
(2012) 06 P&H CK 0049

In the Punjab And Haryana At Chandigarh

Case No : Civil Revision No. 4845 of 2011 (O and M)

HDFC Bank Limited

APPELLANT

Vs

M/s Gee Kay International and others

RESPONDENT

Date of Decision : 01-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 4, Order 7 Rule 10, Order 7 Rule 11, Order 7 Rule 11(a), Order 7 Rule 11(a)
Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 13, 17, 18
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 34

Citation : (2013) 1 RCR(Civil) 589

Hon'ble Judges : Rajesh Bindal, J

Bench : Single Bench

Advocate : Ashok Aggarwal, with Mr. Amit Aggarwal, Mr. Mukul Aggarwal and Ms. Shreela Chirmaley, for the Appellant; Rohit Sood, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Rajesh Bindal, J.—Defendant No. 1 is before this court challenging the order dated 21.5.2011, passed by the learned court below, whereby the application filed by it under Order 7 Rules 10 and 11 CPC for rejection of the plaint, was dismissed. Briefly, the facts are that respondent No. 1-plaintiff filed a suit for declaration to the effect that agreement dated 6.11.2007 between the parties is null and void and is a result of fraud, forgery and consequential relief of permanent injunction was sought restraining the petitioner from realising the amount/benefit under the alleged non-existent agreement. The suit was filed in January, 2009. It is in the aforesaid suit that application for rejection of the plaint was filed by the petitioner, which was dismissed by the learned court below. The order has been impugned before this court.

2. Learned senior counsel for the petitioner submitted that the application filed by the petitioner for rejection of the plaint was primarily under Order 7 Rule 11 (a) and (d) CPC. Firstly, the suit is barred by law and secondly, the plaint does not disclose a cause of action. He further submitted that in terms of the provisions of Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the 2002 Act") and 18 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short, "the 1993 Act"), the jurisdiction of the civil court is barred. Even if the plea of fraud is raised, the suit can be tried by Debts Recovery Tribunal (for short, "the DRT"). Learned counsel further referred to the pleadings in the plaint in support of his contention. A bare perusal thereof does not make out a case of fraud. The primary relief claimed by the plaintiff in the suit is of injunction, for which there is absolute bar. Respondent No. 1-plaintiff could file cross-objections before DRT.

3. Elaborating the contentions raised on the issue that the suit is barred by law, learned counsel for the petitioner submitted that Section 34 of the 2002 Act, in turns, provides that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine. Secondly, it provides that no injunction shall be granted by any court or any other authority in respect of any action taken or to be taken in pursuance of any power conferred under the 1993 Act. The submission is that the aforesaid section is in two parts. First part thereof bars the jurisdiction of the civil court to entertain any suit and the second is a bar for any court or other authority to grant injunction. It further provides that injunction cannot be granted in respect of any action taken or to be taken. Meaning thereby even if an action is contemplated, still no injunction can be granted by the court or any other authority.

4. As far as the contention that the suit is barred on account of non-disclosure of cause of action is concerned, the submission is that Order 6 Rule 4 CPC provides that in all cases where a party relies on misrepresentation, fraud etc., the particulars of the dates and items if necessary have to be stated in the pleadings. In the case in hand, the plea regarding fraud is totally vague. No date or any particulars have been furnished.

5. He further submitted that in the cases of fraud, exception has been carved out by Hon"ble the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others* Etc. Etc., , otherwise the jurisdiction of the civil court is barred. On a perusal of the pleadings in the plaint, the court has to find out at the very initial stage as to whether there is triable issue of fraud. In the absence thereof, the plaint has to be rejected as barred by law. Order 7 Rule 11 (a) CPC, which provides for one of the grounds for rejection of plaint as non-disclosure of cause of action would mean triable cause of action. He further submitted that as far as reliance on the judgment of *Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation*, is concerned, there the issue was only with

regard to transfer of proceedings from Civil Court to DRT, the same is not applicable in the facts and circumstances of the case. In support of the arguments in totality, reliance was placed upon Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, Varanasaya Sanskrit Vishwavidyalaya and Another Vs. Dr. Rajkishore Tripathi and Another, ; I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, and State Bank of India Vs. Sharda Spuntex Pvt. Ltd.,

