

(2014) 04 MAD CK 0088

In the Madras High Court

Case No : Appln. Nos. 4920 of 2011 and 1456 of 2012 in C.S. No. 634 of 2010

Indian Bank, Asset Recovery Management Branch

APPELLANT

Vs

B. Venkataraman

RESPONDENT

Date of Decision : 28-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 7 Rule 11
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), 13(iv), 15

Citation : (2014) 6 CTC 751 : (2014) 8 MLJ 47

Hon'ble Judges : G.M. Akbar Ali, J

Bench : Single Bench

Judgement

G.M. Akbar Ali, J.—Application No. 4920 of 2011 filed under Order VII Rule 11 of Civil Procedure Code r/w Order 14 Rule 8 of Original Side Rules to reject the plaint filed in C.S. No. 634 of 2010. Application No. 1456 of 2012 filed under Order VI Rule 17 of Civil Procedure Code r/w Order 14 Rule 8 of Original Side Rules to amend the plaint.

The applicants in Appln. No. 1456 of 2012, who are the legal heirs of one Dr. S. Balasubramanian, has filed the present suit in C.S. No. 634 of 2010 against the Indian Bank, questioning the measures taken by them in SARFAESI proceedings. The Bank has filed the application in Appln No. 4920 of 2011 to reject the plaint.

2. For convenience sake, the applicants in Appln. No. 1456 of 2012 are referred as the "plaintiffs" and the Indian Bank is referred as "Bank". Since both the matters are interconnected and identical issues to be decided, both the applications are disposed of by a Common Order.

3. The plaintiffs have filed the suit for a declaration that the equitable mortgage created on 27.5.1995 by their father, S. Balasubramanian is null and void and would not bind 4/5th shares of the plaintiffs over the plaint schedule property and for a consequential permanent injunction restraining the bank from

proceeding under SARFAESI Act and also for recovery of a sum of Rs. 20,00,000/- from the bank to the plaintiffs.

4. The present application No. 1456 of 2012 is filed to amend the plaint prayer to one that of a prayer for a partition and separate possession of 4/5th share of the plaintiffs.

5. The brief averments made in the plaint as well as in the present application for amendment are as follows:

(a) The suit property originally belonged to one V. Srinivasan, the grandfather of the plaintiffs, who purchased the same by a registered sale deed dated 7.4.1960. He died on 14.9.1979, leaving behind his wife Smt. Parvathi and two sons viz., S. Balasubramanian and S. Swaminathan. Smt. Parvathi died on 22.2.1991, leaving behind the above two sons as legal heirs. They divided the property by a family arrangement dated 13.2.1995 and the suit property was allotted to S. Balasubramanian, the father of the plaintiffs. Therefore, it is an ancestral property in the hands of the said Balasubramanian and the plaintiffs are entitled 4/5th share as per Hindu law.

(b) The said Balasubramanian died on 29.6.2005 and his wife Suguna pre-deceased him. After the demise of the father, the plaintiffs came to know that the suit property was given as collateral security to the Bank for a loan sanctioned to one G. Gopalakrishnan, proprietor of M/s G.K. Movie Land. They also came to know that the Bank has filed O.A. No. 102 of 2004 on the file of Debts Recovery Tribunal-I, Chennai against the said Balasubramanian for the recovery and for the attachment of the secured debt.

(c) The plaintiffs came to know about the said proceedings only when the property was brought for sale under SARFAESI Act in the year 2009. However, there was a private negotiation for the sale of the property to the second defendant, who agreed to discharge the loan and thereby redeem the mortgage property with the help of the bank. The plaintiffs agreed for private negotiation and executed a sale deed dated 14.8.2009 for a sale consideration of Rs. 60,00,000/- in favour of the second defendant and received Rs. 5,00,000/- and the balance consideration of Rs. 55,00,000/- to be paid to the bank.

(d) However, the second defendant neither paid the sale amount to the bank nor to the plaintiffs. In fact, only thereafter, the plaintiffs came to know that the suit property is an ancestral property and they have equal share along with the deceased father who had no right to create equitable mortgage and such mortgage will not bind the shares of the plaintiffs.

(e) Therefore the plaintiffs have challenged the SARFAESI proceedings. They have also filed the present suit for the reliefs as stated above.

(f) On appearance, the Bank intimated that the suit property has already been sold in an auction sale and therefore, the subsequent purchasers were also impleaded as parties. Thereafter the Bank has filed the above application for

rejection of plaint.

