IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.03.2024

PRONOUNCED ON : 15.04.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

C.R.P.(PD)No.3756 of 2018
and C.M.P.No.20948 of 2018

K.R.Vijayakumar ... Petitioner

Vs

1.D.Ponnuvel

2.The City Union Bank,
Rep. by its Manager,
Rasipuram Branch,
Rasipuram, Namakkal District. ... Respondents

PRAYER: Petition filed under Article 227 of the Constitution of India praying to set aside the impugned order dated 25.09.2018 made in I.A.No.289 of 2018 in O.S.No.25 of 2011 on the file of the Fast Track / Mahila Judge, Namakkal.

For Petitioner	:	Mr.T.Poornam, for M/s.S.Panneerselvam
For Respondents	:	Mr.Avinash Wadhwani for M/s.V.Srimathi for R1
		Mr.K.R.Ananda Gomathy for R2

O R D E R

This Civil Revision Petition is filed challenging the order passed by the trial Court dismissing the application filed by the petitioner / first defendant seeking rejection of the plaint in O.S.No.25 of 2011 on the file of Fast Track Court / Mahila Court, Namakkal, filed by the first respondent herein against the petitioner and the second respondent.

2. The above said suit was filed by first respondent against the petitioner and the second respondent seeking specific performance of sale agreement dated 18.10.2010, allegedly entered into by the first respondent with the petitioner for purchase of plaint schedule property and also for consequential injunction restraining the second respondent from proceeding with auction of the suit property.

3. According to the first respondent, the petitioner herein obtained loan from the second respondent by mortgaging the suit property and in order to discharge the mortgage debt, he agreed to sell the property to the first respondent and entered into suit sale agreement dated 18.10.2010. It was stated by the first respondent that as per the terms of the agreement, sale price was fixed at Rs.30 lakhs and on the date of agreement, he paid a sum of Rs.5 lakhs to the petitioner by way of cash and another Rs.5 lakhs by way of cheque. Thus, on the date of agreement itself, a sum of Rs.10 lakhs was paid to the petitioner as an advance and it was agreed, the remaining Rs.20 lakhs should be paid within three months. It was also claimed by the first respondent that he had been ready and willing to perform his part of contract all along. However, the petitioner failed to take any steps to discharge the mortgage debt with the second respondent and hence, the first respondent issued a lawyer notice to the petitioner on 13.01.2011 expressing his readiness and willingness to complete the sale transactions. The petitioner came up with a reply containing false allegations, as if the petitioner received a loan of Rs.10 lakhs from the first respondent and as a security for the said loan transaction, the suit sale agreement was executed. It was also averred by the first respondent that he was ready to pay the entire amount due to the second respondent and get the sale transaction completed. However, the petitioner failed to accept the same. In these circumstances, the first respondent was constrained to file a suit for specific performance.

4. The petitioner / first defendant in the suit filed an application to reject the plaint on the ground that the suit is barred by section 34 of "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security interest Act, 2002" (hereinafter referred to as "the SARFAESI Act for the sake of convenience and brevity), as suit sale agreement came into existence subsequent to notice under Section 13(4) of SARFAESI Act. The said petition for rejection of the plaint was dismissed by the trial Court and aggrieved by the same, this Civil Revision Petition is filed.

5. The learned counsel appearing for the petitioner submitted that the present suit for specific performance filed by the first respondent is barred by Section 34 of SARFAESI Act and hence, the plaint is liable to be rejected. The learned counsel further submitted that the suit sale agreement, which is sought to be specifically enforced came into existence subsequent to notice by second respondent / secured creditor under Section 13(4) of SARFAESI Act and in view of provisions of Section 13 sub-Section (13) of SARFAESI Act, the petitioner is disabled from transferring the suit property by way of sale, lease or otherwise. In nutshell, it is the contention of the learned counsel that any sale subsequent to notice under Section 13 sub-section (2) of SARFAESI Act shall be treated as a void transaction in view of prohibition contained under Section 13 sub-Section (13) of the said Act. The learned counsel submitted that though Section 13 sub-Section (13) of the said Act does not prohibit entering into a sale agreement, when there is a prohibition against sale, the sale agreement cannot be specifically enforced and hence, there cannot be a decree for specific performance. In support of his contention, the learned counsel for the petitioner relied on the following judgments:

