
(2015) 04 CAL CK 0114
In the Calcutta High Court

Case No : G.A. Nos. 2991 of 2012 and 3073 and 3501 of 2014 and C.S. No. 363 of 2012

Criss Niryat Private Limited and Others APPELLANT

Vs

Naresh Kumar Agarwal and Others RESPONDENT

Date of Decision : 20-04-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17, 2(o)

Citation : (2015) 4 BC 338 : (2015) 2 CALLT 463

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Sakya Sen, Krishna Mullick and Chanchal Kumar Dutt, for the Appellant; Aniruddha Roy and Sanajit Kumar Ghosh, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Soumen Sen, J—This application has been taken out by the defendant No. 2, United Bank of India, for rejection of plaint. The plaintiff has instituted the suit against the defendants praying, inter alia, for a declaration that the notices dated 13th August, 2011 and 14th August, 2012 issued by the defendant No. 2 is illegal, null and void and liable to be set aside. It is stated in the plaint that the defendant No. 1 and the defendant No. 3 are acting hand in glove with each other and have acted in a manner prejudicial to the interest of the company. The said defendants were instrumental in persuading the plaintiff No. 2 in executing personal guarantees in favour of the bank in consideration of grant of loan and cash credit facilities to the plaintiff No. 1. The cause of action against the defendant No. 2 is stated in Paragraph 16 of the Plaint. It is stated that the defendant No. 2 allowed the defendant No. 1 to solely operate the cash credit account of the Company without considering and ignoring the resolution passed

by the Board of the Company on 26th June, 2010. The bank did not reply to the notices issued by the plaintiffs with regard to the non-compliance of the resolution taken by the Board of the Company on 26th June, 2010. The plaintiffs have received a notice purported to have been issued under section 13(2) of the Securitisation Act alleging that the account of the cash credit and term loan account standing in the name of the plaintiff No. 1 had become NPA on 31st July, 2011 and called upon the Company as well as the guarantors to discharge in full the liability of the bank. Since the defendant No. 2 was not disclosing the information relating to transaction alleged to have been illegally conducted by the defendant No. 1 in the cash credit account of the company maintained with the defendant No. 2, the plaintiff applied under the Right to Information Act and pursuant thereto the Public Information Officer on 9th March, 2012 furnished certain documents. On perusal of the documents furnished by the Public Information Officer several irregularities were noticed. It is alleged that the irregularities mentioned in Paragraph 21 of the Plaint have been committed by the defendant No. 1 in collusion and conspiracy between the defendant Nos. 2 and 3. In paragraph 23 the plaintiffs gave particulars of the fraud alleged to have been committed by the defendants in collusion with each other. It is further alleged that in spite of protest being raised by the plaintiff No. 2 against the issuance of the notice dated 13th August, 2011, no step was taken by the bank. On the contrary, in or about 14th August, 2012, the plaintiff No. 2 had received another notice dated 14th August, 2012 purported to have been issued under section 13(2) of the Securitisation Act which is practically a verbatim reproduction of the earlier notice dated 13th August, 2011. It is stated that the defendant No. 3 being a Manager of the defendant No. 2 acted in collusion with the defendant No. 1 and perpetrated fraud upon the plaintiff No. 1 and, accordingly, the bank is not entitled to enforce the remedies available to it and enforce the securities in respect of the cash credit account. The plaintiffs claimed to have filed a criminal complaint against the defendants on 1st September, 2012. On the aforesaid pleading, the plaintiffs claimed declaration that the said notices dated 13th August, 2011 and 14th August, 2012 issued by the defendant No. 2 are illegal, null and void and liable to be set aside. It is further stated that the defendant No. 3 as the Branch Manager of the defendant No. 2 Bank has aided and abetted illegal and unauthorized use of the moneys originally sanctioned by the defendant No. 1. The defendant Nos. 2 and 3 are required and obliged to account for the moneys allowed to be illegally withdrawn and/or transferred at the instance of the defendant No. 1.