6. The prime contention of the bank is that the suit is barred under Sec. 34 of the SARFAESI Act. It also further contended that the mortgage property was the absolute property of S. Balasubramanian and the plaintiffs, having failed in various fora, have come forward with the present suit, which is not maintainable.

7. According to the Bank, the suit filed for the relief of declaration challenging the measures taken by the Bank under the SARFAESI act and as well as the injunction granted are directly barred under section 34 of the Act before a civil court and therefore, they have prayed to reject the plaint.

8. Reiterating that the suit is maintainable, the plaintiffs have also filed the above amendment application converting the present suit as partition suit and contended that a partition suit can only be maintained in a civil court and not before the Debts Recovery Tribunal or before the Appellate Tribunal.

9. Therefore, the points for consideration in both the applications are:

i) whether the suit is barred under sec. 34 of the SARFAESI Act and under section 19 of RDDBFI Act?

ii) whether the plaintiffs have no cause of action to file the suit claiming shares in their suit property?

iii) whether the original relief claimed can be amended to convert the suit into a partition suit?

10. Before taking up the points for consideration and also the provisions of SARFAESI Act and RDDBFI Act, it is necessary to deal with the facts and circumstances, which led to the filing of the suit and present application for rejection of the plaint.

11. Originally, the suit property was purchased by one Mr. Srinivasan, Grandfather of the plaintiffs, by a sale deed dated 7.4.1960. He died on 14.9.1979, leaving behind his wife Smt. Parvathi and two sons viz., S. Balasubramanian and S. Swaminathan. By a letter dated 11.8.1986, Smt. Parvathi and S. Swaminathan released their shares of the property in favour of Mr. Balasubramanian.

12. On 27.5.1995, Balasubramanian, as a guarantor, created an equitable mortgage in favour of the bank for the loan availed by one G.K. Movie Land and for the default of the loan, the bank issued notice under sec. 13(2) of SARFAESI Act dated 25.8.2002. In the year 2004, the Bank filed an application in O.A. No. 102 of 2004 for recovery of dues against the borrower G.K. Movie Land and the guarantor/mortgagor S. Balasubramanian before the Debts Recovery Tribunal.

13. On 5.3.2005, the Bank had taken possession of the suit property under Section 13(4) of SARFAESI Act. During the pendency of O.A. No. 102/2004, Balasubramanian died on 25.10.2007 and subsequently, the plaintiffs were

brought on record as legal representatives of S. Balasubramaniam.

14. On 18.5.2009 final order was passed in O.A. No. 102 of 2004 holding that the plaintiffs are liable to the extent of the asset/estate inherited by them from S. Balasubramaniam. After passing of final order and also after the possession of the suit property taken under SARFAESI Act, the plaintiffs sold the suit property to the 2nd defendant in this suit, by a sale deed dated 14.8.2009.

15. In the sale deed, the parties have agreed to discharge the liability with the Bank but they failed to clear the dues. On 7.10.2009, the plaintiffs filed S.A. No. 214 of 2009 before Debts Recovery Tribunal-I, Chennai and obtained an interim order of stay of the sale notice issued by the bank. Subsequently, on 12.11.2009 the interim stay was vacated as the plaintiffs had suppressed the fact that they sold the property to the second defendant herein.

16. On 17.12.2009, the 2nd defendant filed S.A. No. 280 of 2009 before Debts Recovery Tribunal-I, Chennai, challenging the Auction Sale Notice and obtained an order of interim stay on condition that the 2nd defendant to deposit Rs. 55 lakhs on or before 18.1.2010 and since the amount was not deposited by the second defendant, the interim stay was vacated.

17. On 15.5.2010, the bank, in a public auction, sold the property under the SARFAESI Act to the third defendant herein. On 20.12.2010, the second defendant filed S.A. No. 155 of 2010 to set aside the sale dated 15.5.2010 and the same was also dismissed on 20.12.2010.

18. The present suit was filed on 2.7.2010. An order of injunction not to issue the sale certificate to the auction purchaser was also granted. As stated earlier, aggrieved by that the legal heirs of the secured debtor approaching the civil court and obtaining order against the proceedings of the Recovery Officer of the Bank, the present contentious questions are raised.