6. On the other hand, learned counsel for respondent No. 1-plaintiff submitted that in the plaint, fraud had been pleaded with specific allegations of forgery. The petitioner could raise objection regarding jurisdiction only in case the agreement is admitted. In the present case, once the agreement is claimed to be result of fraud, there would be no bar of jurisdiction of the civil court to try the issue. Such an exception has been carved out by Hon"ble the Supreme Court in Mardia Chemicals Ltd."s case (supra). The cross-objections could be filed only if a claim is filed by the financial institution before the DRT. He further submitted that even though the bar provided for u/s 34 of the 2002 Act is in two parts, but still as provided for in Mardia Chemicals Ltd."s case (supra), the remedy against fraud being only in civil court, the same subject-matter cannot be partly before the civil court and partly before the DRT. The entire claim of respondent No. 1-plaintiff is based upon the documents, which are alleged to be a result of fraud. The plaint cannot be rejected partially. Even if the contention raised by learned counsel for the petitioner is considered to the effect that injunction cannot be granted by the court, but as the same is related with the main issue of fraud, the plaint cannot be rejected in part.

7. Referring to the pleadings in the plaint, learned counsel for respondent No. 1-plaintiff submitted that sufficient details have been provided for. It could not be more than that as fraud or forgery was not committed in the presence of respondent No. 1, as everything was done at his back. Whatever was possible was provided for. Rest would be matter of evidence. In fact, respondent No. 1 had also filed a criminal complaint in which the officials of the bank have been summoned, which prima facie establishes the allegations made by respondent No. 1-plaintiff. In support of his contentions, reliance was placed upon Firm and Illuri Subbayya Chetty and Sons Vs. The State of Andhra Pradesh, ; Sudhir G. Angur and others v. M. Sanjeev and others, 2006(2) RCR (Cri) 2; Ram Prakash Gupta Vs. Rajiv Kumar Gupta and Others, Kamala and others v. K. T. Eshwara Sa and others, 2008(3) RCR (Civil) 199; Bank of India and another v. Madura Coates Ltd., 2009(157) DLT 240; M/s Cambridge Solutions Ltd., Bangalore v. Global Software Ltd. and others, AIR 2009 Mad 74; and Nahar Industrial Enterprises Ltd."s case (supra).

8. Heard learned counsel for the parties and perused the relevant referred record.

9. Before proceeding further to deal with the respective contentions raised by learned counsel for the parties, it would be appropriate to refer to the relevant provisions. The same are reproduced as under:

Section 18 of the 1993 Act

18. Bar of jurisdiction. -On and from the appointed day, 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 the matters specified in Section 17.

Section 34 of the 2002 Act

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 ursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

Order VI Rule 4 CPC

ORDER VIP

LEADINGS GENERALLY

xx xx xx

4. Particulars to be given where necessary.-In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.

10. Further before the case of the parties is considered on merits, this court deems it appropriate to refer to the enunciation of law on the issues, on which contentions have been raised by learned counsel for the parties

11. Hon"ble the Supreme Court in Mardia Chemicals Ltd."s case (supra) dealt with the issue regarding jurisdiction by framing the following question:

(ii) Whether provisions as contained under Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/ disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court u/s 34 of the Act ?

It was answered in paragraphs 50 and 51 thereof. An exception was carved out by Hon"ble the Supreme Court while opining that jurisdiction of the civil court can be invoked to a limited extent, where for example the action of the secured creditor is alleged to be fraudulent and where the claim may be absurd and untenable

12. In Nahar Industrial Enterprises Ltd."s case (supra), the issue under

consideration was whether this court can transfer a suit from civil court to DRT. The answer was in negative.

