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Ct-08

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FMA 252 of 2022
with
I.A No. CAN 2 of 2022

Vistra ITCL (India) Ltd.
Vs.
Asha Agarwal & Ors.

Mr. Ranjan Bachowat, Sr. Adv
Mr. Dwaipayan Basu Mallick
Ms. Suchismita Ghosh
Mr. Arkaprava Sen
.... For the Appellant/Defendant no. 2

Mr. S.N. Mookherjee, Sr. Adv
Mr. Ratnanko Banerjee, Sr. Adv
Mr. Shuvasish Sengupta
Mr. O. Chatterjee
Mr. Indranil Karfa
Ms. Sabrani Mukherjee
.... For the Respondent nos. 1 to 5

Mr. Subhankar Das
.... For the Respondent no. 7

This appeal has arisen out of an order passed by the trial court in an application filed by the plaintiffs under Section 151 of the Code of Civil Procedure in a suit for declaration and injunction.

It appears that the plaintiffs have entered into an agreement for sale with the respondent no. 1 on 17th March, 1972 on a consideration money of Rs. 1.50 lakhs for a large property at Dover Road. Admittedly, no conveyance was executed in favour of the plaintiffs. In the mean time, the appellant alleged that an equitable mortgage has been created by deposit of a certified copy of the title deed in respect of the self-same property on 24th August, 2017 and in view of default while the appellant was seeking to enforce its security interest in relation to the said property the plaintiffs filed an application under Section 151 of the Code of Civil Procedure in which the impugned order was passed.

Mr. Ranjan Bachowat, learned senior counsel representing the appellant, submits that the trial court has completely disregarded Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and it was beyond the jurisdiction of the civil court to pass any order of injunction once the security interest is enforced by the appellant.

It is further submitted that the measures under Section 13(4) of the SARFAESI Act has been initiated but no actual possession has been taken in view of the order passed by the trial court.

Mr. S.N Mookherjee, learned senior counsel appearing for the respondent nos. 1 to 5, submits that the entire consideration money for purchase of the property was paid in the year 1973 itself and the plaintiffs are in continuous and uninterrupted possession of the suit property till date. The said agreement can operate both as sword and shield. In view of such indefeasible right accruing in favour of the plaintiffs the appellant could not have enforced the security interest against the said property. We have examined the order carefully.

It appears from the impugned order that apart from recording the submissions of the parties the trial Court did not assign any reason. It appears from the impugned order that several issues have been raised by the appellants opposing the prayer for injunction along with decisions of the Hon’ble Supreme Court and various other High Courts but there was not even a single word spent on the quality of such objection or the merits of the claim of the plaintiffs. Curiously at the relevant time the application for injunction was pending. The learned trial Judge apart from recording that the plaintiff was able to make out the prima facie case and balance of convenience and using such expression as 'mantras' without indicating the circumstances from which it can be gathered or a prima facie satisfaction could be recorded that the plaintiff has made out a prima facie case and the defendants had not been able to justify the measures taken by the appellant. The trial Judge ought to have decided that once the measures is taken under the SARFESAI Act whether Civil Court would have the jurisdiction to grant an order of injunction.

The order impugned is bereft of any reason. There is no discussion at all with regard to the issues raised by the appellant. The Court is required to decide *prima facie,* if a proceeding under SARFAESI Act is initiated post filing of the suit, whether the civil court could consider the prayer for injunction. The maintainability of the suit is another issue as Section 13(4) and 34 of the SARFAESI Act, if read conjointly, could give an impression that the person aggrieved by the proceeding under the SARFAESI Act would be required to approach DRT for remedy. However, these issues need to be decided by the trial court.

In ***Delta International Limited v. Smt. Nupur Mitra*** reported at **AIR 2018 Cal 8**. The Hon'ble Division Bench interpreted Section 34 of the Act of

2002 in the following words:

31. Section 34 of the Act of 2002 has two parts: the first limb prohibits the receipt of a civil suit in certain cases; and, the second bars the issuance of an injunction by a civil court in certain situations. The sets of situations covered by the two limbs are not identical, though they may be geared towards the same goal. The emphasis in the first limb is on "any matter which a ... Tribunal is empowered by or under this Act to determine", whereas the second part covers "any action taken or to be taken in pursuance of any power conferred by or under" the Acts of 2002 and 1993. A DRT will be empowered by or under the said Act of 2002 to determine any matter once any measure under Section 13(4) of such Act is taken by a notified secured creditor or its authorised officer under Chapter III of the Act of 2002. In other words, till such time that any measure under Section 13(4) is taken by a notified secured creditor or its authorised officer, the jurisdiction to determine the propriety of such measure does not vest in any DRT or DRAT. Thus, merely because a notified secured creditor has issued a notice under Section 13(2) of the Act of 2002, it does not imply that the bar under the first limb of Section 34 of the said Act is kicked in, so to say. The bar under such first limb of Section 34 of the said Act begins with any measure being taken by a notified secured creditor or its authorised officer under Section 13(4) of such Act.