19. Mr. T.V. Ramanujam, learned Senior Counsel, who appeared for the Bank, submitted the following arguments:

i) the Civil Suit is barred by Sec. 34 of the SARFAESI Act and the Civil Court has no jurisdiction to examine as to whether measures taken by the secured creditor under Sec. 13(iv) are legal or not.

ii) it is well settled by the Apex Court as well by the Full Bench of this Court that the jurisdiction of the Civil Court is ousted by sec. 34 of the SARFAESI Act and any person aggrieved against any measures, can only approach DRT or DRAT and not a civil court.

iii) granting of injunction or stay of proceedings under the SARFAESI Act is directly barred and the plaint has to be rejected.

20. The learned senior counsel relied on a decision reported in Jagdish Singh Vs. Heeralal and Others,

21. On the other hand, Mr. R. Kannan, learned counsel for the plaintiffs would urge the following contentions:

i) the property mortgaged by the father of the plaintiffs is not his absolute property, but the ancestral property of the family.

ii) the plaintiffs have 4/5th share in the property which could be demonstrated only before the civil court and not before the Tribunal under the SARFAESI Act.

iii) Neither DRT nor DRAT has jurisdiction to decide a dispute regarding the nature of the property.

iv) though the suit was filed questioning the right of mortgage, the plaintiffs have now sought for the relief of partition by way of amendment and the partition suit cannot be initiated before the DRT or DRAT.

22. The learned counsel relied on a decision reported in Bank of Maharashtra Vs. Pandurang Keshav Gorwardkar and Others, .

23. Countering the arguments of the learned counsel for the plaintiffs, Mr. T.V. Ramanujam, learned Senior Counsel contended that first of all, such amendment cannot be allowed and even if an amendment is ordered, still sec. 34 of the SARFAESI Act is a bar for the civil court to entertain such a suit as it involves questioning the measures taken by the Bank under sec. 13 of the SARFAESI Act.

24. Heard Mr. A. Ramesh, learned Senior Counsel for the second defendant and Mr. R.C. Paul Kanagaraj, learned counsel for the auction purchaser.

25. The learned Senior counsel for the 2nd defendant would contend that the property is the ancestral property of the plaintiffs and the 2nd defendant had advanced money only in order to redeem the property as a third party and the bank ought to have accepted the purchase of the second defendant and release the property to the second defendant. According to the learned senior counsel the auction sale is not valid when the property had already been sold to the second defendant and when the sale proceeds have been credited into the account.

26. Mr. R.C. Paul Kanagaraj, learned counsel, who appeared for the auction purchaser, would submit that in an auction held by the bank under the provisions of the SARFAESI Act, the auction purchaser was the highest bidder and he has purchased the property for valid consideration which has to be honoured.

27. Heard and perused the materials available on record.

28. Sec. 34 of the SARFAESI Act has been under scrutiny by the various High Courts and also by the Hon"ble Supreme Court. The validity of the Securitisation Act and in particular, the vires of sections 13, 15, 17 and 34 have been challenged in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . Ultimately, the Apex Court upheld the validity of the Act and its provisions except that of sub-section 2 of sec. 17 of the act which was declared as ultra-

vires.

29. In paragraph 80 of the judgement the Hon''ble Supreme Court held as follows:

"1.....

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5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in the civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matter relating to an English mortgage enforceable without intervention of the court."

Thus section 34 of the Act was dealt with.

30. Later by an amendment, Sub-section 2 of Section 17 was deleted and sub-section 2 to 6 were inserted in section 17. The provisions of Sec. 17 deals with right to appeal for any person including the borrower, aggrieved by any of the measures referred to in sub-section 4 of section 13, taken by the secured creditor.

31. A Full Bench of this Court had also dealt with the interpretation of amended provisions of Secs. 13 and 17 of SARFAESI Act. Though sec. 34 of the Act was not directly involved, the Full Bench held that all such grounds which render the action of the Bank illegal can be raised in the proceedings under Sec. 17 of the Act before the DRT and it is for the DRT to decide in each case whether the action of the Bank was in accordance with the provisions of the said Act and legally sustainable.

32. The bar under Sec. 34 of the Act was discussed by a learned Single Judge of this court in Arasa Kumar and Another Vs. Nallammal and Others, . However, the learned Single Judge of this Court was of the opinion that the power under Sec. 34 of the Act is not absolute and the same is subject to certain restrictions. According to the learned Single Judge if the claim made by the parties is outside the jurisdiction of DRT or DRAT or under RDDBFI Act, and the dispute raised by the parties cannot be adjudicated by the Tribunal, the right of the parties to approach the civil court cannot be taken away.

