

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 30 OF 2018

1. Union Bank of India,

A Banking Company constituted under the Companies Act, 1956 through its Branch Manager, Vasco-da-Gama Branch, Opp. H. P. Tank, Sumantesh Building, Ground floor, F.L. Gomes Road, Vasco-da-Gama, Goa.

2. Ajai Kumar Sinha,

Major in age, Indian National, Branch Manager, Union Bank of India, Varanasi Branch, Uttar Pradesh.

... Applicants

Versus

1. M/s Gnandrum Enterprises,

Registered Partnership Firm, through its Managing Partner, Shri Gnandrum Ponnu Nadar, Son of late Ponnu Nadar, 52 years old, Indian National, businessman, resident of House No.137/N, Assoi Green Valley, Alto Dabolim, Goa.

2. Shri Gnandrum Ponnu Nadar,

Son of late Ponnu Nadar, 52 years old, Indian National, businessman, resident of House No.137/N, Assoi Green Valley, Alto Dabolim, Goa.

3. Selva Raju Nadar,

Son Madaswami Nadar, 59 years old, Indian National, Resident of Flat No.AS-3, Mangirish Prasad Coop. Hsg. Society, Opp. Babu Naik House, Aquem, Margao, Goa

Deleted as per
order dated
27/06/2019

4. Pushpa Nadar,
Wife of Selva Raju Nadar,
55 years old, Indian National, Resident of Flat No.
AS-3, Mangirish Prasad Coop. Hsg. Society, Opp.
Babu Naik House, Aquem, Margao, Goa

5. M/s Sai Traders,
Proprietorship concern of Sanil S. Dessai, son of
Shashikant Dessai, major in age, Indian National,
Resident of Flat No.T-1, Colaco Arcade,
Deterowado, Vasco-da-Gama, Goa.

Deleted as per
order dated
27/06/2019

... Respondents

Shri Pavithran A.V. with Shri Samuel Abraham, Advocates for the
applicant.

Shri Balkrishna Sardessai, Advocate for respondent Nos. 1 and 2.

CORAM:

BHARAT P. DESHPANDE,J.

RESERVED ON : 19th JANUARY, 2023

PRONOUNCED ON : 23rd JANUARY, 2023

JUDGMENT:

1. The applicants/original defendant Nos.1 and 2 preferred present revision challenging the impugned order dated 29/01/2018 passed in Regular Civil Suit No.101/2017/A whereby an application filed under Order 7 Rule 11 of CPC was rejected.

2. Heard learned Counsel Shri Pavithran with Shri Samuel Abraham for the applicant and Shri Balkrishna Sardessai, for respondent Nos.1 and 2.

3. In nutshell, respondent Nos.1 and 2/plaintiffs filed civil suit against the present applicant and others claiming a declaration that the judgment and decree be passed declaring committal of fraud on the plaintiffs by defendant Nos.1 to 5, to declare Sale Deed dated 26/02/2014 and all actions thereunder as null and void and absolve the plaintiff from all consequences/liability and direct the defendants jointly and severally to pay cash credit amount, along with other reliefs.

4. The applicant after receipt of suit summons and the interim order for injunction, appeared and preferred an application under Order 7 Rule 11 of CPC claiming that the suit filed is barred under Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ('SARFAESI Act,2002', for short)

5. The learned Trial Court after hearing the parties and on considering the decision in the case of **Mardia Chemicals v/s. Union of India**¹ observed that when the suit is filed claiming fraud, all provisions of Section 34 of the SARFAESI Act,2002 are not applicable.