1. ***Satish Kumar Vs. Karan Singh and Another*** reported in ***(2016) 4 SCC 352***;

2. ***Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*** reported in ***(2004) 3 SCC 137***;

3. ***Canara Bank Vs. P.Selathal and Others*** reported in ***(2020) 13 SCC 143***;

4. ***B.P.Samiappan (died) and 4 others Vs. Arunthavaselvan and 3 others*** reported in ***1994-1-L.W.399***; and

5. ***T.Arivandandam Vs. T.V.Satyapal and Another*** reported in ***(1977) 4 SCC 467.***

6. The learned counsel appearing for the contesting first respondent submits that the right acquired by the first respondent is subject to the right of the secured creditor viz., the second respondent and hence, subject to the right of second respondent, the first respondent is entitled to get a decree for specific performance. The learned counsel pointed out that the second respondent / secured creditor who is entitled to invoke the provisions of the SARFAESI Act against the secured asset, has not filed any application to reject the plaint and in such circumstances, the mortgagor of the property, viz., the petitioner is not entitled to maintain an application for rejection of the plaint, when his right is not all affected.

7. The learned counsel for the first respondent further submitted that bar under Section 13 sub-Section (13) of the SARFAESI Act is not an absolute one and therefore, the suit is not hit by provisions of the SARFAESI Act. The learned counsel by relying on Section 91 of Transfer of Property Act, 1882, submitted that he is ready to pay the entire amount due to the second respondent and discharge the mortgage debt payable by the petitioner to the second respondent and hence, he is entitled to maintain the suit for specific performance as per the suit sale agreement. The learned counsel also submitted that he already filed an application before the trail Court for payment of entire amount due to the second respondent and the said application is pending consideration. In support of his contention, learned counsel relied on the following judgements:

1.***Arasa Kumar and another Vs. Nallammal and others*** reported in ***(2004) 4 CTC 261*** and

2.***K.Deenadayalan Vs. N.Sathish Kumar*** reported in ***2015-1-L.W.229***.

8. The suit property, which is the subject matter of the suit sale agreement was mortgaged by the petitioner to the second respondent and as he failed to repay the loan amount, the second respondent initiated SARFAESI proceedings. It is not in dispute that notice under Section 13(2) of the SARFAESI Act was issued by the second respondent on 03.05.2010. The notice under Section 13(4) of the SARFAESI Act was issued on 20.07.2010. Thereafter, auction notice was issued on 08.09.2010. The auction was scheduled to have taken place on 18.10.2010 and the first respondent / plaintiff himself was participated in the auction. It is stated that on the said date, the petitioner paid a sum of Rs.5 lakhs and in view of the same, auction was postponed. The suit sale agreement said to have entered into on 18.10.2010 between the petitioner and the first respondent. Now the main point urged by the learned counsel for the petitioner is suit agreement is not specifically enforceable in view of Section 13 (13) of the SARFAESI Act. The relevant section reads as follows:

> *"13.Enforcement of security interest:*
>
> ......
>
> *(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."

9. A perusal of the above provision would make it clear that the petitioner, who is a borrower is not entitled to transfer by way of sale, lease or otherwise any of his secured assets after receipt of notice under Section 13(2) of the SARFAESI Act. It is not disputed that Section 13(2) notice was received by the petitioner prior to the suit sale agreement. Now the question to be decided is whether the bar created under Section 13 sub-Section (13) of the SARFAESI Act is an absolute one and any transaction violating said Section can be treated as void transaction.

10. The language of Section 13 sub Section (13) of SARFAESI Act would indicate that there is no total bar from transacting with secured asset, after the receipt of notice under Section 13(2) of the SARFAESI Act. Transfer by borrower with a written consent of secured creditor, even after receipt of 13(2) notice, is permissible. Therefore, the bar created by Section 13 sub Section (13) of SARFAESI Act is not an absolute one and transfer is permitted subject to a condition. However, the provision is silent as to the effect of transfer by the borrower without written consent of secured creditor.

