

(2016) 08 CAL CK 0042

In the Calcutta High Court

Case No : G.A. No. 1843 of 2015 with C.S. No. 129 of 2014

Ambay Coke Industries Pvt. Ltd.

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 29-08-2016

Acts Referred:

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 18, Section 19

Citation : (2017) 1 CalLJ 314 : (2017) 1 CalLT 79 : (2017) 1 DRTC 397 : (2017) 1 ICC 690 : (2016) 138 SCL 169 : (2016) 6 WBLR 542

Hon'ble Judges : Sanjib Banerjee, J.

Bench : Single Bench

Advocate : Mr. Mohit Gupta, Mr. R.C. Prusti, Mr. Shaunak Ghosh and Mr. Sanjiv Das, Advocates, for the Respondent; Mr. Surajit Nath Mitra, Senior Advocate Mr. S. Bose, Advocates, for the Plaintiff

Final Decision : Disposed Off

Judgement

Sanjib Banerjee, J. - The most startling feature of this matter is the cavalier manner in which the principal legal issue has been approached on both sides. The bank, in its usual recklessness, has referred to only one judgment which is clearly distinguishable on facts and another which has been subsequently held to be bad law. The plaintiff has carried only one judgment of the Supreme Court for the proposition that a suit of the present kind cannot be transferred to the Debts Recovery Tribunal (DRT), though there is no prayer for transfer in this case and there have been several authoritative pronouncements in recent lines on the maintainability of a suit by a constituent against a bank.

2. The bank has applied for the rejection of the plaint on the ground that it has lodged a claim under Section 19 of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993 after this suit was instituted and it had issued a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 prior to the present suit

being lodged.

3. It is necessary first to see the nature of the suit before noticing, in particular, the reliefs claimed therein. The suit is clearly divisible in two parts: the more assertive part of the suit refers to the plaintiff-constituent's account being wrongfully debited to the tune of about Rs.9.66 crore by the defendant bank sometime in March, 2012; and, the other aspect being the failure by the bank to adhere to the recommendations made by the agencies engaged by the bank to restructure the debt of the plaintiff. Before the factual aspect is noticed in somewhat greater detail in the context of the question that falls for consideration, the anomaly in the two parts to the plaint should not be missed. The first part of the claim is that a debit entry was wrongfully made by the bank and the second part is that, notwithstanding the perceived erroneous entry, the plaintiff's debt ought to be restructured by the bank. If the very basis of the claim is erroneous, it begs the question as to why the restructuring is being insisted upon. However, that may have to do with the fact that the money debited from the plaintiff's account may have been credited to a sister concern; but such aspect of the matter may also not be relevant for the present consideration.

4. The entire substance of the first part of the plaint is that the plaintiff is not liable to pay the bank the money that the bank shows to be due from the plaintiff. The plaintiff claims that the plaintiff did not authorise the bank to either debit the plaintiff's account or credit the sum of Rs.9.66 crore therefrom to company Mahalakshmi or any other; that the bank acted in an unauthorised manner in debiting the plaintiff's account; and, as such, the claim in such regard is without basis.

5. As to the restructuring aspect, it is claimed in the plaint that the bank engaged on agency which recommended the restructuring of the debt of the plaintiff whereupon the bank wanted a second opinion, which was also in favour of restructuring the debt; and such second opinion was forwarded to the plaintiff for the plaintiff's acceptance. The plaintiff claims that the plaintiff forwarded the restructuring proposal to the bank after duly accepting the same. As such, according to the plaintiff, the restructuring of the plaintiff's debt was agreed to between the parties herein and such restructuring would preclude the claim being pursued, whether by way of steps being taken under the Act of 2002 or by filing a money claim before the DRT.

