
(2014) 09 GAU CK 0032
In the Gauhati High Court
Case No : CRP No. 187 of 2013

Bank of Baroda

APPELLANT

Vs

Ranjan Chetia

RESPONDENT

Date of Decision : 08-09-2014

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Section 17
Civil Procedure Code Amendment Act, 2002 — Section 8
Civil Procedure Code, 1908 (CPC) — Order 5 Rule 9, Order 6 Rule 4, Order 7 Rule 1, Order 7 Rule 11, Order 7 Rule 11(a)
Constitution of India, 1950 — Article 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 34

Citation : (2015) 3 BC 721 : (2015) 2 GLT 473

Hon'ble Judges : Nishitendu Chaudhury, J

Bench : Single Bench

Advocate : M. Dutta, Advocate for the Appellant; S.S. Dey, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—In this application under Article 227 of the Constitution of India, the petitioner, Bank of Baroda, has questioned legality and correctness of order dated 24.08.2012 passed by the learned Civil Judge, Tinsukia, in Title Suit No. 24 of 2011. By that order the learned trial court rejected application filed by the respondents under Order VII Rule 11 of the Code of Civil Procedure.

2. The opposite parties No. 1 & 2, as plaintiffs, instituted Title Suit No. 24 of 2011 praying for declaration, inter alia, that creation of guarantee document dated 28.01.2011 and equitable mortgage relating to loan account of M/s. ARK Group is a fraudulent act and that it is neither binding on the plaintiffs nor is the defendant No. 1 entitled to enforce the same against the plaintiffs towards financial aid granted to M/s. ARK Group. The case of the plaintiffs in brief is that in the year 2009 the plaintiffs along with defendant No. 2 decided to establish a business of Restaurant-cum-Bar at Tinsukia. Pursuant to this, they purchased a

plot of land measuring 1279.25 sq., ft. at A.T. Road, Tinsukia vide Registered Sale deed No. 1790 of 2009 at consideration of Rs. 2,50,000/-. Then the defendant No. 2 put forward a proposal to the plaintiffs that he would arrange funds by taking financial assistance from the defendant No. 1, Bank of Baroda, as the defendants No. 3 & 4 who are the officers of the said bank at Tinsukia Branch are in good relation with him. The plaintiffs agreed in good faith. In the month of January, 2010 the defendant No. 2 informed the plaintiffs that a sum of Rs. 28,00,000/- had been sanctioned in favour of them i.e., the plaintiffs and the defendant No. 2 by Tinsukia Branch of the defendant No. 1 and that they were required to create equitable mortgage of the premises purchased by them for executing a guarantee document. Accordingly, plaintiffs having accepted the proposal of defendant No. 2 at face value and having placed implicit confidence in him, met at defendant No. 4 who asked the plaintiffs and defendant No. 2 to come to the Bank at night on 20.01.2010. The plaintiffs complied with the instructions and thereafter, on being asked by defendant No. 4 they signed some papers which were presented before them by the defendant No. 4. On being specifically asked, the defendant No. 4 replied that plaintiffs and defendant No. 2 have been sanctioned a sum of Rs. 28,00,000/- which would be disbursed within a short period of time. But when even after lapse of substantial period of time, they did not receive any money, the plaintiffs made queries to defendant No. 2 as well as defendant No. 3 & 4 who did not furnish any information to the plaintiffs. At that stage, the plaintiffs and the defendant No. 2 empowered the plaintiff No. 1 to establish and run the business with his own money. Accordingly, the plaintiff No. 1 established a Restaurant-cum-Bar and started business since March 2010 with his own finance. In the month of December, 2010 the plaintiff No. 1 obtained "IMFL Bar ON" licence from the Government of Assam and the bar was commissioned. In the mean time, on 10.08.2010 they received a letter from defendant No. 1 issued on 05.08.2010 and addressed to one M/s. ARK Group which revealed that a loan limit of Rs. 28,00,000/- was sanctioned by Tinsukia Branch of the defendant No. 1 in favour of M/s. ARK Group. Smelling foul play of the defendant No. 2, the plaintiffs made enquiry with the defendant No. 2 about the existence and status of M/s. ARK Group and as to procurement and utilisation of loan amount of Rs. 28,00,000/-. The defendant No. 2 refused to disclose the details and rather became furious. He assaulted plaintiffs and hence, finding no other alternative, plaintiffs approached defendants No. 3 & 4, who also did not disclose any information. Situated thus, plaintiffs took recourse to the provision of Right to Information Act, whereupon the defendants No. 1, 2 & 3 parted with information disclosing that loan of Rs. 28,00,000/- was sanctioned to the defendant No. 2 as proprietor of M/s. ARK Group and that plaintiffs were shown as guarantor of the loan. According to the plaintiffs, the officials of the Tinsukia Branch of the defendant No. 1, more particularly, the defendant No. 3 & 4 being in collusion with defendant No. 2, fraudulently obtained signatures of the plaintiffs on the guarantee document and created equitable mortgage of the premises, with a pretext to sanction loan in favour of the plaintiffs and the defendant No. 2 for establishment of Restaurant-cum-Bar over the aforesaid