6. Shri Pavithran while inviting attention of this Court to the pleadings in the plaint and the documents would submit that the respondent Nos.1 and 2 availed the loan by mortgaging three plots purchased by him and failed to repay the loan amount and therefore notices under Section 13(2) of the SARFAESI Act,2002 were issued by

¹ (2004(4) SCC 311)

the Bank. The respondent Nos.1 and 2/plaintiffs even did not replied to the said notices. Accordingly, the secured assets were attached and symbolic possession was taken by the Bank. Only thereafter the plaintiffs filed suit in the year 2017 before the Civil Court thereby claiming fraud and declaration of the Sale Deed as null and void. He would submit that the Bank had not played any role with regard to the sell and purchase of the plots by the plaintiffs and the third party. There are no specific allegations of fraud as far as defendant No.1 is concerned which is the Bank. Though there are some allegations against defendant No.2 i.e. the then Branch Manager, such allegations are vague and not disclosing the ingredients of fraud. He would submit that the provision under Section 34 of the SARFAESI Act,2002 stands clearly attracted and there is a clear bar to entertain any suit or proceedings by a Civil Court since all questions with regard to secured assets are necessary to be dealt with by Debt Recovery Tribunal('DRT', for short) or by the Appellate Authority. He would submit that entire mechanism of filing proceedings before the DRT including the Appellate Authorities are provided under the Act. Any person aggrieved in connection with secured assets is entitled to approach DRT and not the Civil Court. He then submitted that the plaint is contrary to the documents of the plaintiffs i.e. the Sale Deeds wherein there is clear reference that the plaintiffs after verifying all the documents and visiting the site, were satisfied and only thereafter agreed to purchase said three plots.

7. Shri Pavithran placed reliance on the following authorities:

1. **Mardia Chemicals Ltd. and others v/s. Union of India and others**(supra)

2. **Jagdish Singh v/s. Heeralal and others**²

3. **Sree Anandhakumar Mills Limited v/s. Indian Overseas Bank and others**³

4. **Electrosteel Castings Limited v/s. UV Asset Reconstruction Company Limited and others**⁴

8. Shri Pavithran then would submit that observations of the Supreme Court in the case of **Mardia Chemicals Ltd.** and more specifically paragraph 51 is not at all attracted to the matter in hand. However, the learned trial Court have misconstrued such observations and arrived at incorrect findings.

9. Per contra, Shri Sardesai appearing for respondent Nos.1 and 2 would submit that the plaintiff is the customer of defendant No.1-Bank and the then Manager i.e. respondent No.2 convinced the plaintiff to purchase three plots which belongs to defendant No.3 who is another customer of the said Bank. The plaintiff was assured that all finances will be looked after by the Bank. He was also assured that such plots are in the main vicinity near the airport, railway station having good potential for business activities. Even the valuation report was prepared at the instance of defendant No.2 by showing much higher value of the said property. Accordingly, the plaintiff believing defendant No.2, invested

2 (2014) 1 SCC 479

3 (2019) 14 SCC 788

4 (2022) 2 SCC 573

huge amount. Immediately all the said plots were mortgaged with defendant No.1. Thereafter, when the plaintiff realised that all these plots are coming within the funnel zone of the airport, the value of it is not even half of the value which the plaintiff paid while purchasing it. He then submitted that the cheques were cleared when the same were time barred in order to pay the balance amount from the account of the plaintiff. In this respect he claimed that the plaintiff suffered losses due to such fraud played on him by the defendants and hence the suit is maintainable.

10. Rival contentions fall for the consideration.

11. In order to appreciate the submissions and more particularly specific bar of the Civil Court to entertain proceedings which are in respect of the matter covered under SARFAESI Act, under Section 34 of the said Act of 2002 needs to be consider.

12. Section 34 of the Act of 2002 reads thus:

“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).”

13. The main object of the above Section is that no Civil Court shall have jurisdiction to entertain any suit or proceedings in respect of any

matter of DRT or the Appellate Tribunal and is empowered by or under the said 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 under the said Act.

14. Thus, in order to understand the powers of the DRT, Chapter III of the Act 2002 assumes importance, which deals with enforcement of security interest.

15. Admittedly, the plaintiff by mortgaging three plots with the defendant No.1- Bank created security in favour of the Bank. Defendant No.1 —Bank is covered under the definition of Section 2(c) whereas the plaintiff is covered under the definition of 'borrower' under Section 2(1) (c) and 2(1) (f). The finance/loan which the plaintiff took from the defendant No.1 —Bank is certainly covered under the definition of 'debt' as found in Section 2(1) (ha).