11. Under common law, if the mortgagor / borrower transfers the secured assert to a third party, such a transferee will acquire right over the property subject to the mortgage liability. Therefore, notwithstanding transfer of the property by borrower, the secured creditor is entitled to proceed against the secured asset which is transferred in favour of a third party. Therefore, even in the absence of qualified bar created under Section 13 sub-Section (13) of the SARFAESI Act, the right of the secured creditor is very well protected and he can always proceed against the secured asset simply ignoring the subsequent transfer by the borrower in favour of a third party.

12. In the case on hand, it is admitted fact that the first respondent was aware of mortgage liability created by the petitioner in favour of second respondent bank. In fact, the learned counsel for the first respondent submits that he is ready to pay the entire amount due to the second respondent and get the mortgage debt discharged. Knowing fully that its rights are very well protected under law, the second respondent bank consciously decided not to file any application for rejection of the plaint. The petitioner, who allegedly entered into sale agreement with the first respondent is not entitled to take shelter under Section 13 sub-Section (13) of the SARFAESI Act and seek rejection of the plaint so as to get rid of his obligation under the agreement. Section 13 sub-section (13) of the SARFAESI Act does not indicate that any transaction violating prohibition contained under the Section shall be treated as void. When the Section does not declare a transaction, without written consent of secured creditor as a void transaction, this Court is not inclined to supplement something which is not contemplated by the legislature in it's wisdom. Therefore, this Court holds that the bar under Section 13 sub-Section (13) of the SARFAESI Act is not an absolute one and any transfer made by the borrower without written consent of the secured creditor is not void, but it is not binding on the secured creditor to the extent of enforcing it's right over secured asset.

13. As discussed earlier, even in the absence of Section 13 of sub-section (13) of the SARFAESI Act, under common law any transfer by the mortgagor in favour of a third party, when the mortgage is subsisting, is only subject to the mortgage liability. In other words, the mortgagor is entitled to transfer the property, which is subjected to mortgage liability to a third party and the third party will acquire right over the suit property subject to mortgage liability. Notwithstanding such transfer in favour of third party, the mortgagee is entitled to enforce payment of mortgage debt against the property even if it is in hands of third party concerned. Section 13 sub-section (13) of the SARFAESI Act only imposed a condition on the mortgagor to get a written consent from secured creditor before transferring the property to a third party. However, the consequence of failure to get written consent is not declared expressly. In such circumstances, it would be appropriate to hold that transfer without written consent of secured creditor is not void. However, it is not binding on the secured creditor to the extent of his right to enforce payment of debt due to him. Therefore, notwithstanding such transfer, the secured creditor is entitled to proceed against the property.

14. In the light of the discussion made earlier, the first respondent is very well entitled to insist for decree for specific performance based on the sale agreement, which was contracted ignoring provisions of Section 13 of sub-Section (13) of the said Act. Any decree passed in the suit will not affect the right of the second respondent bank to proceed against the secured asset. The right acquired by the decree holder is subject to the right of the mortgagee / secured creditor. The other contentions made by the learned counsel for the petitioner that the suit sale agreement was entered into as a security for loan transaction is a matter to be decided based on evidence and hence, parties shall be relegated to trial.

15. Section 34 of the SARFAESI Act reads as follows:

> *"34. Civil Court not to have jurisdiction.-No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts*

Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)"

16. A perusal of the same would indicate that no Civil Court shall entertain any suit or proceedings in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Section 17 of the SARFAESI Act enables any person aggrieved by any of the measures referred to in sub-section (4) of section 13 of the SARFAESI Act to approach the Tribunal. Section 18 of the SARFAESI Act enables any person aggrieved by the order passed by the Debts Recovery Tribunal to the Appellate Tribunal. The scope of Sections 17 and 18 of the SARFAESI Act and jurisdiction of the Tribunal constituted under the SARFAESI Act came up for consideration before this Court in ***K.Deenadayalan Vs. N.Sathish Kumar*** reported in ***2015-1-L.W.229***. The relevant observation of this Court reads as follows:

"16. At this juncture, the decision of the Honourable Supreme Court reported in 2009 (8) SCC 646 = 2009 (4) CTC 74 (Nahar Industrial Enterprises Ltd. Vs. Hong Kong & Shangha Banking Corpn.), more particularly paragraphs 96

and 97, are relevant to be quoted:

"96. The Tribunal was constituted with a specific purpose as is evident from its Statement of Objects. The Preamble of the Act also is a point to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, it did not even have any power to entertain a claim of set-off or counter-claim. No independent proceedings can be initiated before it by a debtor.