6. It is now that the reliefs claimed in the suit must be seen:

"(a) Decree for recovery/refund of an amount of Rs.9.66 crore (Rupees Nine crore sixty six lacs only) which has been unlawfully debited in the Cash Credit Loan accounts of the plaintiff maintained with the defendant at its S.M.E. branch, being cash credit account A/c Nos. 032267477119 and 030507010680, by levying and/or charging commitment interest and interest under several other heads at exorbitant rates and by capitalizing the same;

(b) Decree for refund/recovery of a further amount of Rs.9.66 crore (Rupees Nine Point Sixty Six Crore), as was debited from the cash credit accounts of the plaintiff, bearing cash credit account nos.30507010680, 32267477119, and was transferred to the Cash Credit account of the said company;

(c) A decree for declaration to the effect that the defendant is not entitled to charge or levy penal interest or commitment interest in any of the loan accounts maintained with it in the name of the plaintiff, in any manner whatsoever or to capitalize interest or penal interest;

(d) A decree for permanent injunction restraining the defendant from levying and/or charging penal interest or commitment interest in any of the loan accounts maintained in the name of the plaintiff with the defendant.

(e) A decree for mandatory injunction defendant to immediately restructure the credit facilities sanctioned to the plaintiff, as is recommended in the report submitted by M/s. Texpro (India) Industrial & Management Consultant, being Annexure "S" hereof.

(f) Mandatory injunction directing the defendant to immediately return and/or make over to the plaintiff all the original title deeds lying in the possession of the defendant pertaining to several properties belongings to the plaintiff, which no more remain required to be kept mortgaged the defendant under the sanction letter dated 24th March, 2012.

(g) A decree for mandatory injunction directing the defendant to rectify the statement of account in relation to each of the loan accounts maintained in the name of the plaintiff with the defendant at its S.M.E. Branch at 50A, Gariahat Road, Ballygunage, Kolkata - 700019, being cash credit account nos.030507010680, 032267477119 and 031284689288 and to supply to the plaintiff fresh statement of accounts.

(h) A decree for permanent injunction restraining the defendant from taking any coercive measure against the plaintiff in any manner whatsoever without first crediting the loan accounts from or authorisation by the plaintiff and without first refunding to the plaintiff the amount realised from it by levying commitment interest and penal interest and by capitalisation thereof and without first rectifying the statement of account and issuing a fresh statement of account in relation to each of the aforesaid loan accounts.

(i) Injunction;

(j) Costs;

(k) Such other relief or reliefs, to which the plaintiff may be found to be entitled in the facts and circumstances of the case."

7. It is evident from the reliefs claimed in the suit - whether or not there is any ground made out in the body of the plaint in support of each of them - that the entire thrust of the suit is to negate or nullify any claim lodged by the bank

before the DRT or any steps taken by the bank under the Act of 2002 in respect of the securities that may have been furnished by the plaintiff to the bank. There are at least two clear reliefs in respect of the securities claimed in the suit.

8. The bank asserts that the account became non-performing and the bank declared it as such on or about December 19, 2013. The bank claims to have issued a notice under Section 13(2) of the Act of 2002 to the plaintiff on March 4, 2014. However, it is also evident from the bank's petition that such notice may not have been served on the plaintiff. The bank published its notice under Section 13(2) of the Act of 2002 in newspapers on or about April 4, 2014.

9. The present suit was filed on or about April 4, 2014 and the plaint presented on April 8, 2014. By May 22, 2014 the bank lodged its claim under Section 19 of the Act of 1993 before the appropriate DRT.

10. According to the bank, the plaintiff was aware of the impending steps against it for which the plaintiff dodged the notice that the bank issued under Section 13(2) of the Act of 2002 and filed this preemptive suit in this Court so as to stall the realisation of the bank's dues or the consideration of the bank's claim by the DRT. The bank says that since the bench of the DRT before which the bank's claim has been lodged is subject to the jurisdictional control of this Court under Articles 226 and 227 of the Constitution of India, it would be embarrassing for such tribunal to go ahead and adjudicate the bank's claim, though the same issue is involved in a previous suit filed in this Court. The bank suggests that the only object of the plaintiff's exercise is to thwart the realisation of the bank's dues and to create grounds of confusion on which some further illusory defence may be raised by the plaintiff to stall the inevitable.