16. Chapter III of the Act 2002 deals with enforcement of security interest. For the better understanding Section 13 reads thus :

“13. Enforcement of security interest-(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 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.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in

repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

1[Provided that— (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

2[(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate 3[within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication

of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(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;

4[(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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such

person a valid discharge as if he has made payment to the borrower.

1[(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.

(5C)The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).]

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence

of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

2[(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and

(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]

(9) 1[Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of] financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than 2[sixty per cent.] in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be

distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.—For the purposes of this sub-section,—

(a) “record date” means the date agreed upon by the secured creditors representing not less than 2[sixty per cent.] in value of the amount outstanding on such date;

(b) “amount outstanding” shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

17. From the reading of all the above provisions makes it clear that it starts with non-obstante clause and gives powers to the secured creditors to enforce, without the intervention of the Court or Tribunal the security interest for the repayment of secured debt or any installment thereof, in respect of such debt as classified by the secured creditor as non-performing asset. The secured creditor is required to give notice in

writing to the borrower to discharge in full his liabilities to the secured creditor within a period of 60days from the date of such notice failing which the secured creditor shall be entitled to exercise all or any of the rights as provided in sub-section (4).

18. The provisions of sub-section 4 of Section13 are very vast and it gives power to a secured creditor to take recourse to one or more of the measures to recover secured debts which includes taking possession of secured assets of the borrower, to take over management of the business, to appoint any person to manage the secured assets etc.

19. Section 14 of the Act of 2002 gives powers to the District Magistrate to assist the secured creditor in taking possession of the secured asset.

20. Section 17 of the Act provide remedy to any person (including borrower), who is being aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor by making an application to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken. The DRT is the authority who decides such application in accord with law and within a period of 60days from filing of such application.

21. Section 18 provides appeal to Appellate Tribunal against any order passed by the Debts Recovery Tribunal. Thus, the provision of Section

34 as quoted earlier clearly barred the Civil Court from entertaining any suit or proceedings, in respect of any matter which a DRT or the Appellate Tribunal is empowered under the said Act to determine.

22. The learned trial Court though considered provisions SARFAESI Act including a bar to take cognizance of any proceedings mainly relied upon observations of the Apex Court in paragraph 51 in the case of **Mardia Chemicals Ltd.** (supra). Such observations in paragraph 51 reads thus:

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 their 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. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V.Narasimhachariar (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 22:

"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a

fraud or irregularity on the basis of which relief is sought: 'Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784)."

23. In **Mardia Chemicals Ltd.**(supra), bunch of petitions filed before the Supreme Court and High Court thereby challenging the validity of SARFAESI Act 2002 were taken together. It was contended that by the said Act, certain provisions are such that the banks and financial institutions have been vested with arbitrary powers which are without guidelines for their exercise and without providing any appropriate and adequate mechanism to decide the disputes relating to the correctness of the demand, its validity and the actual amount of dues, sought to be recovered from the borrowers. According to them, the offending provisions, are such that, it all has been made one sided affair while enforcing drastic measures of sale of the property or taking over the management or the possession of the secured assets without affording any opportunity to the borrower.

24. After considering all submission, the Supreme Court in paragraph 33 framed main questions which broadly fall for consideration as under:

33. Taking an overall view of the rival contentions of the parties, we feel the main questions which broadly fall for consideration by us are :

i) Whether it is open to challenge the statute on the ground that it was not necessary to enact it in the prevailing background particularly when another statute was already in operation?

ii) Whether provisions as contained under Section 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court under Section 34 of the Act?

iii) Whether the remedy available under Section 17 of the Act is illusory for the reason it is available only after the action is taken under Section 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand?

iv) Whether the terms or existing rights under the contract entered into by two private parties could be amended by the provisions of law providing certain powers in one sided manner in favour of one of the parties to the contract?

v) Whether provision for sale of the properties without intervention of the court under Section 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the civil court?

vi) Whether the provisions under Sections 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different decisions of this Court?

vii) Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect?