33. According to the learned Single Judge, in a suit for partition, including the item in respect of which the bank had taken out the proceedings for sale without the intervention of the Court, the Civil court alone could decide the rights of the parties and the bank cannot take shelter under Sec. 34 of the Act. This order was delivered on 9.03.2004 whereas the order in Mardia's case was delivered on 8.04.2004.

34. In Punjab National Bank v. J. Samsath Beevi, (2010) 3 CTC 310 : LNIND

2010 MAD 1331 : (2010) 3 MLJ 439, another Single Judge of this Court, was deciding rejection of a suit filed for declaration challenging the sale conducted by the recovery officer of the Bank as illegal, and for a declaration that no valid equitable mortgage was created in favour of the bank.

35. However, it was a case where fraud, collusion and non execution of letters of guarantee were raised in a civil forum. The learned Single Judge had observed that fraud vitiates all solemn act and that the jurisdiction of the civil court is not barred when serious allegations of fraud has been made. However, in that particular case the learned Single Judge would continue to hold that it is not very difficult for a seasoned litigant or an intelligent lawyer to draft the plaint in such a manner and by a clever drafting of the plaint, creating an illusion of fraud, collusion, misrepresentation and the like. However, section 34 was not discussed.

36. In V. Thulasi Vs. Indian Overseas Bank, , a Division Bench of this Court had dealt with a suit filed for declaration to declare the creation of guarantee as null and void. The Division Bench had dealt with the exceptions provided in the Mardia Chemicals case and held that the fraud and collusion raised are not sustainable and the suit is barred under Sec. 34 of the Act.

37. In Jagadish Singh v. Heeralal and Others (supra), the Apex court has dealt with section 13(4), 17 and 34 of the SARFAESI Act. It is relevant to point out the facts of the above case which is as follows:

The respondents therein have filed a civil suit in the court of District judge for a declaration of title, partition and permanent injunction against respondents 7 to 9 in which the appellant bank was also a party. The Bank filed preliminary objection before the Civil Court stating that in view of sec. 13 read with sec. 34 of the SARFAESI Act, civil court has no jurisdiction to entertain the suit. The civil court upheld the preliminary objection and held that the plaintiffs ought to have filed an appeal before the DRAT under sec. 17 of the Act not a suit in view of specific bar contain under sec. 34 of the Act. The plaintiffs appealed before the High Court. However, the High Court allowed the appeal and the operative portion of the appeal reads as follows:

"I have perused the contents of the plaint from the record of the case. A bare perusal of the plaint indicates that the plaintiffs have raised the question of title, on the basis of joint Hindu family property and they being the members of the joint Hindu family, it has been pleaded by them that the property in question had been acquired through the earnings of the joint family property. On that basis, it has been maintained by them that the property in question was liable to be treated as joint Hindu family property, and not the exclusive property of the defendants. In these circumstances, on the bare perusal of the contents of the plaint, it cannot be suggested at all that the civil suit, filed by the plaintiffs, is barred under any provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2000, or that civil court has no jurisdiction in the matter".

38. Aggrieved by such judgment, an appeal was preferred to the Supreme Court. The Hon"ble Supreme court considered sec. 13, 17 and 34 of the SARFAESI Act and ultimately held that,

"25. 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. The Bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondents 6 to 8 (sic Respondents 1 to 5) have been crystallised, before creating security interest in respect of the secured assets."

39. On analysing the facts, the Hon"ble Supreme court held that the expressions "any person" used in sec. 17 of the Act includes the plaintiffs who had filed a civil suit challenging sale of the secured property on grounds that the same was HUF property and allowed the appeal.

40. The facts and circumstances of the case on hand and the facts and circumstances of the case reported in Jagadish Singh v. Heeralal and Others (supra), are similar in respect of the claim of nature of the property and the nature of the suit.

41. It is also pertinent to point out that having found that the relief as sought for cannot be maintained before the Civil court in view of the bar under sec. 34 of the Act, the plaintiffs have filed the application for amendment of the prayer to convert the suit as a suit for partition. As rightly pointed out by the learned Senior Counsel for the bank, that such a partition suit is also not maintainable before the civil court, in view of the decision rendered by the Supreme court as stated above.

42. One may wonder how a suit for partition can be filed before the Tribunal and how a partition decree either preliminary or final can be passed declaring the shares of the parties. Strictly speaking such a partition suit can only be filed before a Civil Court which can declare the rights and shares of the party by passing a preliminary decree under the provisions of the Civil Procedure Code and later pass a final decree allotting the shares and further execution proceedings can be initiated in the executing court for the parties to realise the fruits of the decree.