11. The bank has first referred to a judgment reported at (2014) 1 SCC 479 (Jagdish Singh v. Heeralal) where it was held that a Debts Recovery Tribunal could deal with allegations of fraud and the like. However, that matter before the Supreme Court arose from a suit filed by the auction purchaser upon a sale conducted by the bank under the said Act of 2002. The other case cited by the bank is reported at (2007) 1 SCC 97 (State Bank of India v. Ranjan Chemicals Ltd.) where the Supreme Court held that it was possible to transfer a suit from a civil court to a Debts Recovery Tribunal. However, the bank has failed to notice a subsequent judgment of the Supreme Court reported at (2009) 8 SCC 646 (Nahar Industrial Enterprises Ltd v. Hongkong and Shanghai Banking Corporation Ltd), which has been cited by the plaintiff, wherein the judgment in Ranjan Chemicals was held not to be good law.

12. On behalf of the plaintiff, a substantial part of the plaint has been placed and it is submitted that the objection taken by the bank is without basis. The judgment in Nahar Industrial is placed for the proposition that notwithstanding the Act of 1993, the civil court has not lost its jurisdiction to entertain claims of constituents. Several aspects of the judgment in Nahar Industrial have been emphasised on by the plaintiff, including that a constituent has no right to

approach a Debts Recovery Tribunal before a bank applies before such tribunal under Section 19 of the Act of 1993. The plaintiff also seeks to demonstrate that the scheme of the 1993 Act does not envisage any positive order, whether interlocutory or final, being made in favour of a defendant to an action before such forum. The plaintiff also asserts that there is no provision for passing a money award in favour of any defendant since certificates can only be issued in favour of claimant banks and financial institutions by the tribunal and the statute does not provide for the execution of certificates obtained by any constituent. The substance of the plaintiff's submission is that even if the subject-matter of the present suit were to be carried by way of a counter-claim to the action launched by the bank before the appropriate DRT, no money award could ever be made in its favour; or even if a money award were made in favour of the plaintiff herein, as there is no provision for execution thereof, the plaintiff herein would have to file a fresh suit to implement the money award. However, the nature of the present suit is such that if it is pitted against the bank's claim, no money award can ensue in favour of the plaintiff herein; at the highest, the claim of the bank may be reduced or rejected.

13. Section 17 of the Act of 1993 confers authority on the tribunals thereunder to exercise "the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions." Section 18 of the Act of 1993 mandates that "no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to matters specified in Section 17". Section 19 of the Act of 1993 provides for the procedure for applying before a tribunal and the interlocutory applications and orders that may be made therein. Section 19(1) of the Act of 1993 deals with the territorial jurisdiction of the tribunals formed under such Act.

14. On a reading of Sections 17, 18 and 19 of the Act of 1993, there can be no doubt that claims of such banks and financial institutions as are covered by the provisions of the said Act have, per force, to be carried to an appropriate DRT and not to a civil court, where such claim is in excess of Rs.10 lakh. But the wording of Section 18 of the said Act is somewhat more than merely providing for bank claims to be carried exclusively to the tribunals under such Act. The legislative command of such section precludes courts and other authorities from exercising the jurisdiction, powers and authority that may be exercised by a tribunal under such Act.

15. The bank's demurrer in this case is not limited to the Act of 1993 and the primary provision cited for the plaint in this suit to be rejected is Section 34 of the Act of 2002, which provides 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. In addition to the draconian sweep of Section 34 of the Act of 2002 that covers not only matters pending before a tribunal but also matters which are capable of being determined by the tribunal or the appellate tribunal, there is also the all-pervasive Section 35 of the Act of 2002. Such provision mandates that the provisions of the Act of 2002 "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."