25. Question No.(ii) as quoted above is mainly dealing with adequacy of the remedy available under Section 17 of the Act specifically when there is a bar to approach under the Civil Court under Section 34 of the Act.

26. In that context, the Apex Court has observed in paragraph 50 that reading Section 34 shows that the jurisdiction of the Civil Court is barred in respect of the matter which DRT or Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. The bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil Court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil Court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

27. After the above observations, Section 51 as quoted above in the judgment wherein the Supreme Court observed that 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 their 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. While observing so, the Apex Court has relied upon the decision of Madras High Court which deals with the remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations. In such case, the mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. However, the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought.

28. Coming back to the plaint in the suit, the allegations of fraud are not with regard to the procedure adopted by the secured creditor against the secured interest. It is nowhere claimed by the plaintiff that action of the Bank in attaching the secured assets and thereafter taking further steps to recover the debt is by playing fraud. Admittedly, defendant No.1-Bank issued two notices to the plaintiffs i.e. the secured assets. However, plaintiff failed to file reply to it.

29. The allegations in the plaint are completely different and it shows that the plaintiff was induced by the Branch Manager i.e. defendant No.2 to purchase three plots in higher price though such plots were within the funnel zone and having restrictions for construction activities.

Admittedly, the sale transaction between the plaintiffs and defendant No.3 is totally independent transaction and there is nothing on record to show that defendant Nos.1 and 2 played any role in these transactions.

30. Mr. Sardesai tried to canvas submissions that defendant No.2 being the Branch Manager induced the plaintiff to purchase said plots and to mortgage it with the Bank for the purpose of availing loan. However, the pleadings in the plaint are totally vague. There are no details as to when such inducement had taken place and in whose presence. Secondly, it is necessary to note that the Bank and the Branch Manager are conducting business in the financial field and in order to secure business every Bank Manager is bound to make efforts to get the customers for advancing loan. If the Branch Manager advises any party in such manner that he is entitled to mortgage his property for availing loan, it nowhere amounts to inducing him and more so does not amounts to fraud in any manner.

31. The allegations in the plaint are basically against defendant No.2 who was the then Branch Manager. The Bank i.e. defendant No.1 is a separate entity in the eyes of law. There is absolutely no allegations against defendant No.1 in connection with so called fraud. Shri Pavithran pointed out that the loan was availed by the plaintiff immediately after executing Sale Deeds and till the year 2017 he was regularly paying installments. He then invited attention of this Court to the notice given under Section 13(2) of SARFAESI Act 2002 which is dated 24/05/2017. This notice discloses details of all the secured assets

and called upon the plaintiff to pay the debts and failing which the Bank will exercise all the rights available to them under Section 13 including attachment of the properties and sale in all auction. Plaintiff failed to reply to such notice.

32. The Sale Deeds which the plaintiff himself is challenging now in the suit specifically show that the purchaser/plaintiff approached the vendor and the purchaser have taken the inspection of the property as well as inspection of title documents of the vendor and being satisfied with the same agreed to purchase it for the value mentioned in the Sale Deed. All the Sale Deeds were executed before the Sub-registrar and in presence of two independent witnesses. These Sale Deeds are of the year 2014. These properties were mortgaged with defendant No.1–Bank for the purpose of obtaining loan. Till the time the said secured assets were taken possession of by the Bank under the provisions of Securitisation Act, there were no allegations of whatsoever nature from the plaintiff. Suddenly a suit came to be filed only on 26/10/2017 claiming therein that fraud was played on the plaintiffs. The only intention which could be gathered from such plaint is to obtain ex-parte ad-interim relief and to stall all the proceedings which the defendant No.1- Bank was entitled to take under the provisions of SARFAESI Act .

33. The learned Counsel Shri Pavitran then pointed out that the plaintiff succeeded in obtaining ex-parte temporary injunction thereby restraining defendant No.1- Bank from proceeding ahead with secured assets. The Bank immediately filed application under Order 7 Rule 11

CPC for rejection of the complaint. However, the learned Trial Court by misconstruing the observations of the Apex Court in paragraph 51 of **Mardia Chemicals Ltd.** (supra), rejected such application.