2. The defendant No. 2 has filed this application for rejection of the plaint and for recalling of the ad interim order dated 24th September, 2014. In the petition it is stated that the plaintiff No. 1 is the borrower. The plaintiff No. 2 and the defendant No. 1 along with one Smt. Salani Samir Saraiya, are the guarantors in respect of a term loan facility for a sum of Rs. 150 lacs and a cash credit facility for a sum of Rs. 150 lacs, aggregating to an overall limit of Rs. 300 lacs obtained by the plaintiff No. 1 from the said bank on the terms and conditions mentioned

in the sanction letter dated 30th June, 2009.

3. For the purpose of availing of the said Credit facility, the plaintiff No. 1 duly passed a Board resolutions on April 8, 2009 and June 26, 2009 respectively wherein the Directors of the plaintiff No. 1 decided to avail of the said financial assistance from the said bank to run its business and the defendant No. 1 was duly authorized to execute all the necessary papers, agreements and documents with the said Bank in usual course of business. In consideration of the bank agreeing to grant such credit facilities, the plaintiff No. 1 and Smt. Salani Samir Saraiya have jointly executed a letter of guarantee dated 30th June, 2009. The plaintiff No. 1, the plaintiff No. 2 and the defendant No. 1 have also created equitable mortgage of immovable property. The plaintiff No. 1, however, has failed to adhere to the terms of the credit facilities and thereby a sum of Rs. 2,19,58,395/- became due and payable as on March 31, 2010. In spite of repeated demands neither the plaintiff No. 1, the borrower, and the said guarantors paid the just and lawful dues of the bank. As a result thereof the said Loan Account was classified as a "Non Performance Assets" (NPA) on July 31, 2011 within the meaning of section 2(o) of the said SARFEASI Act.

4. On or about August 13, 2011, the defendant Nos. 2 and 3 issued the First Notice under section 13(2) of the SARFEASI Act claiming a sum of Rs. 2,97,24,937/-. Upon receipt of the said First SARFEASI Notice the plaintiff No. 1 approached the defendant No. 2 for settlement, following which, negotiations and discussion took place and the plaintiff No. 1 from time to time paid some amount in order to regularise its accounts. The plaintiff No. 1, however, defaulted to repay the loan during 2012 when the said bank was constrained to issue the Second SARFEASI Notice dated August 14, 2012 under section 13(2) of the SARFEASI Act claiming a sum of Rs. 2,67,68,009/-. On 25th September, 2012, the defendant No. 1 on behalf of the plaintiff company made a representation against the said notice. The said representation on consideration was, however, rejected by the bank on 29th September, 2012. In terms of the notice dated August 14, 2012 issued under section 13(2) of the SARFEASI Act, as stated above, on November 2, 2012, the bank took symbolic possession of the secured asset, namely, the said Champahati property in exercise of its power under section 13(4) of the SARFEASI Act. On 20th November, 2012, the bank had initiated a proceeding under section 19 of the Recovery of Debts due to Bank and Financial Institutions Act, 1993 which was registered as OA No. 419 of 2012, for realization of its dues from the plaintiffs and the defendant No. 1. In the said proceeding, the applicant has prayed for enforcement of mortgaged securities. The bank thereafter has taken steps to sell the secured asset by public auction in terms of a sale notice dated 2nd December, 2012 after taking possession of the assets in question in terms of Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002. The bank with great difficulties could sell Champahati Property on 25th August, 2014. In the meantime, in or about August 25, 2014 the plaintiff No. 1 filed SA Case No. 1008 of 2014 challenging the measures taken under section 13(4). The said application was duly signed by the

defendant No. 1. In the said proceeding, an order was passed giving liberty to the borrower to sale the Champahati property in accordance with law. It is submitted that the plaintiffs have suppressed the filing of SA Case No. 1008 of 2014. The said application is alleged to have been moved on September 11, 2014 before the learned Kolkata Debts Recovery Tribunal-2 (hereinafter referred to as the "said DRT-2"). It is submitted that the interim order was obtained by suppression of the aforesaid orders and the proceedings initiated by the company. It is further stated that on a reading of the plaint, it would be evident that the civil suit has been filed to defeat the lawful and bona fide claim of the defendant No. 2 and to resist the bank from enforcing its right under the provisions of SARFEASI Act. It is submitted that the plaintiff is a family company of Agarwalas and the family members of the Agarwalas have set up an internal family dispute to defeat the legitimate claim of the bank. It is submitted that in view of section 34 of the SARFEASI Act, Civil Court has no jurisdiction to pass any declaration that the notices issued under section 13(2) of the SARFEASI Act are illegal and null and void. The bank has also invoked the provisions of section 13(4) of the SARFEASI Act. It is submitted that a reading of the plaint would show that the suit is vexatious, mala fide, frivolous and harrassive and the suit has been filed only to resist the defendant No. 2 from realizing its lawful claim against the plaintiff No. 1 and its directors.