17. There was a possibility that if the objection here were taken by the bank merely on the ground of the Act of 1993 and the suit contained any positive reliefs, the challenge may have been repelled. The several reasons which have been cited by the plaintiff in such regard are more than sufficient to justify why every action instituted by a constituent before a civil court cannot be forced to be carried to the tribunal by way of a counterclaim. At any rate, it is evident from Section 19(11) of the Act of 1993 that it is possible for a counter-claim made by a constituent against a bank or financial institution to be thrown out at the instance of the concerned bank or financial institution. It is for such reason, that Nahar Industrial also recognised that a counter-claim could not be carried to the tribunal, unless the parties agreed that the same would be adjudicated by the tribunal.

18. But the bank's objection herein is also founded on Section 34 of the Act of 2002. It must be recognised at this stage that the Act of 2002 is a departure from the general principle that an adjudication would precede execution. In a sense, the said Act of 2002, like the State Financial Corporations Act, 1951, which was limited to a few bodies, gives the power to the banks and financial institutions covered thereby to first obtain control or possession of the secured asset before an adjudication as to the propriety of the bank's action or its claim is gone into. Indeed, the scheme of the Act of 2002 is such that a post-facto objection to the measures taken by the secured creditor may only be raised under Section 17 thereof.

19. Unlike Nahar Industrial, where the Court recognised that a claim carried by a suitor before an appropriate civil court could not be transferred to any Debts Recovery Tribunal since there was no provision therefor, a preemptive claim as the present one made by a constituent against a bank in anticipation of the measures to be taken by a bank cannot be maintained in view of Section 34 of the Act of 2002. The validity of such provision has been upheld by the highest Court of the land and such issue cannot be revisited at this level. But the first limb of Section 34, and particularly the words "is empowered by or under this Act

to determine", are of such wide import that an action before a civil court that was perfectly in order at the time of its institution may at a later stage become incapable of being continued with by virtue of such provision. It is possible that a suit is filed before an appropriate civil court regarding the title to an immovable property and such immovable property later becomes the subject-matter of a bank's claim. At the time of institution of the civil suit, the bank may not have had any claim or the property may not even have been mortgaged or given as security to any bank. But once a bank covered by the said Act of 2002 claims the property to have been secured in its favour, the adjudication of the suit or the title to the property would no longer be possible before the civil court since it would be a matter which the tribunal or the appellate tribunal would be empowered under the Act of 2002 to determine. This is not to question the wisdom of upholding the validity of such provision; but only to indicate the extent of the provision and its wide amplitude and ramifications.

20. There are two parts to Section 34 of the Act of 2002: the first is the authority of a civil court to receive or continue an action and the second is the power of a civil court or other authority to issue an order in the nature of injunction in respect of an action taken or to be taken in pursuance of any power conferred by the Act of 2002 or by the Act of 1993. In other words, even if some actions instituted in civil courts or before other authorities could be saved on the ground that they were not covered by the first limb of Section 34 of the Act of 2002, the complete embargo on issuing an order in the nature of injunction in respect of the matters covered by the second limb of the provision would make the pending suits meaningless if the subject-matter thereof involved any property or matter which the tribunal would be entitled under the said Act of 2002 to determine.

21. Thankfully, the issue in the present context is not as complex as it may get. The scope of the present suit is defensive in nature. Both limbs of this suit, in a way, seek to preempt the bank's claim; whether for realising the amount of Rs.9.66 crore or from proceeding against the plaintiff without restructuring its debt. If the suit had been somewhat differently framed, there may have been a little more difficulty in deciding the issue.

22. In addition to the grounds of defence that a constituent may have against the claim of a bank or financial institution, it is possible that the constituent also has a counter-claim which may not be inextricably linked to the claim of the bank. For instance, if there is delay in disbursal of the sanctioned loan on the part of a bank or financial institution and the delay has caused substantial loss to the constituent that the bank was aware of, the constituent may maintain a claim in damages; which would be somewhat related but not inextricably linked to the claim of the bank in the matter of adjudication. There is a distinction between a positive claim and a defensive claim. When a positive claim is made by a constituent against a bank, as in the case of the example given above, notwithstanding the previous institution of the bank's application under Section 19 of the Act of 1993, the constituent's action may be maintained in a civil

court, at least for the purpose of adjudication. However, when the constituent's claim is purely defensive as in the present case, in view of the wide authority conferred by the Act of 1993 and the embargo placed on civil courts by Section 18 thereof, civil courts should yield in favour of the tribunal under the Act of 1993 and allow such a defensive claim to be urged only by way of a counter-claim before the tribunal.

