

(2017) 02 MAD CK 0186
In the Madras High Court
Case No : 693 of 2011

Bank of Baroda

APPELLANT

Vs

R.Subramanian

RESPONDENT

Date of Decision : 01-02-2017

Acts Referred:

Contract Act, 1872, Section 56 -
Agreement to do Impossible act
Recovery of Debts Due to Banks and Financial Institutions Act, 1993,
Section 18, Section

Citation : (2017) 02 MAD CK 0186

Hon'ble Judges : N.Sathish Kumar

Bench : SINGLE BENCH

Advocate : N.Sathish Kumar

Judgement

1. The 1st defendant in C.S.No.693 of 2011 has taken out this application seeking to reject the plaint in the above suit.
2. The case of the applicant/original 1 st defendant Bank is that it has advanced a loan to M/s. Subhiksha Trading Services Ltd (In short "STSL"), the second respondent herein. The 1 st respondent/ original plaintiff is a Guarantor to the applicant Bank in respect of dues payable by the STSL. As there was a default in paying the loan amount, the applicant/original 1 st defendant Bank has filed an application in O.A.No.178 of 2011 before the Debts Recovery Tribunal -I (DRT), Chennai for recovery of a sum of Rs.88,16,33,236.28/- . The 1 st respondent/ original plaintiff has also filed a written statement before the DRT contending that the said guarantee is unenforceable. Besides he has also filed interim application for discharge by raising the same allegation as has been made in the present suit and the same was dismissed. An appeal filed before the Debts Recovery Appellate Tribunal (DRAT) against the said order also did not yield result in his favour. In the above circumstances, he has filed the present suit declaring the Guarantee as null and void. According to the applicant / original 1 st defendant Bank that the suit is hit by Section 18 of the Recovery Debts due to

the Banks and Financial Institutions Act, 1993 (In short "RDDDB"). Hence, the applicant/ original 1 st defendant Bank prayed for rejection of the plaint in C.S.No.693 of 2011.

3. Denying the allegations, the 1st respondent/original plaintiff filed a counter contending that the applicant / original 1st defendant Bank has filed an Original Application No.185 of 2009, renumbered as OA.No.178 of 2011 for recovery of a sum of Rs.88,16,33,236.28p wherein, the 1st respondent/original plaintiff was arrived as a second defendant on the basis that there wa Guarantee executed by him in respect of the loan availed by the original 2 nd defendant, i.e. STSL. It is the contention of the 1st respondent/Original Plaintiff that the Guarantee was taken as a mere formality knowing that the same was not enforceable. According to the 1st respondent/original plaintiff, the various lender banks to STSL had taken Guarantees aggregating to Rs.800 crores from him even though all of them were aware that his networth was not even Rs.5 crores and there was no feasibility of such Guarantees being performed by him. As contracts not capable of being performed even at the time of being entered into the Guarantees executed by him in favour of various banks are ab initio void as per Section 56 of the Contract Act. According to the 1st respondent/original plaintiff that RDDDB Act only bars suits by banks for recovery from being filed in Civil Courts and no manner bar suits against the Banks. Hence, he prayed for dismissal of the application.

4. The learned counsel for the applicant/original 1st defendant Bank submitted that the suit has been filed to declare the Guarantees executed by the 1st respondent/ original plaintiff in favour of the applicant/ 1 st defendant Bank as void and unenforceable. In fact, the Bank has already filed proceedings before the DRT for recovery of the amount advanced to STSL, in which the original plaintiff has also filed interim application in I.A.No.562 of 2010 raising the similar ground and to decide the same as the preliminary issue. Therefore, now the present suit filed for declaration of the Guarantee executed by the original plaintiff as void, is in fact barred under the RDDDB Act. It is the further contention of the applicant/original 1 st defendant Bank that the present suit is the abuse of process of law as all these defence can very well be agitated before the DRT and Civil Court jurisdiction is totally barred in the matters relating to the recovery of the loan. Hence, the learned counsel for the applicant/ original 1 st defendant Bank prayed for rejection of plaint. In support of his arguments, the learned counsel for the applicant Bank has placed reliance on the judgments reported in (2016) 7 MLJ 641 (Cambridge Souldions Limited v. Global Software Limited); 2014 1 SCC 479 (JADISH SINGH V. HEERALAL AND OTHERS); 1969 SC 78 (1) (DHULABHAI VS. STATE OF M.P) and 2012 (3) CTC 785 (SRI CHANDRU VS. K.NAGARAJAN).

5. Whereas it is the contention of the learned counsel for the 1st respondent/original plaintiff that the Guarantee obtained by the Bank are unenforceable in law. Section 18 of the RDDDB Act only bars the suit by banks for recovery from

being filed in Civil Courts and no manner bars suits against banks. The Guarantee is incapable of performance and the same is frustrated and void as per Section 56 of the Contract Act. It is the contention of the learned counsel for the original plaintiff that the enforceability of the contract can be decided only by the Civil Court. Hence, the learned counsel for the original plaintiff prayed for dismissal of the suit. In support of his contention, the learned counsel for the original plaintiff has placed reliance on the judgments of the Hon`ble Supreme Court reported in (2009) 8 SCC 646 (NAHAR INDUSTRIAL ENTERPRISES LIMITED V. HONG KONG AND SHANGHAI BANKING CORPORATION)

6. In the light of the above submissions, now the point arises for consideration in this application is as to whether the suit filed by the plaintiff is maintainable before the Civil Court or not.

