

(2012) 01 AHC CK 0448
In the Allahabad High Court
Case No : Civil Revision No. 580 of 2010

Allahabad Bank Head Office Kolkata, through its Chief Manager Branch, Kamla Nagar, Agra APPELLANT

Vs

Canara Bank through its Branch Manager, Branch Office At Bodla, Agra and others RESPONDENT

Date of Decision : 17-01-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 17, 34, 35

Citation : (2012) 01 AHC CK 0448

Hon'ble Judges : Prakash Krishna, J

Final Decision : Dismissed

Judgement

Prakash Krishna,J.

In the present revision a vexed and pristine question of law with respect to the maintainability of the civil suit for recovery of borrowed sum filed by the creditor bank against the debtor and security vis a vis the proceedings initiated by another creditor bank namely Allahabad bank against the same borrower for recovery of borrowed sum by invoking Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as SARFAESI Act) is involved. The present revision is against the judgment and order dated 27th of April, 2010. The application under Order 7 Rule 11 C.P.C. filed by the present applicant who is one of the defendants in the suit no.261 of 2008 has been rejected.

Canara Bank instituted suit no.261 of 2008 against the defendant nos. 1 and 2 and also the Allahabad Bank on the allegations that Mata Prasad, father of the defendant no.1 and husband of defendant no.2 who had borrowed a sum of Rs.4 Lakhs on 26th of March, 2003 from the plaintiff bank after executing a housing loan agreement dated 7th of April, 2003 in favour of the plaintiff bank. It was agreed upon that the borrower will repay the amount in 180 equal monthly

instalments along with interest. The borrower executed a letter evidencing the deposit of title deed dated 5th of April, 2003 along with registered sale deed dated 12th of November, 1974 and the property was mortgaged with the plaintiff bank and the bank has first charge on the said property. The borrower failed to repay the amount. The plaintiff bank came to know through newspaper dated 4th of April, 2008 that the Allahabad bank i.e. defendant nos.3 and 4 are going to sell the mortgaged property.

In the suit, a decree for recovery of Rs.6,30,590/ with pendente lite and future interest at the rate of 13.25% per annum with monthly rests against the defendant nos. 1 and 2 jointly and severally claimed. In addition a decree for permanent prohibitory injunction restraining the defendants to sell the property in dispute by way of auction, transfer and alienation as also a preliminary decree under Order 34 Rule 4 C.P.C has been claimed.

The Allahabad Bank, defendant nos. 3 and 4 filed an application under Order 7 Rule 11 C.P.C to reject the plaint on the allegations that the suit is barred by Sections 38 and 41 of Specific Relief Act, by Section 39 of C.P.C, Sections 34 and 35 of SARFAESI Act and Section 3 of the U.P. Public Money (Recovery of Dues) Act vide application dated 31st of July, 2009. In reply, the plaintiff bank came out with the case that the present suit is for recovery of dues of housing loan granted by it to the defendant nos. 1 and 2 and therefore, the Civil Court has jurisdiction to try it.

The trial Court by its order dated 27th of April, 2010 rejected the aforesaid application on the ground that the suit is not barred either by sections 34 or 35 of the SARFAESI Act as its valuation is less than Rs.10 Lakhs. Suits valued more than 10 Lakhs of rupees can be tried by Debt Recovery Tribunal and Civil Court has jurisdiction to try the suits valued below Rs.10 Lakhs.

Challenging the aforesaid judgment and order, the present revision under section 115 of C.P.C has been preferred.

Heard Sri Ashish Srivastava, learned counsel for the defendant bank. He submits that in view of provisions as contained in Sections 17, 34 and 35 of SARFAESI Act, the jurisdiction of Civil Court is barred. Elaborating the argument, it was submitted that the cause of action against them as disclosed in the plaint is the notice published in the newspaper (Hindustan). The said notice is a sale notice for the sale of immovable properties mortgaged to the Allahabad Bank, under the SARFAESI Act. Wide language used in Section 17 of the Act bars the jurisdiction of Civil Court in respect of the steps taken by the secured creditor against the borrower who fails to discharge his liability. It uses the phrase "any person", in its opening sentence which includes every person even a person like the plaintiff herein. Strong reliance has been placed on a judgment of the Apex Court in United Bank of India Vs. Satyawati Tandon and others, 2010 AIR SCW 5267 (para 17 in particular).

In reply, Sri Siddharth, learned counsel for the Canara Bank, submits that the

plaintiff bank is also a secured creditor who has first charge on the mortgaged property. Its loan amount including interest recoverable from the borrowers defendant nos. 1 and 2 being less than Rs.10 Lakhs, it cannot invoke the jurisdiction of the Debt Recovery Tribunal. The only remedy available according to him is to institute a civil suit for recovery of the debt amount as also to enforce the security of the mortgaged property.