108. Although some arguments have been advanced before us whether having regard to the provisions of Sections 17 and 18 of the Act the civil court jurisdiction is completely ousted, we are of the view that the jurisdiction of the civil court would be ousted only in respect of the matters contained in Section 18 which has a direct co-relation with Section 17 thereof, that is to say that the matter must relate to a debt payable to a bank or a financial institution. The application before the Tribunal would lie only at the instance of the bank or the financial institution for the recovery of its debt. It must further be noted in this respect that had the jurisdiction of the civil courts been barred in respect of counterclaim also, the statute would have said so and Sections 17 and 18 would have been amended to introduce the provision of counterclaim.

109. We may in this context place on record the following observations from Indian Bank (*supra*):

14. Section 9 of the CPC provides that the courts shall have jurisdiction to try all suits of a civil nature, excepting suits of which their cognizance is either expressly or impliedly barred.

15. It is evident from Sections 17 and 18 of the Debts Recovery Act that civil court's jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of civil courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief.[...]

16. [...]What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of civil courts barred in regard to such suits or proceedings.

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the Act, it is difficult to hold that a civil court's jurisdiction is completely ousted. Indisputably the banks and the financial institutions for the purpose of enforcement of their claim for a sum below Rs. 10 lakhs would have to file civil suits before the civil courts. It is only for the claims of the banks and the financial institutions above the aforementioned sum that they have to approach the Debt Recovery Tribunal. It is also without any cavil that the banks and the financial institutions, keeping in view the provisions of Sections 17 and 18 of the Act, are necessarily required to file their claim petitions before the Tribunal. The converse is not true. Debtors can file their claims of set off or counter-claims only when a claim application is filed and not otherwise. Even in a given situation the banks and/or the financial institutions can ask the Tribunal to pass an appropriate order for getting the claims of set-off or the counter claims,

determined by a civil court. The Tribunal is not a high powered tribunal. It is a one man Tribunal. Unlike some Special Acts, as for example Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 it does not contain a deeming provision that the Tribunal would be deemed to be a civil court.

118. The liabilities and rights of the parties have not been created under the Act. Only a new forum has been created. The banks and the financial institutions cannot approach the Tribunal unless the debt has become due. In such a contingency, indisputably a civil suit would lie. There is a possibility that the debtor may file preemptive suits and obtain orders of injunction, but the same alone, in our opinion, by itself cannot be held to be a ground to completely oust the jurisdiction of the civil court in the teeth of Section 9 of the Code. Recourse to the other provisions of the Code will have to be resorted to for redressal of his individual grievances.

13. In Sudhir G. Angur's case (supra), Hon''ble the Supreme Court opined that where there are serious allegations of forgery, fraud, diversion of trust properties, the same cannot be enquired into in a summary manner and the matter can only be gone into by a court. Application under Order 7 Rule 11 CPC for rejection of plaint on the ground of lack of jurisdiction of the court was dismissed.

14. In Ram Prakash Gupta's case (supra), Hon''ble the Supreme Court opined that while deciding an application under Order 7 Rule 11 CPC, few lines or passage should not be read in isolation and the pleadings have to be read as a whole to ascertain its true import.

15. In D. Ramachandran Vs. R.V. Janakiraman and Others, , Hon''ble the Supreme Court opined that under Order 7 Rule 11 (a) CPC, the court cannot dissect the pleadings into several parts and consider whether each one of them discloses a cause of action. There cannot be partial rejection of plaint or petition.

16. In Bishundeo Narain's case (supra), Hon''ble the Supreme Court opined that in case of fraud, undue influence and coercion, the parties must set forth full particulars and the case can be decided on the particulars so laid. General allegations are insufficient. The aforesaid judgment was followed in Varanaseya Sanskrit Vishwavidyalaya and another's case (supra).