5. While the basis of the argument on behalf of the bank is based on a decision of the Hon'ble Supreme Court in Jagdish Singh Vs. Heeralal and Others, (2014) 1 ABR 124 : (2014) 2 AD 647 : (2013) 11 AD 624 : AIR 2014 SC 371 : (2013) 4 BC 744 : (2013) 117 CLA 173 : (2014) 1 CompLJ 307 : (2014) 1 CTC 652 : (2013) 14 JT 173 : (2013) 13 SCALE 359 : (2014) 1 SCC 479 : (2014) 2 SCJ 460 the sheet anchor of the argument of the plaintiffs" constituents is the decision of the Hon'ble Supreme Court in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, (2009) 10 JT 199 : (2009) 10 SCALE 360 : (2009) 8 SCC 646 : (2009) 12 SCR 54 .

6. Before I consider the said application on merits, there are few facts which have emerged undisputed.

7. The plaint discloses some internal dispute in the running and management of the plaintiff No. 1. It is significant to note that the plaintiff No. 2, who is now so vocal and wants his voice to be heard, was completely silent when the notices under section 13(2) was issued by the bank. The measures taken by the bank under section 13(4) of the SARFAESI Act, 2002 was not challenged by the plaintiff No. 2. It appears that the defendant No. 1 has filed an application challenging the measures taken by the bank. The plaintiff No. 2 was sitting on the fence and it was only after the process of sale was initiated by the defendant No. 2 that the present plaintiff No. 2 has instituted the suit as a preemptive action. The plaintiff No. 2 is a party to the proceeding initiated by the bank in the year 2012 for recovery of money under the Recovery of Debts due to Banks and Financial Institutions Act, 1993.

8. The plaintiff No. 2, however, did not file his objection in the said proceeding. There is some force in the argument made on behalf of the bank that the plaintiffs and the defendant No. 1 have set up an internal dispute with a view to prevent the bank from proceeding with the pending proceedings.

9. There cannot be any doubt that the RDB Act completely ousts the jurisdiction of this Court. In the SARFAESI Act, the provisions are more stringent and there is a complete ouster of the jurisdiction of the Civil Court as one could find in section 34 of the said Act which reads:

"S. 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).

The scope of the said section was considered by the Hon'ble Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 .

The said decision was subsequently followed in *Jagdish Singh Vs. Heeralal and Others*, (2014) 1 ABR 124 : (2014) 2 AD 647 : (2013) 11 AD 624 : AIR 2014 SC 371 : (2013) 4 BC 744 : (2013) 117 CLA 173 : (2014) 1 CompLJ 307 : (2014) 1 CTC 652 : (2013) 14 JT 173 : (2013) 13 SCALE 359 : (2014) 1 SCC 479 : (2014) 2 SCJ 460 and *Standard Chartered Bank Vs. V. Noble Kumar and Others*, (2013) 117 CLA 18 : (2013) 180 CompCas 137 : (2013) 4 CompLJ 417 : (2013) 6 CTC 683 : (2013) 10 SCALE 540 : (2013) 9 SCC 620 .

The scope of section 34 came up for consideration in the said *Mardia Chemicals* (supra). In paragraph 50 of the said judgment the Hon'ble Court held:

"It has also been submitted that an appeal is entertainable before the Debts 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 Debts 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 the Respondents that there would be no bar to approach the Civil Court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Sri 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 Debts Recovery Tribunal or an 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 to cognizance of by the Debts Recovery Tribunal though no measures 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 courts thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of the section 13.