premises but the sanctioning authority of the defendant No. 1 ultimately sanctioned entire loan in the name of M/s. AKR Group of which defendant No. 2 is the sole proprietor. The plaintiffs also alleged that the defendant No. 3 & 4 acted in collusion with the defendant No. 2 and his associates and committed a serious fraud to misappropriate and embezzle public money. In support of the allegations, the plaintiffs furnished material particulars in detail in subparagraphs A, B, C, D & E of paragraph 9 of the plaint as required under the provision of Order VI Rule 4 of the Code of Civil Procedure. Thus, having stated material facts and particulars in support of the allegations, the plaintiffs approached the learned Civil Court praying for adjudication that the fraud has been perpetrated on them by the defendants No. 1, 2, 3 & 4 in collusion with each other and thereby, the plaintiffs have been wrongly shown as guarantor of defendant No. 2.

3. Upon receipt of the summons, the defendant No. 1 submitted written statement denying the allegation of fraud and also filed an application under Order VII Rule 11 of the Code of Civil Procedure. The substance of the objection raised by defendant No. 1 is that the plaintiffs did not file the suit immediately after the so called fraud was noticed. Plaintiffs have filed the suit only after notice under Section 13 of the SARFAESI Act, 2002, was issued by the bank and so the suit is barred under Section 34 of the same Act.

4. Learned Court heard both sides at length and thereupon, passed order on 24.08.2012 rejecting the application. The learned Court held that since the plaintiffs have come forward with a specific case of fraud of the defendants and has sought declaratory relief on the basis of specific averments made in the body of the plaint, the jurisdiction of the Civil Court is not ousted under Section 34 of the SARFAESI Act, 2002. In so doing the learned Court placed reliance of the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . This order rejecting the application under Order VII Rule 11 of the Code of Civil Procedure has been brought under challenge in the present revision petition.

5. Before venturing to see as to whether impugned order is required to be revised or interfered with under supervisory jurisdiction of this court, it is necessary to have a look at the law of Order VII Rule 11 of the Civil Procedure Code. By now it is almost established that once a suit is instituted it normally drags on for considerably long period of time to reach the stage of finality. Even passing of judgment and decree in a suit is not the last milestone in journey to derive fruit of litigation. There is appeal, second appeal or revision etc., followed by execution proceedings. In the process not only the litigants are involved in recurring expenditures but the subject matter of the dispute also gets stuck. Long and protracted proceeding in a suit is one of the reasons for which civil litigations have earned disrepute. The law makers, therefore, devised a mechanism so that absurd, unnecessary or vexatious litigations can be shot down at the threshold by rejecting the plaint. Order VII Rule 1 is such a law which has vested power with Court to scuttle a vexatious proceeding. Order VII Rule 1 initially had only four clauses specifying as to when a plaint could be