97. A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The civil court, therefore, will continue to have jurisdiction."

(emphasis supplied)

17. Further, in a decision reported in 2004 (4) SCC 311 = AIR 2004 SC 2371 (Mardia Chemicals Ltd. Vs. Union of India), the Apex Court held in paragraph 51 as follows:

"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 his 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. ... .." (emphasis supplied)

18. Considering the scope of Section 18 of the Act, coupled with a combined reading of Section 17 of the Act and considering the above decisions of the Apex Court, I am of the view that the "bar of jurisdiction of Civil Courts" contemplated under Section 18 of the Act, is not a total bar as claimed by the petitioner/fourth defendant and on the other hand, it is only under the circumstances stated therein.

17. In ***Bank of Baroda Vs. Gopal Shriram Panda and Ors*** reported in ***MANU/MH/0987/2021***, a Division Bench of Bombay High Court, after referring to various case laws on the point of exclusion of civil Court's jurisdiction under SARFAESI Act held that Tribunals constituted under SARFAESI Act cannot adjudicate on the civil rights claimed vis-a-vis security interest and its jurisdiction is restricted to examination of legality of actions of secured creditor under Section 13 of the SARFAESI Act. The relevant observation of Division Bench reads as follows:

*"**23.** Keeping in mind the principles as laid down in Dhulabhai (supra), and what we have considered and discussed above, when we ask ourselves a question as to whether the DRT exercising jurisdiction under Sections 13 and 17 of the SARFAESI Act, has the power, nay jurisdiction to determine the Civil Law rights, which may be available to a person, in the security interest, in the same manner as a Civil Court could ? or in other words, can a person who claims a right of partition, specific performance, reliefs under*

Sections 31 and 34 of the Specific Relief Act, preemption, redemption, declaration in respect of a property which is a security interest, approach the DRT for claiming adjudication of his such claim ? and can the DRT grant him such relief ? In our considered opinion, the answer has to be in the negative for the reason that it is not permissible for the DRT to embark on an adjudication of the civil rights claimed vis-a-vis the security interest, in light of the clear, precise and specific language of Section 17 (1) and 18 of the DRT Act read with Sections 13, 17 and 34 of the SARFAESI Act, as already discussed above.

***23.1**. If the DRT is not a Court as held in Nahar Industrial Enterprises Limited (supra), which still holds the field, and the jurisdiction of the DRT is limited and is confined to the extent of examination of the actions of the secured creditor under Section 13 (4) and Section 17 of the SARFAESI Act, within the framework of Sections 17 and 19 of the DRT Act 1993, then the DRT is jurisdictionally incapable and incompetent to adjudicate and decide upon the rights of a civil nature, accruing in favour of citizens, even if such rights are found to be accruing or created by law or otherwise, in the security interest. The jurisdiction to adjudicate and decide such rights of a civil nature, would then continue to vest with the Civil Courts under Section 9 of the C.P.C., whose jurisdiction though otherwise is plenary, omnipotent and unlimited, is limited only by the exclusion clause/provision in various Statutes, which exclusion clause/provision has to be strictly construed.*

***24**. The purpose of creation of the Special Statutes i.e.*

the SARFAESI Act and the DRT Act, 1993, was to facilitate creation of special machinery for speedy recovery of the debts, due to Banks and Financial Institutions, which had gained alarming proportions and still are alarmingly high, and not to obviate or set at naught the civil rights as available to litigants by availing the Civil Law remedy.