34. On careful perusal of the plaint, it is clear that first of all there are vague and general averments in connection with fraud. At no point of time the plaintiff claimed as to when he was induced by defendant No.2 to purchase such properties and in whose presence.

35. The plaintiff though claimed that the valuation of the property was inflated when he purchased it, there are no particulars as to what was the actual valuation of the said three plots in the year 2014. Only because these plots are within funnel zone, apart from some restrictions, there is nothing on record to show that the value of these properties was much less than the one shown in the Sale Deeds. Therefore, making general and vague allegations only referring to the word 'fraud' or 'fraudulent', would not be sufficient for the plaintiff to avoid specific bar under Section 34 of the Securitisation Act and to bring civil action before the Civil Court.

36. In the case of **Electrosteel Castings Limited** (supra), the Supreme Court dealt with Section 34 of the Securitisation Act wherein the High Court has dismissed the appeal preferred by the original plaintiff rejecting his plaint on the ground that the suit is barred under Section 34 of the SARFAESI Act, observed that the civil suit filed by the borrower claiming some declaration was barred under Section 34 of said

Act. The argument advanced on behalf of the plaintiff that he pleaded fraud and it was the case that the assignment agreement is a fraudulent document and needs to be declared as null and void. It was further submitted that when the suit is filed alleging fraud, bar under Section 34 of SARFAESI Act 2002 shall not be applicable and the suit sought for reliefs is maintainable. It is necessary to note that the Apex Court observed in paragraph Nos. 7.1 and 7.2 as under:

7.1. It is the case on behalf of the plaintiff-appellant herein that in the plaint there are allegations of “fraud” with respect to the assignment agreement dated 30-6-2018 and it is the case on behalf of the plaintiff-appellant herein that assignment agreement is “fraudulent” inasmuch as after the full payment as per the approved resolution plan under IBC and the original corporate debtor is discharged, there shall not be any debt by the plaintiff-appellant herein as a guarantor and therefore assignment deed is fraudulent. Therefore, it is the case on behalf of the plaintiff-appellant herein that the suit in which there are allegations of “fraud” with respect to the assignment deed shall be maintainable and the bar under Section 34 of the Sarfaesi Act shall not be applicable.

7.2. However, it is required to be noted that except the words used “fraud”/“fraudulent” there are no specific particulars pleaded with respect to the “fraud”. It appears that by a clever drafting and using the words “fraud”/“fraudulent” without any specific particulars with respect to the “fraud”, the plaintiff-appellant herein intends to get out of the bar under Section 34 of the Sarfaesi Act and wants the suit to be maintainable. As per the settled proposition of law mere mentioning and using the word “fraud”/“fraudulent” is not sufficient to satisfy the test of “fraud”. As per the settled proposition of law such a pleading/using the word

“fraud”/“fraudulent” without any material particulars would not tantamount to pleading of “fraud”.

37. The Supreme Court then observed in paragraph Nos.9 to 11 as under:

9. Having considered the pleadings and averments in the suit more particularly the use of word “fraud” even considering the case on behalf of the plaintiff, we find that the allegations of “fraud” are made without any particulars and only with a view to get out of the bar under Section 34 of the Sarfaesi Act and by such a clever drafting the plaintiff intends to bring the suit maintainable despite the bar under Section 34 of the Sarfaesi Act, which is not permissible at all and which cannot be approved. Even otherwise it is required to be noted that it is the case on behalf of the plaintiff-appellant herein that in view of the approved resolution plan under IBC and thereafter the original corporate debtor being discharged there shall not be any debt so far as the plaintiff-appellant herein is concerned and therefore the assignment deed can be said to be “fraudulent”.

10. The aforesaid cannot be accepted. By that itself the assignment deed cannot be said to be “fraudulent”. In any case, whether there shall be legally enforceable debt so far as the plaintiff-appellant herein is concerned even after the approved resolution plan against the corporate debtor still there shall be the liability of the plaintiff and/or the assignee can be said to be secured creditor and/or whether any amount is due and payable by the plaintiff, are all questions which are required to be dealt with and considered by the DRT in the proceedings initiated under the Sarfaesi Act.