rejected. By Section 17 of the CPC Amendment Act, 1999 an additional clause being clause (e) was added providing that if plaintiff does not file plaint in duplicate, a plaint shall be rejected. Then clause (f) of this rule was incorporated vide Section 8 of the CPC Amendment of 2002 (Act 22 of 2002), whereby it has been provided that if plaintiff fails to comply with requirements of Order VII Rule 9, the plaint is liable to be rejected. Rule 9 requires a plaintiff to take steps within seven days from the date of order directing service of summons under Rule 9 of Order V by presenting as many copies of plaint as the number of defendants on whom such service is ordered by the Court. However, in view of the spirit of pre-existing proviso to this rule incorporated by CPC Amendment Act 104 of 1976, the Court before rejecting a plaint under Rule 11(e) of Order VII is required to give opportunity to the plaintiff for making amend for the lapse. However, even after getting opportunity, the plaintiff does not remove the defect, in that event Court has to reject the plaint.

6. The original provisions warranting rejection of plaint were prescribed under Clauses (a), (b), (c) and (d) of Rule 11 of Order VII. Rule 11(a) provides that where plaint does not disclose a cause of action, the plaint shall be rejected. In so doing court is required to peruse the plaint in entirety and to find whether on a liberal view of the matter, the material facts disclosed in a plaint constitute any cause of action. It is not necessary to look into the averments made in the written statement or any other materials other than plaint. In the case of *Bhau Ram Vs. Janak Singh and Others*, , the Hon''ble Supreme Court held that only averments made in the plaint can be looked into while deciding application for rejection of plaint. (also see, *Abdulla Bin Ali and Others Vs. Galappa and Others*,). The power to reject plaint under this clause can be exercised only if the Court arrives at objective satisfaction that even if all averments made in plaint are proved, the plaintiff would not be entitled to any relief. In such case, even before issuance of summons court can reject a plaint. But at the same time, mere formal reading of the plaint would not be sufficient. Reading must be meaningful. (See, *T. Arivandandam Vs. T.V. Satyapal and Another*,). Plea taken by the defendant in the written statement is not at all relevant for the purpose of deciding as to whether plaint is to be rejected or not. Court cannot presume that any averment made in the plaint is not likely to be established in course of trial or that the stand taken by the plaintiff in its plaint is not factually correct. At the same time in the case of *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others*, , the Hon''ble Supreme Court has cautioned that Court has to ascertain as to whether plaint created an illusion of cause of action by clever drafting.

7. The clause (b) of rule 11 provides where relief is undervalued, and plaintiff on being required by the court to correct the valuation within a time to be fixed by the Court, fails to do so in that event a plaint can be rejected. On the other hand, clause (c) operates in cases where suit correctly valued but plaint is written on paper insufficiently stamped and on being required to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so. Court, however, if satisfied that a plaintiff was prevented by sufficient cause from not removing the

aforesaid defects stated in clause (b) and (c) of Rule 11, then Court is empowered under proviso to this rule to extend time for removing defects. Of course, if even thereafter, the plaintiff does not remove such defects within permitted period, then plaint has to be rejected.

8. Rule 11 (d) is important in this regard. It mandates that if the suit appears from the statement in plaint to be barred by any law, in that event also plaint shall be rejected. Present case comes under this clause. According to the defendant, the suit is barred under section 34 of the SARFAESI Act, 2002 which is quoted 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)."

In view of the discussions made above as to nature and scope of Rule 11 of Order VII of the Code of Civil Procedure, let us see whether from statement made in plaint in the instant case, suit appears to be barred by Section 34 of the SARFAESI Act, 2002. On consideration of the law laid down by the Hon'ble Supreme Court in regard to rejection of plaint, it appears that Court has to read the plaint as a whole to find out as to whether it discloses a cause of action and whether suit is barred by any law. For this purpose nothing except the averments made in plaint can be considered. As long as a plaint, discloses some cause of action which requires a determination by the Court the mere fact that in the opinion of the judge the plaintiff may not succeed in the long run, cannot be a ground for rejection of the plaint.