Considered the respective submissions of the learned counsel for the parties and perused the record. It is a case where there are two secured creditors and according to both of them the same property has been mortgaged to them by the borrower. The case of the plaintiff bank is that it has the first charge on the property in question. Therefore, the plaintiff bank is entitled to recover the secured amount from the security i.e. the mortgaged property.

It may be correct that the plaintiff cannot institute proceedings for the recovery of the amount due to it, as it is less than Rs. 10 Lakhs. But the plaintiff bank is also aggrieved by the action taken by the Allahabad Bank (defendant Bank) by initiating the process to sell the mortgaged property without intervention of Court, by recourse to SARFAESI Act. Remedy to an aggrieved person has been provided for in Section 17 of the SARFAESI Act.

For the sake of convenience, section 17 (1) is reproduced below:

17. Right to appeal

(1) "Any person (including borrower), aggrieved by any of the measures referred to in subsection (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within fortyfive days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this subsection."

The other provision relevant for present purposes is sections 13 (4) of the SARFAESI Act.

Section 13 of the Act is a provision which provides for enforcement of "Security Interest". Ambit and scope of Section 13 was up for consideration before the Apex Court in the case of Mardia Chemicals Limited and others Vs. Union of India and others (2004) 4 SCC 311 with reference to the Constitutional validity of the SARFAESI Act. The Apex Court examined the SARFAESI Act in detail in the light

of its object and purpose. It also took into consideration the provisions of the Transfer of Property Act relating to the rights of the mortgagor and mortgagee with respect to mortgage and repelled the argument that the mortgaged property cannot be sold without intervention of Court. It concluded that a person against whom the proceedings under section 13(4) of the Act have been taken by secured creditor, in such cases it would be open to the borrowers to file appeals under section 17 of the SARFAESI Act before Debts Recovery Tribunal having jurisdiction within the limitation as prescribed therefor.

The ambit and scope of Section 17 of the Act was up for consideration in the case of United Bank of India (*supra*).

Paragraph 17 from the judgment of United Bank of India (*supra*) for the sake of convenience is reproduced below:

17. "There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

A fair reading of the above quoted paragraph would show that the expression "any person" used in section 17(1) has been held to be very wide. It is having a wide import. It takes within its fold the borrower, guarantor or any other person who may be affected by the action taken under section 13 (4) or section 14. It would be clear from the plaint averments that the plaintiff bank is feeling aggrieved by the action of the defendant bank taken under section 13(4) of the SARFAESI Act.

A bare perusal of the plaint would show that there two sets of defendant therein. Defendant Nos. 1 and 2 are the heirs of the original borrower and defendant nos. 3 and 4 is the Allahabad Bank and its Officers. It would further show that the plaintiff bank has claimed a money decree against the defendant nos.1 and 2 on the basis of secured loan agreement. It has also claimed a decree under Order 34 Rule 4 CPC against them for property described in the plaint. Copy of the Schedule A has not been annexed before this Court. The second relief is for permanent injunction against all the defendants restraining them, their managers and officials from selling the property in suit by way of auction, transfer, alienation or in any other manner.

So far as the personal decree against defendant nos.1 and 2 for recovery of the amount is concerned, it does not appear that the defendant bank has any objection with regard to the maintainability of the suit. The sole grievance of the defendant bank is with regard to the relief claimed in respect of the mortgaged property.

Before proceeding further it may be placed on record that before the trial Court and before this Court as well, the application under Order 7 Rule 11 C.P.C was pressed only on the ground that the plaint is liable to be rejected in view of sections 34 and 35 of the SARFAESI Act. The plea that the suit is barred under other Acts as set out in the application were neither argued nor pressed before this Court.

For the sake of convenience sections 34 and 35 of the SARFAESI Act are reproduced below:

"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).

35. The provisions of this Act to override other laws

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

On a plain and simple reading of Section 34 of the Act, it would show that it can be subdivided in two parts. In the first part it bars the jurisdiction of Civil Court to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered under the said Act. Its second part provides that 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.

Under the General Civil Law, a person having first charge on the mortgaged property has preferential right to recover his dues from the mortgaged property (security). It was neither argued nor any material was placed before this Court nor it is an appropriate stage to adjudicate upon as to out of two creditor banks who has first charge on the mortgaged property although the plaintiff bank claims the first charge over the mortgaged property. In absence of any material to arrive at a definite conclusion the said issue is left as it is to be adjudicated upon in an appropriate proceedings at an appropriate stage if so canvassed.