11. It is required to be noted that as such in the present case the assignee has already initiated the proceedings under Section 13 which can be challenged by the plaintiff-appellant

herein by way of application under Section 17 of the Sarfaesi Act before the DRT on whatever the legally available defences which may be available to it. We are of the firm opinion that the suit filed by the plaintiff-appellant herein was absolutely not maintainable in view of the bar contained under Section 34 of the Sarfaesi Act. Therefore, as such the courts below have not committed any error in rejecting the plaint/dismissing the suit in view of the bar under Section 34 of the Sarfaesi Act.”

38. In the case of **Jagdish Singh**(supra), the appellant therein was the auction purchaser being the highest bidder in respect of the land which was brought to sale for recovery of loan under the Securitisation Act. The auction was confirmed by the Bank, however, the appellant was not put in possession of the property. The appellant then came to know that the respondents-borrowers filed civil suit in the District Court for declaration of title, partition and permanent injunction against the Bank. In the meantime, respondent Nos.7 to 9 filed application before DRT under Section 17 of the Securitisation Act challenging the sale notice. The Bank filed a preliminary objection before the Civil Court stating that the Civil Court has no jurisdiction to entertain such suit. The Civil Court upheld the objections thereby allowing the application under Order 7 Rule 11 CPC. The borrowers preferred appeal before the High Court. Said appeal was allowed by the High Court. This order of the High Court was carried to the Supreme Court and in that context after considering the provisions of Sections 13, 17 and 34 of the Securitisation Act and further referring to the case of **Mardia Chemicals Ltd.**(supra), it is observed in paragraph nos.22, 23, 24 and 25 as under :

22. The scope of Section 34 came up for consideration before this Court in **Mardia Chemicals Ltd.** (supra) and this court held as follow:

“50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub- section (4) of Section 13, it is submitted by Mr Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken “or to be taken in pursuance of any power conferred under this Act”. That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart

from those matters in which measures have already been taken under sub-section (4) of Section 13.”

23. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.

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 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.

25. We are of the view that the civil court jurisdiction is completely barred, so far as the “measure” taken by a secured creditor under sub- section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether there has been any illegality in the “measures” taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystallised, before creating security interest in respect of the secured assets.”

39. Thus, from the over all reading of the plaint and the documents attached to it, it is crystal clear that apart from general allegations of fraud without giving specific details, the suit was filed against the Bank as well as the Manager of the Bank. The observations of the Apex Court in paragraph 51 in the case of **Mardia Chemicals Ltd.** (supra) have been misinterpreted by the learned trial Court. Only because the word 'fraud' and 'fraudulent' is mentioned in the plaint at various places, the suit cannot be taken away from the bar of Section 34 of the Securitisation Act. The Apex Court has categorically mentioned that to a very limited extent the jurisdiction of Civil Court could be invoked and not in the matter of such nature. There is absolutely no allegations on the Bank and the officials that while exercising powers under the Securitization Act, they have played any fraud. In fact the allegations regarding alleged fraud are much prior to even mortgage of suit properties i.e. at the time of purchasing of three plots. Therefore, the application filed by defendant Nos.1 and 2 for rejection of plaint on the ground that there is a specific bar under Section 34 of the Securitisation Act ought to have been allowed.

40. Having said so impugned order is required to be quashed and set aside and the application filed by the present applicants needs to be allowed.

O R D E R

1. The revision stands allowed.
2. The impugned order dated 29/01/2018 below Exh.A-11 in Regular Civil Suit No.101/2017/A is hereby quashed and set aside. Consequently, the application at Exh.11 dated 29/11/2017 is allowed. The plaint in Regular Civil Suit No.101/2017/A stands rejected as barred under Section 34 of the Securitisation Act.
3. Parties shall bear their own costs.

BHARAT P. DESHPANDE, J.

MEENA
VISHAL
BHOIR



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by MEENA
VISHAL BHOIR
Date: 2023.01.24
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