9. Learned counsel for the petitioner has placed much reliance in the case of Mardia Chemical (Supra) to show that the suit is barred under Section 34 Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as SARFAESI Act). According to the learned counsel for the petitioner only after steps were taken under Section 13 of the SARFAESI Act, the plaintiffs rushed to the Civil Court praying for declaration that fraud was perpetrated on them and thus, the case is squarely covered under Mardia Chemicals (Supra). Learned counsel for the petitioner has placed reliance that Paragraph-50 of the said judgment wherein the Hon'ble Supreme Court specifically held that in matter in respect of which an action may be taken letter on under the SARFA SAI Act the Civil Court shall have no jurisdiction to any proceeding thereof.

10. Paragraph-50 of the judgment in Mardia Chemicals (Supra) is quoted below:

"50. It has also been submitted that an appeal is entertainable before the Debt 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 Debt 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 respondents that there would be no bar to approach the civil court. Therefore, it cannot be said 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 Debt 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 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. 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 Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of section 13."

11. According to the learned counsel for the petitioner, learned trial court did not consider this paragraph of the judgment in right earnest and thus, arrived at erroneous finding. The learned counsel for the petitioner further submits that although there is allegation of fraud in the plaint but in view of observations made in Paragraph-50 of the judgment in Mardia Chemicals (Supra) the impugned order passed by the learned trial court is liable to be set aside and the plaint is liable to be rejected.

12. Having gone through the full judgment of Mardia Chemicals (Supra), it appears that the aforesaid judgment cannot be considered to have imposed a complete ban on entertaining a Civil Suit in a given case. Even in Paragraph-51 of the said judgment the Hon'ble Supreme Court has observed that at least to a limited extent, jurisdiction of the Civil Court can be invoked where the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable that it may not require any probe whatsoever. To say precisely, a scope has been indicated to bring an action in the Civil Court in certain cases. The Paragraph 51 appears to have illustrated one such scope for entertaining suit by the Civil Court. Paragraph-51 of the judgment in Mardia Chemicals (Supra) is quoted below:

"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. Narasimhachariars case (supra) a judgment of the learned Single Judge where it is observed as follows in.

"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold 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 (249). 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) (p. 143)."

13. In the case in hand the plaintiffs have come forward with a specific case of fraud by the defendant No. 2 in collusion with defendants No. 3 & 4. The particulars of fraud as required under the provision of Order VI Rule 4 of the Code of Civil Procedure have been furnished in the plaint. The fraudulent acts described in the plaint by laying down material particulars make out a prima facie case of the plaintiffs to go for trial and the said facts are covered by observations made in Paragraph-51 of the judgment in the case of Mardia Chemicals (Supra). The learned counsel for the petitioner has drawn attention of this Court to a Division Bench judgment of this Court in the case of 2012 (2) GLT 562 (Pannalal bhansali vs. Axis bank Ltd. (M/s) & ors.,) There is no allegation of fraud in that case. The facts stated in the same case are entirely different from the facts in the case in hand. Here is a case where the plaintiffs come forward with a specific plea of fraud by furnishing necessary materials particulars. It is established law that fraud vitiates all and that being the position unless jurisdiction of the Civil Court under Section 9 for entertaining a suit is expressly or implied by ousted objection with such plea cannot be held to be bar merely because the secured creditor has already proceeded with some or other action under Section 13 of the SARFAESI Act, 2002.

14. Section 9 of the Code of Civil Procedure is general and wide. It is an enforcement of the maxim Ubi jus ibi remedium. A litigant thus having a grievance of civil nature has a right to institute a civil suit in a competent Civil Court unless its cognizance is either expressly or impliedly barred. It is established law that even in the case of express or implied ouster of jurisdiction of Civil Court, a suit may lie if it is made out by appropriate pleadings that the fundamental principle of judicial procedure has been violated and/or that the

provisions of Act which bars jurisdiction of the Civil Court have not been strictly followed. The aforesaid view expressed by the Privy Council in the case of AIR 1940 105 (Privy Council) has been subsequently adopted by the Hon"ble Supreme Court in various judgments. A Full Bench Judgment of this court in Daulat Ram Lakhani vs. State of Assam & others reported in (1989) 1 GLR 131 contains all the previous references in this regard. Apart from violation of the principles of natural justice and/or violation of the provision of the Act, there is yet another exigency when a Civil Court alone can have the jurisdiction to decide a lis. This is the allegation of fraud.