Elaborating on these aspects, the Hon'ble Supreme Court in Jagdish Singh (supra) in paragraphs 22 and 23 held:--

"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, sub-section (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 realizing the secured assets. Any person arrived 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 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. 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, Code of Civil Procedure as well.

We are of the view that the Civil Court jurisdiction is completely barred, so far as the "measures" taken by a secured creditor under sub-section (4) of section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal to determine as to whether there has been any illegality in the "measures taken."

10. Mr. Sakya Sen, learned Counsel being conscious of the insurmountable difficulties the plaintiffs would face if prayer (b) in the plaint remains, submitted that the plaintiff is not seeking a relief in terms of prayer (b) of the plaint. Prayer (a) relates to a money decree against the defendants. The other prayers are

couched in a form seemingly with a view to have a parallel proceeding continued in this Court, although, in my opinion, these issues definitely would come up in the pending proceedings before the Debts Recovery Tribunal at least in so far as the bank is concerned. Mr. Sen has relied upon paragraph 117 to 119 of Nahar Industrial Enterprises Ltd. (supra) to argue that the reliefs claimed in this proceeding, save and except prayer (b) are maintainable in this Court. There cannot be difference of opinion that the dispute between the plaintiffs and the other defendants save and except the bank, could be tried before a civil Court but the reliefs claimed against the bank in this proceeding cannot be tried in this Court in view of the specific bar both under the RDB Act as well as under the SARFAESI Act. The plaintiffs cannot by clever drafting seek to create an illusion of a cause of action and thereby continue with an action in a civil Court bypassing the provisions of special statutes. The purpose and object of the special statutes are required to be kept in mind while considering the claims made in the plaint. Parliament enacted SARFEASI Act because it was found that the legal mechanism available till then was wholly insufficient for recovery of the outstanding dues of banks and financial institutions. United Bank of India Vs. Satyawati Tondon and Others, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267 and Indian Bank Vs. Blue Jaggers Estates Ltd. and Others, AIR 2010 SC 2980 : (2010) 3 BC 694 : (2010) 158 CompCas 357 : (2010) 3 CompLJ 606 : (2010) 8 JT 395 : (2010) 8 SCC 129 : (2010) AIRSCW 4751 : (2010) 7 Supreme 620 . The plaint, as it stands, in my view, is not maintainable in this Court. If the plaintiffs accept that the measures taken by the defendant No. 2 is just and proper, then the other claims would fall to ground save and except if any personal cause of action of the defendant No. 2 survives against the other defendants. The defendant No. 2 is not remediless. The defendant No. 2 can raise its counter-claim in the proceeding pending before the Debts Recovery Tribunal. In fact, a Division Bench judgment of this Court presided over by the Hon''ble Chief Justice in M/s. Index Suppliers (P) Ltd. & Anr. v. State Bank of India (APO 518 of 2014) decided on April 1, 2015 was placed before this Court where the Hon''ble Division Bench permitted the plaintiff in that suit to raise counter-claim in the pending recovery proceeding. Although the recovery proceedings were initiated in the year 2012, it is significant to note that the plaintiff No. 2 did not file any written statement in spite of being a party to the said proceedings. The suit as framed, in my view, is a ploy to get out of the provisions of RDB Act and SARFAESI Act and clearly not maintainable against the defendant No. 2.

11. Under such circumstances, the application for rejection of plaint, G.A. No. 3501 of 2014, is allowed.

12. Since the suit does not appear to be bona fide and the same is held to be not maintainable, the plaint is rejected. C.S. No. 363 of 2012 stands dismissed.

13. This order shall, however, not prevent the plaintiff No. 2 from raising any

counter-claim in the pending proceeding in accordance with law and the bank shall not raise any objection in the event such counter-claim is filed by the plaintiff No. 2 in the said proceedings. This order also shall not also prevent the plaintiff No. 2 to institute proceeding against the defendant No. 1 and with regard to the management of the plaintiff No. 1 since it is alleged that the defendant No. 1 has acted contrary to the interest of the plaintiff No. 1. if such suit is filed within a period of eight weeks it shall not be treated as barred by limitation.

14. G.A. No. 339 of 2013 also stands dismissed. Interim orders stand vacated.

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