***25**. A meaningful interpretation has to be put to the language of the bar as contained in Section 34 of the SARFAESI Act so that the object and purpose sought to be achieved by the Act is not rendered illusory and is fulfilled. However, at the same time, the civil rights, which may be available in respect of security interest, cannot be lost sight of, which also have to be protected and the common law remedy available for the enforcement cannot be rendered ineffective. No doubt, Section 34 by creating a bar of jurisdiction ensures the recovery of public money in a speedy manner, however, the bar has to be read and construed in light of the language it contains and not otherwise so as to impeach upon the rights of a civil nature as available, which are equally important for a citizen. In the zeal to ensure speedy recovery of money, the civil rights which a citizen has, cannot be permitted to be rendered redundant and balance between both the rights has to be maintained, which would only be possible on a case to case basis. The bar under Section 34 of the SARFAESI Act, therefore, in view of the discussion made above, in our considered opinion, is not absolute, but is restricted to examination by the DRT of the actions of the secured creditor under Section 13 of the SARFAESI Act and the rights available under Section 17 of* *the SARFAESI Act, to be in accordance with the provisions of the SARFAESI Act and the Rules made thereunder, as indicated."*

18. In the light of case laws mentioned above, the bar under Section 34 of the SARFAESI Act is limited to the matters over which the Tribunals constituted under the SARFAESI Act are having jurisdiction. The jurisdiction of the Tribunals constituted under the SARFAESI Act is limited to the legality of the proceedings initiated under Section 13 of the SARFAESI Act. Therefore, only to that limited extent, the jurisdiction of the Civil Court is barred and in other respects, the jurisdiction is not ousted. This position was very well clarified in ***K.Deenadayalan's case and Bank of Baroda's case (Cited Supra)***.

19. In view of the discussion made earlier, the submission made by the learned counsel for the petitioner that suit is barred under Section 34 of the SARFAESI Act is not acceptable to this Court. The contract between petitioner and first respondent can very well be enforced in civil Court and any decree passed in the suit is subject to the right of the secured creditor / second respondent bank over the secured asset.

20. The first respondent also prayed for injunction restraining the second respondent from proceeding with the auction of the secured asset. The said prayer is clearly hit by second limb of Section 34 of the SARFAESI Act. The auction proceedings in pursuance of Section 13(2) notice is an auction, which is being taken by the second respondent in pursuance of power conferred on it under the provisions of the SARFAESI Act and the first respondent is not entitled to seek injunction against second respondent bank. However, a plaint cannot be invoked in part while exercising power under Order 7 Rule 11 of C.P.C. Therefore, merely because one of the prayers in the suit is hit by Section 34 of the SARFAESI Act, this Court is not inclined to reject the entire plaint when the first prayer for specific performance is found to be maintainable.

21. The decision relied on by the learned counsel for the petitioner in ***B.P.Samiappan (died) and 4 others Vs. Arunthavaselvan and 3 others*** reported in ***1994-1-L.W.399*** is not applicable to the facts of the present case in view of the fact that statutory provisions viz., Tamil Nadu Land Reforms Act, dealt with in that case expressly declares the transactions to be void. However, as discussed earlier under Section 13 sub-section (13) of the SARFAESI Act, there is no such declaration declaring any transaction violating prohibition contained therein as void. The decisions in ***Canara Bank Vs. P.Selathal and Others*** reported in ***(2020) 13 SCC 143, T.Arivandandam Vs. T.V.Satyapal and Another reported in (1977) 4 SCC 467*** and ***Sopan Sukhdeo Sable and Others Vs. Assistant Charity Commissioner and Others*** reported in ***(2004) 3 SCC 137*** were pressed into service for the proposition that Court should be cautious of clever drafting creating illusion of a cause of action.

22. In the case on hand, as per the averments made in the plaint, first respondent entered into an agreement with the petitioner and the same is sought to be enforced. Whether really the agreement was entered into or it was entered as a security for loan transaction is a matter for trial. In view of the conclusion reached by this Court with regard to the effect of Section 13 sub-Section 13 of the SARFAESI Act, I do not think the plaint involves any clever drafting so as to create illusory cause of action.

23. In view of the discussion made earlier, the civil Revision petition is dismissed with the clarification, any decree passed in the suit is subject to the right of the secured creditor / second respondent over the secured asset. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

15.04.2024

NCC : Yes
Index : Yes

vsm

To

1.The Fast Track / Mahila Judge, Namakkal.

2.The Section Officer,
VR Section,
Madras High Court,
Chennai.

S.SOUNTHAR, J.
vsm

Order in
C.R.P.(PD)No.3756 of 2018

15.04.2024