7. The suit has been filed to declare the Deed of Guarantee executed by the original plaintiff as void ab initio and also restraining the first defendant Bank making or pursuing claim against the plaintiff in connection with the Deed of Guarantee dated 06.02.2008.

8. It is the contention of the original plaintiff in the plaint that though his net worth is not more than 5 crores, the document executed by him as Guarantee in favour of various banks would show the worth around Rs.800 crores, which is highly impossible and not enforceable as it is incapable of performance. According to him, it was obtained only for the sake of record. Further, the pleadings clearly indicate that the proceedings against the plaintiff have already been taken by the applicant/original 1st respondent Bank before the DRT and in the above proceedings, the original plaintiff has also filed an application in I.A.No.562 of 2010 to decide the preliminary issue and the same was negatived by the DRT as well as DRAT. The above facts clearly indicate that the original plaintiff has already taken a similar stand before the DRT as well as DRAT that Deed of Guarantee is unenforceable. Having taken such a stand before the DRT & DRAT, the plaintiff is now trying to achieve, by way of the present suit, what he could not before the Tribunal.

9. It is to be noted that the DRT and DRAT are constituted specifically for recovery of money from the defaulter and all recovery proceedings by the Banks would be instituted only before the said Tribunal. The Tribunal is empowered to decide all the issues pertaining to the recovery of loan. Therefore, this Court is of the view that having taken similar defence before the DRT as well as DRAT, filing of the present suit on the same ground by the original plaintiff is only to stall the proceedings before the Tribunal, which is nothing but abuse of process of law.

10. In this regard, it is useful to refer the judgment of the Hon`ble Supreme Court reported in AIR 1969 SC 78 (DHULABHAI etc., vs. STATE OF MADHYA PRADESH) wherein the Apex Court has held as follows: ".. ..(1) Where the statute gives a finality to the orders of the special Tribunals the civil courts" jurisdiction must be held to be excluded if there is adequate remedy to do what

the civil courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegality collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

11. Similarly, in 2014 (1) SCC 479 (JAGADISH SINGH V. HEERALAL AND OTHERS), the Hon`ble Apex Court has held as follows: ".. .. 24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, subsection (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of

Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

12. In 2012 (3) CTC 785, the Division Bench of this Court has held as follows: " 22. Observing that Courts have a greater duty to see that the allegations of fraud are made just for the purpose of maintaining a Civil Suit and categorising such civil suits filed challenging SARFAESI Act in 3 or 4 categories, in Punjab National Bank vs. J.Samsath Beevi, (2010(3) CTC 310)), V.Ramasubramanian,J., held as under:

8. But at the same time, the Court has a duty to see, if such allegations of fraud are thrown, just for the purpose of maintaining a suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. If by clever drafting, the plaintiff creates an illusion of a cause of action, the Court is duty bound to nip it in the bud. To find out if it is just a case of clever drafting, the Court has to read the plaint, not formally, but in a meaningful manner. So is the dictum of the Apex Court in T.Arivandandam vs. T.V.Satyapal {1977 (4) SCC 467}. It was again reiterated by the Court in I.T.C. Ltd vs. Debts Recovery Appellate Tribunal {1998 (2) SCC 70}, by holding that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order VII, Rule 11(a).

9. A Court is obliged to see if the allegations of fraud and collusion made in the plaint, are themselves a product of "fraud and collusion" between the family members of the borrowers, so as to escape liability and save the secured assets, somehow or the other. In the recent past, there is a sudden spurt in the number of civil cases filed against the actions initiated by Banks and Financial Institutions, either under the 1993 Act or under the SARFAESI Act, 2002. All these cases fall under 3 or 4 categories viz.,

(i) cases filed by strangers claiming that their properties are brought to sale on the basis of forged documents or certified copies of documents submitted by borrowers to banks

(ii) cases filed by guarantors claiming that they never signed letters of guarantee or offered their properties as securities

(iii) cases filed by close relatives of borrowers such as spouses, children, brothers and sisters, claiming that they have a share in the properties mortgaged by the borrowers and that they were never aware of and they never gave consent to the properties being offered as securities and

(iv) cases filed by third parties claiming that the properties were sold to them by the borrowers or guarantors by suppressing the creation of the mortgage and that they are bona fide purchasers for value without notice of the encumbrances.