43. However, the proceedings under the SARFAESI Act deals with secured assets which pre-supposes that the secured assets is free from all encumbrances and the mortgagor had a valid and marketable title to create a security on the asset.

44. Sec. 13 of the SARFAESI Act provides the measures which can be taken by the Bank against the secured asset for the realisation of the debt. Sec. 17 of the Act provides the reliefs that are available for any person to approach the Tribunal questioning the measures taken by the Bank under Sec. 13 of the Act.

45. The bare reading of these two provisions would show that the measures taken under Sec. 13 alone can be challenged under Sec. 17 of the Act before the Tribunal. In a given case where the title itself is questioned, the remedy available is only before the Civil Court, however, there is a bar under Sec. 34 of the Act questioning the measures taken by the Bank in a civil court.

46. In one hand, we have the object of the SARFAESI Act for a speedy recovery of the loan without the intervention of the Court. On the other hand, if any party approaches a civil court, challenging the validity of mortgage or seeking any relief regarding the title of the property, the object is defeated.

47. The object of SARFAESI Act is speedy recovery of public money without intervention of the Court. Under the guise of questioning the right of the mortgagor or claiming any title or right in the secured debt, the object of the Act cannot be subverted.

48. Therefore, in their wisdom, the Hon'ble Supreme Court in *Mardia's case* and in *Jagdish Singh v. Heeralal and Others* (supra), has held that any questions incidental to the secured assets including the nature of property can be decided only by the Tribunal and not by filing a suit before the Civil Court which would naturally take a longer time to decide.

49. Therefore, Tribunal can adjudicate and declare the rights of the parties in respect of the secured asset which has undergone the measures taken by the Bank under Sec. 13 of the SARFAESI Act.

50. In the present case, the Bank would contend that by a release deed executed by one Smt. Parvathi and one Swaminathan, the mortgagor S. Balasubramanian had become the absolute owner of the property, which is also evidenced by a confirmation of family arrangement dated 13.12.1995. However, the contention of the plaintiffs is that the confirmation of the family arrangement dated 13.12.1995 would reveal that the property is an ancestral property and by a division between two brothers, the secured asset was allotted to the said Balasubramanian and his sons and thereby it is an ancestral property where the plaintiffs have 4/5th share and the said Balasubramanian has only 1/5th share.

51. At this juncture, this court is not inclined to go into the merits of the matter and give a finding on the nature of the property and the rights of the parties.. Even assuming that a partition suit can be filed by the plaintiffs treating the property as ancestral, the measures taken by the Bank is also under question. Such question has to be decided only by the Tribunal or by the Appellate Authority. This court is of the considered view that the same can be adjudicated by the Tribunal and test the right of the mortgagor. If an application to decide the rights of the parties is filled the Tribunal is bound to decide the same. Having opposed this proceedings the bank can not oppose filing of such application.

52. Though the learned counsel for the plaintiffs had relied on various case laws in support of amendment of the plaint in respect of the relief, this court is of the

view that a partition suit cannot be maintained before a civil court which also involves challenging the measures taken under sec. 13 of the Act. However, an application as stated above can be filed before Debt Recovery Tribunal and the Tribunal can adjudicate all the questions including the rights of the subsequent purchasers and the auction purchasers.

53. In view of such circumstances, the application filed for amendment of plaint cannot be allowed and is liable to be dismissed. However, it is open to the plaintiffs to approach the Debts Recovery Tribunal to prove that the secured asset is an ancestral property and the mortgage is not binding on the plaintiffs.

It is also made clear that such issue was not so far decided either before the Debts Recovery Tribunal or before this Court.

54. As far as the application filed for rejection of the plaint is concerned, following the principles laid down in Jagadish Singh v. Heeralal and Others (supra), the present suit is barred under Sec. 34 of the Act and the plaint is liable to be rejected, however with the liberty to the plaintiffs to approach Debts Recovery Tribunal for any other relief. In the result,

(i) Application No. 1456 of 2012 filed to amend the plaint is dismissed and the plaintiffs are at liberty to approach the Debts Recovery Tribunal as observed above.

(ii) Application No. 4920 of 2011 filed to reject the plaint in C.S. No. 634 of 2010 is allowed, however with the liberty to the plaintiffs to approach Debts Recovery Tribunal for any other relief.

Consequently, all the connected M.Ps. are also closed.