The cause of action so far as the defendant bank is concerned, against them is the notice published in the newspaper (Hindustan) for sale of the property in dispute which according to the plaintiff bank is also mortgaged with them.

The contention of the plaintiff bank is that it cannot move to the the Debts Recovery Tribunal as its loan amount is less than Rs.10 Lakhs.

The contention of defendant bank is that it has taken recourse to the proceedings under section 13 (4) of the Act and the remedy to an aggrieved person against such action has been provided for under section 17. A conjoint reading of Sections 17 and 34 and 35 of the Act would show that for a measure taken under section 13 (4) of the Act, jurisdiction of the Civil Court to grant injunction by the second part of section 34 is barred. Section 35 of the Act gives overriding effect to SARFAESI Act over other laws. Consequently, whether the plaintiff bank could initiate proceedings for the recovery of secured amount before the Debts Recovery Tribunal or not is of little consequence. There is no such requirement of law under section 17 that only such aggrieved person can approach thereunder whose claim would lie before the Debts Recovery Tribunal. Any person who is aggrieved by any of the measures referred to in subsection (4) of Section 13 taken by secured creditor can approach under section 17 of the Act.

Interpreting Section 34 of the Act, the Apex Court in the case of Mardia Chemicals Limited (supra) has held that full reading of section 34 shows that jurisdiction of the Civil Court is barred in respect of matters which Debts Recovery Tribunal 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 the matters which can be taken cognizance of by Debts Recovery Tribunal though no measure is taken in that direction has so far been taken under subsection (4) of section 13. The relevant extract is quoted below:

"It is further to be noted that bar of jurisdiction is in respect of proceedings which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, Civil Court shall have no jurisdiction to entertain any proceeding thereof. The bar on Civil Court, thus, applies to all such matters which may be taken cognizance of by Debts Recovery Tribunal, apart from those matters in which measures have already been taken under

subsection (4) of section 13."

In the next paragraph it has been laid down that the jurisdiction of Civil Court can be invoked only when action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any proof whatsoever or to say precisely to the extent the scope is permissible to bring an action in the Civil Court in cases of English Mortgages.

The other aspect of the case is that partial rejection of the plaint under Order 7 Rule 11 C.P.C is not possible. Justice C.K. Thakkar in his commentary on Code of Civil Procedure on Page 584 Volume III has written that a plaint cannot be rejected in part and retained in part. If the court is satisfied that a case falls under Rule 11, the plaint has to be rejected as a whole. Divergent views on this point have been noted by the learned author thereafter. However, the matter stands settled by the judgment of Apex Court in *Roop Lal Vs. Nachhattar Singh*, (1982) 3 SCC 487 wherein it has been held that where the plaint did not disclose the cause of action, it was obligatory upon the court to reject the plaint "as a whole" under Order 7, Rule 11 (a). The rule did not justify rejection of any particular portion of a plaint.

The above view has been reiterated in *D. Ramachandran v. R.V. Janakiraman*, AIR 1999 SC 1128, The relevant para 10 is quoted below:

10. "On the other hand, Rule 11 of Order 7 enjoins the Court to reject the plaint where it does not disclose a cause of action. There is no question of striking out any portion of the pleading under this rule. The application filed by that first respondent in O.A. No. 36/97 is on the footing that the averments in the election petition did not contain the material facts giving rise to a triable issue or disclosing a cause of action. Laying stress upon the provisions of Order 7, Rule 11(a), learned senior counsel for the first respondent took us through the entire election petition and submitted that the averments therein do not disclose a cause of action. On a reading of the petition, we do not find it possible to agree with him. The election petition as such does disclose a cause of action which if unrebutted could void the election and the provisions of Order 7 Rule 11(a) C.P.C. can not therefore be invoked in this case. There is no merit in the contention that some of the allegations are bereft of material facts and as such do not disclose a cause of action. It is elementary that under Order 7 Rule 11(a) C.P.C., the Court can not dissect the pleading into several parts and consider whether each one of them discloses a cause of action. Under the rule, there can not be a partial rejection of the plaint or petition." See *Roop Lal Sathi v. Nachhattar Singh Gill* [1982] 3 S.C.C.

Coming to the facts of the present case, it cannot be said that the plaint does not disclose either a cause of action or is barred under law in its entirety. There is a cause of action against the private defendant nos.1 and 2 for recovery of the amount and the suit before Civil Court is not barred for recovery of the amount by any law. The claim being less than Rs.10 Lakhs cannot be laid before Debts

Recovery Tribunal.

In view of the above, the plaint is not liable to be rejected under Order 7 Rule 11 CPC.

There is no merit in the revision. The revision is dismissed.

No order as to costs.