23. At this stage it is necessary to appreciate the two distinct - and somewhat incongruous - heads of claim made in suit. If the plaintiff succeeds in its assertion that the sum of Rs. 9.66 crore was wrongfully debited from its account, the net effect of that would be that the bank's claim to the extent of Rs. 9.66 crore, and whatever amount may be incidental thereto, would stand reduced by the appropriate quantum. If the second part of the plaintiff's claim, however unlikely, were to succeed and the bank were to be found to be bound to restructure the debt and not pursue its claim, the bank would not be entitled to any immediate payment or an adjudication in such regard. Both these matters or the issues that arise therefrom are eminently capable of being adjudicated before the DRT as being inextricably linked to the bank's claim.

24. The answer to the primary legal question that has arisen in the present case is made easier by the fact that the Act of 2002 is also involved herein. The plaintiff ought to have been aware that its account had been declared as NPA in December, 2013 and, whether or not the plaintiff received the notice under Section 13(2) of the Act of 2002, both the grounds which have been canvassed in this suit were capable of being determined by the tribunal in the event the plaintiff applied under Section 17 of the Act of 2002 after the bank had taken the measures under Section 13(4) of the Act of 2002. That would hold good even if the bank in this case had not applied under Section 19 of the said Act of 1993, which the bank has done about a month after the present suit was instituted.

25. Since the very nature of the plaintiff's claim in this suit, in its twin aspects, is capable of determination by the tribunal within the meaning of the relevant expression in Section 34 of the Act of 2002, the present suit cannot be maintained. In any event, the nature of the claim by the plaintiff herein is such that it has also to be seen to be barred under Section 18 of the Act of 1993.

26. An axiomatic legal principle of yore ? that the maintainability of a suit has to be assessed with reference to the time of institution thereof - may have gone out of fashion in respect of suits by constituents against banks or financial institutions covered by the said Acts of 1993 and 2002. The expression in Section 18 of the Act of 1993 is that "no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority ? in relation to the matters specified in Section 17". The implication of such words is that Courts or other authorities will not only not have the jurisdiction to entertain such matters, but they would also not be entitled to exercise any jurisdiction in such regard. In a situation as the present one, where the only heads of claim are defensive in nature, the primary issues that would arise upon the bank traversing the

averments in the plaint would also be the main issues if the plaintiff herein were to contest the claim before the DRT on merits. Further, since there is no aggressive claim by way of damages or the like for the delay or inaction or conduct of the bank, there is no independent issue that would arise in this suit which would not arise if the bank's claim were resisted before the DRT. That ought to be the real test in the wake of the overwhelming bar under Section 18 of the Act of 1993.

27. Again, if the prohibition of the civil courts' jurisdiction, on a conjoint reading of Sections 34 and 35 of the Act of 2002, is to be given its fullest statutory effect, the primary issues in this suit would both be capable of determination by a tribunal under such Act and the embargo on any consequential injunction would also be operative.

28. Accordingly, GA 1843 of 2015 is allowed by rejecting the plaint relating to CS No. 129 of 2014 or, in other words, dismissing CS No. 129 of 2014 without adjudicating on the merits of the claim therein and by leaving the plaintiff free to assert such claim before the Debts Recovery Tribunal in appropriate proceedings whether by way of any counter-claim or under Section 17 of the Act of 2002 at the appropriate stage.

29. Since this attempt by the plaintiff was a thinly-veiled endeavour to keep the bank's claim at bay, the plaintiff will pay costs assessed at Rs.2 lakh to the defendant bank.

30. Urgent website copies of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.