17. In I.T.C. Limited's case (supra), Hon''ble the Supreme Court opined that a plaint can be rejected under Order 7 Rule 11 CPC even after framing of issues when the matter is posted for evidence. It was also considered as to whether real cause of action has been set out in the plaint or something purely illusory has been made with a view to get out of Order 7 Rule 11 CPC. Clever drafting creating illusions of cause of action are not permitted in law and a clear right to sue should be shown in the plaint. 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 7 Rule 11(a) CPC. Shelter cannot be taken under the words "fraud" or "misrepresentation" used in the plaint. In

the aforesaid case, the plaint was rejected as the plea of fraud was not made out.

18. A perusal of the suit filed by respondent No. 1-plaintiff shows that following prayer has been made therein:

It is, therefore, prayed that the decree for declaration to the effect that the alleged agreement dated 06-11-2007 between the parties is null and void, non-existent, result of fraud, forgery, misrepresentation, concealment of facts against the statute and the public policy with a consequential relief of permanent injunction restraining the defendants from further realizing any amount/benefits against the alleged agreement from the plaintiff firm and further mandatory injunction directing the defendant to refund the amounts along with interest and damages which they have illegally obtained under threat, duress and coercion on the basis of a forged, fabricated, non-existent document and any other relief which this Hon''ble Court deem fit may also kindly be granted in favour of the plaintiff and against the defendant.

19. A perusal of the aforesaid prayer shows that firstly the declaration has been sought to the effect that the alleged agreement dated 6.11.2007 between the parties is a result of fraud, forgery, misrepresentation and concealment of facts. Second relief sought is for permanent injunction restraining the bank from realizing the amount/benefits under the alleged non-existent agreement from respondent No. 1-plaintiff. The amount so realized/obtained from respondent No. 1-plaintiff under duress, threat and coercion

20. It has been pleaded in the plaint that -

* The respondent-firm is a two star export house.

? The business transactions of the plaintiff-firm were shifted from the petitioner-bank to Indian Bank, Jalandhar on 30.7.2007.

? In November, 2007, the bank came out with a proposal to the plaintiff suggesting that to hedge their losses in the fluctuation of the rates of foreign exchange, they may enter into a contract with the bank.

? For the purpose, a rough draft of the agreement to be arrived at between the parties and a preliminary document in the shape of a proposal form was sent, which was signed by the authorised signatory of the plaintiff-firm. Though, thereafter the bank was required to supply a detailed contract, which was to be signed by both the parties, but the same was never signed.

? Ever since November, 2007, the plaintiff had been requesting the bank to supply them copy of the agreement, but the request was never acceded to. To the surprise of the plaintiff, the bank started acting on the alleged agreement.

? On account of earlier dealings between the parties, title deeds of certain documents were lying with the bank as security, which they were required to be returned when commercial dealings between the parties ended in July, 2007, but the same were not returned and under threat, the bank had been recovering the

amount from the plaintiff-firm.

? On persistent request of the plaintiff, photo copy of the alleged agreement was supplied by the bank on 5.12.2008 with an ante-dated covering letter dated 31.1.2008.

? The plea of fraud is sought to be substantiated with further allegations that though the process for negotiation started in November, 2007 but the documents bear the date as 30.11.2006. The stamp papers were also purchased on 30.11.2006.

? None of the partners were present at Mumbai on the date the agreement is alleged to have been signed. It has not been signed by the authorised signatory.

? The alleged agreement/contract dated 6.11.2007 has not seen the light of the day despite repeated requests.

21. Though in the plaint to take a plea of fraud, forgery, misrepresentation etc., it has been stated that business transactions of the plaintiff-firm were shifted from the petitioner-bank to Indian Bank Jalandhar on 30.7.2007 and thereafter in November, 2007, the petitioner-bank came out with a proposal to the plaintiff-firm to enter into a contract to hedge their losses in the fluctuation of the rates of foreign exchange, they may enter into a contract with the bank, for which a rough draft was supplied, which is alleged to be in the form of a proposal form. It is categorically stated therein that the aforesaid document was signed by the authorised signatory of the plaintiff-firm. It is further claimed that thereafter final agreement was to be supplied and was required to be signed by both the parties.

