

(2010) 12 GUJ CK 0052
In the Gujarat High Court

Case No : Civil Application No. 14195 of 2010 in Civil Application No. 395 of 2009 in Second Appeal No. 5 of 2009

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

Balaram Cements Limited

RESPONDENT

Date of Decision : 30-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 226, 227
Debts Recovery Tribunal Act, 1993 — Section 19
Financial Institutions Act, 1993 — Section 20, 34, 35
Registration Act, 1908 — Section 17, 49
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 33, 34
Transfer of Property Act, 1882 — Section 17

Citation : (2011) 3 BC 263 : (2011) 3 KLJ 809

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : Navin K. Pahwa, for the Appellant; Ashok L. Shah and Sudhir M. Mehta, for the Respondent

Judgement

Rajesh H. Shukla, J.—The present Civil Application has been filed for vacating the inter order dated 10.08.2009 passed in Civil Application No. 395/2009.

2. The facts of the case briefly stated are that the the Plaintiff filed Suit for declaration that he has not taken any loan or advances or hypothecated any property to the Defendant and yet the Defendant has served the notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Securitization Act") on the ground that the debt of the Plaintiff to the ICICI Bank has been assigned in favor of the Respondent bank by executing the deed of assignment under the Securitization Act and, therefore, they have no right to take every action for the recovery of the outstanding dues. The Defendant filed an application, Exh.21 under Order VII, Rule 11(d) of the CPC Code, 1908 for the rejection of the plaint,

which came to be allowed by passing order. Therefore, the Plaintiff filed Regular Civil Appeal, which has been dismissed and, therefore, the present Second Appeal has been filed by the original Plaintiff raising substantial questions of law posed therein with regard to the interpretation of the Securitization Act, which came to be admitted. Along with the Second Appeal, Civil Application for stay also came to be filed, wherein the order came to be passed on 10.08.2009 and stay was granted.

3. Learned Counsel, Mr. Navin Pahwa for the applicant contended that in view of the judgment of the Hon'ble Apex Court reported in JT 2010 (10) SC 599 in case of ICICI Bank Limited v. Official Liquidator of Aps. Star Industries Ltd., by which, the Hon'ble Apex Court has set aside the judgment of the Division Bench of this Court and it has made observation that assignment of the debt is valid. It is further observed that a benefit under the contract can always be assigned. Reference is made to the provisions of the Banking Regulation Act, 1949 and it has been observed that RBI can lay down guidelines and directions enabling banking companies to deal in derivatives like futures and options and also to do all things as are incidental or conducive to the promotion or advancement of the business of the company. He has referred to Sections 34 and 35 of the Recovery of Debts due to Banks and Financial Institution Act, 1993 (hereinafter referred to as "Financial Institution Act") and submitted that there is an absolute bar of the Civil Court and, therefore, the Suit itself would not be maintainable. Learned Counsel, Mr. Pahwa submitted that once the jurisdiction of the Civil Court is barred, the remedy would be to make any such application before the Debt Recovery Tribunal, which is established under the Act and, therefore, the present application may be allowed.

4. He emphasized and submitted that the order passed in Civil Application No. 395/2009 dated 10.08.2009 was passed in view of the judgment of the Division Bench of this Court prohibiting the assignment of debt. However, as the judgment of the Apex Court has not accepted the said findings permitting assignment of debt, the applicant would be stepping in shoes of the ICICI Bank, to which, the debts are due and payable by the Plaintiff. He submitted emphasizing Section 34 of the Securitization Act that the overriding effect has been given to this Act and, therefore, the jurisdiction of the Civil Court would bar. He has also referred to Section 34 of the Securitization Act and submitted that Section 34 of the Act provides that no civil court shall have no 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. Similarly, Section 35 provides that the provisions of this Act shall have effect,. Meaning thereby, the jurisdiction of the civil court is totally out stand.

5. Learned Counsel, Mr. Pahwa, therefore, submitted that whatever the contention the Respondent may seek could be raised before the same Forum i.e. Debts Recovery Tribunal, which will decide in accordance with law but the Suit itself would be barred and, therefore, Second Appeal itself would not have been

maintainable but for the aforesaid circumstances. However, he submitted that in any case, the circumstance has been changed in view of the judgment of the Hon"ble Apex Court reported in JT 2010 (10) SC 599 and, hence, the interim order requires to be vacated, otherwise, the Appellant may not be applied to pursue the remedy for the recovery though it is otherwise under the law like Securitization Act. Therefore, it was submitted that the present application may be allowed.

