge shares is specifically excluded from the scope of the SARFAESI Act. Those transactions excluded under Section 31 does not fall within the meaning of security interest. What not fall under the meaning of 'security interest' will not fall within the meaning of 'secured debt' for the purpose of this Act.

20. From the plaint averments which has been extracted above in nutshell, for recovery of the debt, the plaintiff has resorted to sell the shares of the 1st defendant pledged by the defendants 1 and 2. The relief sought is not under any of the four measures mentioned under Section 13(4) of the Act.

For easy reference, Section 13 (4) is extracted below:-

> ***Section 13: Enforcement of security interest.-***
>
> *(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 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.*
>
> ....
>
> *"(4). In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), to 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 assets.*

(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"

21. The suit laid for recovery of money by selling the shares pledged fall out of the scope and ambit of the SARFAESI Act by virtue of Section 31(b). The fact being so, Section 34 of the Act, has no application to oust the Civil Court jurisdiction. Mere fact that, the suit laid by a Non-Banking Financial Company against the borrower for the debt secured is not sufficient to determine the jurisdiction. Whether the said 'secured debt' also satisfy the meaning of 'security interest' as defined under the Act is the test. The plaint averment and the prayer clearly speaks that, the shares pledged has to be sold for recover the money. While so, in view of Section 31, the subject matter of the suit is away from the scope and ambit of SARFAESI Act.

22. In ***Dhulabhai Vs. State of Madhya Pradesh*** reported in ***(AIR 1969 SC 78)***, nearly about half a century ago, the Hon'ble Supreme court has laid, when the Civil Court jurisdiction get ousted. The principle laid in the said judgment is as reproduced below :-

"(1) Where the statute gives a finality the orders of the special tribunals the

Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

23. The plaintiff cannot resort to any of the measures mentioned in Section 13(4) to enforce the debt based on the shares pledged, since Section 31 (b) will stare at him. Civil suit is the only forum for the plaintiff to enforce the debt based on the pledged shares. The plaintiff has rightly approached this Court. This Court, finds no merit in these applications filed to reject the plaint.

24. It is disheartening to note that these Applications are filed after two years, from the date of instituting the suit and after few rounds of fight in the interlocutory applications. Further, in Application No.8215 of 2017, filed under Order XII Rule 6 of C.P.C., the 1st defendant has admitted the liability and consent decree has been passed on 05.01.2018. Now these applications are filed by the defendants 2 and 3. They are the parties, who have given the letter of guarantee on 31.12.2015 in favour of the plaintiff for the debts of 1st defendant. That apart, the 2nd defendant is holding the parent company viz., the 1st defendant and the 3rd defendant is a Director/Promoter of the 1st and 2nd defendants.

25. This Court see a dubious design in the conduct of the defendants 1 to 3, to delay the lawful process by filing these applications which is devoid of merits. Hence, the ***Applications***

are dismissed with cost of Rs.2,50,000/- lakhs to each of the petitioner payable to the plaintiff. The cost to be paid within 30 days from today.

Sd./-G.J.J
03.02.2020

//Certified to be true copy//

Dated at Madras this the day of 2020.

JJ 13/02/2020 COURT OFFICER(O.S.)

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