32. But even in a civil suit which is instituted at a time when no measures have been taken by a notified secured creditor or its authorised officer under Section 13(4) of the Act, no injunction can issue - even quia timet - in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act of 2002 or the Act of 1993. The two limbs of Section 34 of the said Act are complementary, operate in *tandem and are designed to serve the same objective. At the stage when the provision first appeared in the Ordinance that preceded the Act of 2002, it could not have had retrospective operation. Thus, any suit filed prior to Section 34 of the said Act, or the corresponding provision in the preceding Ordinance, coming into operation could not be regarded as bad even if the matters covered thereby were capable of being determined by a DRT or DRAT under the said Act or its preceding Ordinance. But from the date that the provision became effective, no injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act (or its preceding Ordinance) or under the Act of 1993 could be issued by any civil court. In suits filed after such provision has come into effect, it is possible that the entirety of the reliefs claimed may not be capable of being granted by a DRT or DRAT. It is here that the second limb of the provision acts as a fall-back safety-net to arrest the mischief that it seeks to do. Even if a civil suit is entertained which contains some matter that a DRT or DRAT is empowered to determine by or under the Act of 2002, but the plaint thereof cannot be rejected since the entirety of the subject-matter of such suit may not be capable of determination by a DRT or DRAT; the second limb of Section 34 prohibits any injunction to be issued by the civil court in respect of any action taken or to be taken in pursuance of any power conferred by or under the said Act or under the Act of 1993."*

Similarly, in **Sree Anandhakumar Mills Ltd. v. Indian Overseas Bank** reported at **AIR Online 2018 SC 498** the Hon'ble Supreme Court has clearly stated that the remedy of a person aggrieved by proceedings under SARFASAI Act lies in approaching Debt

Recovery Tribunal as the jurisdiction of the Civil Court is completely barred under the SARFASAI Act. The relevant observations are:

"The matter need not engage the Court in any great detail as in view of the law laid down by this Court in Jagdish Singh v. Heeralal and Ors. IX (2013) SLT 253 : IV (2013) BC 744 (SC) : (2014) 1 SCC 479, it would clear and evident that the suit filed by the second Respondent (i.e. O.S. No. 106 of 2009) is not maintainable, In Jagdish Singh (supra) this Court after an elaborate consideration of the provisions of the SARFAESI Act, particularly, Sections 2(zf), 2(zc), 13(1), 17, 18 and 34, took the view, on almost similar facts, that a suit for partition would not be maintainable in a situation where proceedings under the SARFAESI Act had been initiated. It was also held mat the remedy of any person aggrieved by the initiation of proceedings under the SARFAESI Act lies Under Section

17. which provides for an efficacious and adequate remedy to a party aggrieved. Paragraph 24 of the report in Jagdish Singh (supra) which make the above position clear may be usefully extracted below:

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 the 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, Code of Civil Procedure as well.*

The trial Court is required to find out if the relief claimed by way of injunction can be granted, taken into considerations Section 13, 17, 18 and 34 of the SARFESAI Act and the rationess decidendi of the aforesaid two decisions along with any other decisions that may be relied upon by the parties at the hearing of the injunction petition.

We feel that the trial court ought to have considered the above issues before passing any interim order in favour of the respondents. Moreover, Rs. 2 crores is due and payable by the respondent no.6, Williamson Magor & Co. Ltd. to the appellant. We have been informed that the trial court has fixed the hearing of the injunction application on 7th May, 2022.

The parties are at liberty to pray for preponing the date of hearing of the injunction application. In the event, such prayer is made, the Ld. trial court is requested to prepone the date of hearing of the said application and decide the said application as expeditiously as possible keeping in mind the provisions made in the SARFAESI Act and the observations made by us in this order.

It is needless to mention that the trial court shall dispose of the injunction application by a reasoned order.

We dispose of the appeal and the applications by directing the ld. Trial Court to dispose of the injunction application on merits on or before 7th May, 2022. The impugned order shall operate till 7th May, 2022 or till the disposal of the injunction application whichever is earlier.

In view of the above, FMA 252 of 2022 along with I.A. No. CAN 2 of 2022 is disposed of.

(Ajoy Kumar Mukherjee,J.) **(Soumen Sen, J.)**