10. It is not very difficult for a seasoned litigant or an intelligent lawyer to draft the plaint in such a manner as to make a secured asset, come within anyone of the above 4 categories, by a clever drafting of the plaint, thereby creating an illusion of fraud, collusion, misrepresentation and the like. Today, with the advancement of technology, the creation of an illusion and the creation of a virtual world are both possible. The moment the civil suit is taken on file, the proceedings before the Debts Recovery Tribunal or under the SARFAESI Act, 2002, gets slowed down. This results in two consequences viz., (i) out of frustration, the banks agree for one time settlements or (ii) third party rights get created by taking advantage of the situation. Therefore, the Courts have a greater responsibility to scan the pleadings and see if the allegations of fraud and collusion made in the plaint are actually a product of fraud and collusion between the borrowers and those making such claims." 23. Courts have a duty to see whether genuine grounds have been made out to attract the jurisdiction of the Civil Court. No generalisation could be made as to when a Civil Suit is maintainable or when the jurisdiction of the Civil Court is ousted. In the facts and circumstances of each case, it is to be examined whether there is genuine grievance to be redressed in the Civil Court... .. "

13. It is also useful to refer the latest judgment of this Court reported in (2016) 7 MLJ 641 (CAMBRIDGE SOLUTIONS LIMITED V. GLOBAL SOFTWARE LIMITED), wherein the Division Bench of this Court has held as follows: "... ..The plaintiff having already invoked the jurisdiction of the DRT cannot sustain the suit by invoking the original jurisdiction of this court for the very same relief. However, it is at liberty to take up the cause before the DRT. Also, even according to the plaintiff, the fact about attachment and issuance of duplicate debentures, came to their knowledge in April 2006 itself. But, the suit has been filed only in 2007. The reasons given by the plaintiff is not acceptable as even according to them, they had parted with huge money to the 3 rd defendant and if the allegations of fraud are true, they ought to have approached the tribunal at the earliest. Therefore, we are of the view that the plaintiff would have no cause of action to set at naught the recovery proceedings initiated as per law and the orders passed by the competent authority having jurisdiction. Also, the suit is barred by the provisions of the RDDB Act. The learned judge has failed to consider the averments in the plaint with the documents carefully and has rather

travelled with the contentions and probabilities of the case. The learned judge also failed to consider the implied bar under the RDDB Act. Hence, the order of the learned judge in A.No.339/2008 is set aside. The plaint is rejected. The plaintiff is at liberty to work out his remedy as per the provisions of the RDDB Act as against the 3rd defendant, if so advised. For the reasons stated above and in view of the fact that the suit is held to be not maintainable, the order in OA.No.1034/2007 cannot survive. Hence, the same is set aside. "

14. From the above judgments and the principles set out therein, it is very clear that jurisdiction of Civil Court would be ousted with regard to the dispute relating to recovery of the proceedings. Of course, the Civil Court has jurisdiction to decide the issue if any fraud has been played by the secured creditor. Otherwise, for deciding the enforcement of agreement, this Court is of the view that the Tribunal has all powers to decide the same. The Tribunal is not mere collection agent to pass an order with regard to the issue of recovery certificate based on the documents and contracts executed by the parties. The enforcement of the contract can very well be decided by the Tribunal. Therefore, the contention of the original plaintiff that only Civil Court can decide the enforceability of Guarantee is not sustainable in law.

15. The original plaintiff having filed the application to decide the similar issue before the DRT as well as DRAT, as the preliminary issue, now cannot re-agitate the same by filing the present suit on the similar ground. As repeatedly held by the Courts, clever drafting itself will not make sufficient to infer the jurisdiction. Sections 17 and 18 of the RDDB Act clearly set out the procedure for entertaining the application filed by the Bank for recovery of loan amount. Section 17 of the RDDB Act empowers the tribunal to exercise the jurisdiction, powers and authority to entertain and decide the applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial Institutions. The powers vested with the Tribunal under Section 17 of the RDDB Act is not a mere formality. The power to decide the application includes the power to test the validity of the documents relied on by the Banks. Section 18 of the RDDB Act bars the Civil Court jurisdiction relating to the matters specified under Section 17. The original plaintiff, having approached the DRT as well as DRAT on the similar grounds that the Guarantee executed by him is unenforceable, cannot file the present suit seeking declaration of the said Guarantee as void. If such suit is entertained by this Court, no bank would be able to recover money from the unscrupulous defaulters.

16. Having regard to the above judgments and the allegations contained in the plaint, this Court is of the view that the suit is barred by Section 18 of the RDDB Act.

17. Though the learned counsel for the original plaintiff/1st respondent herein has relied upon the judgment of the Hon`ble Supreme Court reported in (2009) 8 SCC 646 (NAHAR INDUSTRIAL ENTERPRISES LIMITED V. HONG KONG AND SHANGHAI BANKING CORPORATION) , the same is not applicable to the facts of

the present case. In the said judgment, the issue was with regard to the derivative contracts, which were alleged to be the violation of Foreign Exchange Management Act, 1999 as well as the circulars and guidelines issued by the Reserve Bank of India. Only taking note of the derivative contracts, the civil Court Jurisdiction was retained by the Hon`ble Supreme Court. Therefore, this Court is of the view that the present suit is nothing but abuse of process of law. The plaintiff, having approached the DRT for the similar issue can very well agitate the same before it. The captioned application is allowed on the above terms. Consequently, the plaint in C.S.No. 693 of 2011 is rejected.