15. Chief Justice Edward Coke of England observed about three centuries ago "Fraud avoids all judicial acts, ecclesiastical or temporal." In the case S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , Hon"ble Supreme Court took note of this view and held "A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order to gain by another's loss. It is a cheating intended to get an advantage." What have been pleaded in the plaint in question are material facts of such a deliberate act of deception in concert among all defendants. These allegations ultimately may succeed or may not succeed. But on the face of the allegations, a prima facie case has been made out to claim that fraud has been perpetrated on the plaintiffs. At this stage neither trial court nor this court exercising revisional jurisdiction can venture to decide correctness or otherwise of the statements. That shall be task of the Civil Court during trial. For limited purpose of decision within scope of order VII Rule 11(d) of the Code of Civil Procedure, the pleaded facts are sufficient to make out case of prima facie fraud.

16. Now, the next question arises as to whether such disputed facts on fraud can be decided by Debt Recovery Tribunal (for short, "DRT"). Can a DRT pass decree holding that there is fraud even if best of the evidence is adduced in support of the specific pleadings of fraud under order VI rule 4 of the Code of Civil Procedure? Can it pass anything more than issuing a recovery certificate? All these questions came up for considerations before the Hon"ble Supreme Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, and it is held that DRT is a tribunal constituted for a specific purpose and no independent issue can be initiated before it by a debtor. It cannot pass a decree. It can only pass recovery certificates. In the present case there shall be oral and documentary evidence by both sides to prove and disprove respective allegations on fraud going much beyond the books of accounts and banking notes and this would warrant interrogatories as well as examinations and cross examinations of witnesses. Considering the nature, scope, power and jurisdiction of the DRT as revealed in the discussions of the case of Nahar Industrial Enterprises Ltd. (supra), it does not appear that allegations of the nature mentioned in the plaint under question, can be decided by a DRT. It can be done by the Civil Court only.

17. In this regard there is yet another aspect. In a given suit involving arbitration agreement, if defendant appears and files an application informing the Court that there is arbitration agreement between the parties in regard to the subject matter of the suit, in that event under Section 8, the Civil Court is duty bound to refer the parties to arbitration. In a catena of judgments of the Hon''ble Supreme Court, it was initially held that once an application is filed under Section 8 of the Arbitration and Reconciliation Act, 1996, enclosing a copy of the arbitration agreement then the Civil Court becomes functus officio and is bound to refer the matter to arbitration without going for trial of the suit. But in the case of N. Radhakrishnan Vs. Maestro Engineers and Others, , the Hon''ble Supreme Court placed reliance on earlier judgment in the case of Abdul Kadir Shamsuddin Buberi Vs. Madhav Prabhakar Oak, and held that in the event of serious allegation of fraud, in regard to execution of the agreement or the subject matter of the suit, it is Civil Court which can decide the matter and so decision of not referring the case to arbitration was justified. This judgment was passed keeping in view that an Arbitral Tribunal cannot decide complicated questions of facts involving allegations of fraud. Summarizing the effects of Nahar Industrial Enterprises Ltd. (Supra) and N. Radhaskrishnan (Supra) on one hand and that of Mardia Chemicals (Supra) on the other hand, this Court feels that the learned trial court has not committed any error in rejecting prayer for rejection of plaint in the present case. The suit in question involves allegations of fraud against the defendants so in the fitness of things these allegations can be tried by a Civil Court only not by any tribunal far less a DRT which has no power to pass a decree but can only issue recovery certificates.

18. The revision petition is devoid of any merit. It is accordingly dismissed.

19. No order as to cost.