22. The statement of account No. 03412320000704 maintained by the respondent No. 1-plaintiff with the petitioner-bank from 4.10.2006 to 8.7.2009 has been placed on record as Annexure P-26. A perusal of the aforesaid statement shows that first entry in the account is shown on 31.10.2006 with a credit of Rs. 51,00,000/- in the account of respondent No.1-plaintiff with narration as "EPCL Disbursed". On the same day, the amount was transferred to Civil Lines Branch vide cheque No. 0181026. Thereafter, on number of occasions, either the amount was credited in the account of respondent No. 1-plaintiff on account of "EPCL Disbursed" or deposited by the plaintiff as "Imp. Bill LIQ.", "Exp Bill RSLD", "Export Bill NEGO", "Export Bill LIQ", "FX Contract CANC Charges", "Cancellation Charges", "Cash Deposit", "SETT INR OPT".

23. Withdrawals from the account are primarily on account of funds transferred to some different accounts, "Imp. Bill LIQ", "DDs made on request", "some inward clearance", "EPCL INT", "EXP Bill COMM", "CPCL LIQ", "Export Bill NEGO", "cheque issued in the name of different party", "cheque issued in favour of Employees State Insurance Corporation", "EPCL LIQ", "cash withdrawal", "FX Contract Stamp COMM", "INT", "Export Bill RSLD", "EPCL LIQN", "SETT INR OPT".

24. The total credits in the account of respondent No. 1-plaintiff upto 1.7.2009 are to the tune of Rs. 11,85,18,866.36, whereas the debits are Rs.

14,44,20,814.82.

25. The contention raised is belied from the statement of the bank account of respondent No. 1-plaintiff with the petitioner-bank.

26. The documents produced on record as Annexures P3 and P4 dated 18.10.2006 further show that one Memorandum Recording Past Transaction of Creation of Mortgage by Deposit of Title Deeds was signed for availing loan facility of Rs. 5,00,00,000/-. Subsequent thereto, various transactions continued in the aforesaid bank account, which was maintained by the plaintiff-firm with the petitioner-bank.

27. If without there being any understanding between the parties any account was opened by the bank in the name of the plaintiff-firm and certain amount was shown to have been credited therein and the stand of the party is that they had, in fact, not signed any document or contract for the purpose, none had compelled them for carrying on transactions in that account by making withdrawals either in cash or by way of cheques, transferring the amount to other accounts, payments made to various other private parties or in discharge of their statutory liability etc. In the account, deposits had been made by the plaintiff-firm on numerous occasions by way of cheques, DDs, transfer from some other accounts, cash deposits and on account of export bill negotiation etc. The transactions continued from October, 2006 till July, 2009. The deposits and withdrawals in the account continued for almost a period of 3 years but never thought to be objected to by the plaintiff-firm that there was no agreement. Not only this, the transactions continued even after it is alleged in the plaint that from November, 2007 onwards, the firm had been requesting the bank to supply a copy of the agreement.

28. Considering the aforesaid facts and the law laid down by Hon"ble the Supreme Court in I.T. C. Limited's case (supra), where it has been opined that an illusion in the plaint can certainly be unravelled and exposed by the court while dealing with an application under Order 7 Rule 11 CPC, in my opinion, considering the documents which were admittedly signed by the respondent and the period and number of transactions in the account maintained with the petitioner-bank, there is no triable cause of action to the respondent to file a suit even if the plea of fraud is to be considered.

29. As the plea of fraud being the only exception carved out by Hon"ble the Supreme Court in Mardia Chemicals Ltd."s case (supra) and the same being not prima facie made out in this case, the plaint deserves to be rejected.

30. Accordingly, the impugned order passed by the learned court below is set aside and the application for rejection of plaint filed by the petitioner before the court below is allowed. The petition stands disposed of.