6. Learned Counsel, Mr. Pahwa has also referred to the order passed in Civil Application No. 395/2009 dated 10.08.2009 to emphasize that what has weighted with the Court at the relevant time and emphasizing on this aspect, he has submitted that the present application may be allowed.

7. He has also referred to and relied upon the judgment of the Apex Court reported in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., referred to the observation made in Para No. 41 in support of his submission regarding the jurisdiction of the Civil Court. He has also relied upon the observations made in Para Nos. 52 and 53. Similarly, he also emphasized to the observations made in Para No. 68 and submitted that the jurisdiction of the Civil Court is outstead by the special statute and, therefore, the Suit would not have been maintainable and in any case, Second Appeal would also not be maintainable. He, therefore, submitted that it is only because of the aforesaid judgment, the interim order was passed. However, when the Apex Court has permitted such assignment of debts, the order should be modified or stay should be vacated and the Respondent may raise any contention before the appropriate Forum i.e. Debts Recovery Tribunal. He, therefore, submitted that this Civil Application may be allowed and the interim order passed in Civil Application No. 395/2009 dated 10.08.2009 may be vacated.

8. Learned Counsel, Mr. A.L. Shah appearing with Mr. Sudhar Mehta for the Respondent submitted that the aforesaid Second Appeal is admitted by the Court and the interim order was passed in Civil Application after bi-parte hearing. He referred to the judgment of the Hon"ble Apex Court reported in JT 2010 (10) SC 599 and submitted that what the Hon"ble Apex Court has permitted is only assignment of debt under Banking Regulations Act, 1949. For which, he emphasized the observations made in Para Nos. 23 and 24. He, therefore, submitted that what is required to be considered is Securitization Act as defined under the Securitization Act. Again referring to the observations made in a judgment reported in JT 2010 (10) SC 599, he pointedly referred to the ultimate object behind the statute and submitted that it is specifically observed in Para No. 21 as under:

SARFAESI Act, 2002 was enacted enabling specified SP v. to buy the NP As from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case.

9. It is in this circumstance, the learned Counsel Mr. A.L. Shah submitted that what has been permitted by the Apex Court in this judgment is assignment of debt as per the Banking Regulation Act, however, the contentions or the points or the issues involved in the Second Appeal are much wider. He has referred to the statements and objects of the Securitization Act and also the definition of the Securitization Act to emphasize that it provides acquisition of finance, assets or reconstruction and the Securitization Act would be applicable and the powers under the Securitization Act could be invoked by the securitisation companies, which is formed and registered under the Companies Act and the assignee will not be entitled to get any right to invoke the provisions of this Act. He emphasized that the Securitization Act was made for special purpose and, therefore, as the issues involved in the Second Appeal are far wider, it cannot be said that only because of the judgment of the Apex Court permitting the assignment of debts under the Banking Regulation Act, it would change the circumstances.

10. Learned Counsel, Mr. Shah submitted that what is required to be considered is whether Section 34 of the Securitization Act would be attracted and whether such a provision can be invoked is required to be considered as it will have to be considered as per the Securitisation Act and the Banking Regulation Act. He, therefore, submitted that the Securitization Act could apply only if the same was applicable as the Respondent bank was not the original vendor and, therefore, the Respondent-original Plaintiff is not borrower within the meaning of the said Act, which would entitle the invocation of Securitization Act. He, therefore, submitted that the interim order, which has been passed after bi parte hearing may not be modified or vacated.

11. Learned Counsel, Mr. Shah referred to Section 13(d) of the Securitization Act and submitted that proviso to Section 13(4)(b) is also required to be considered. He, therefore, submitted that the present Civil Application may be rejected.

12. In rejoinder, Learned Counsel, Mr. Pahwa referred to the judgment of the Hon"ble Apex Court reported in United Bank of India Vs. Satyawati Tondon and Others, and submitted that as observed by the Apex Court, the statements of object and reason are required to be considered and such special statute like the Securitization Act keeping in view the objects of setting up such special statute has to be kept in mind. He pointedly referred to the observations made in this judgment that when there is change in the financial climate, speedy method of recovery of dues are required to be considered, for which, such special statute are made. He, therefore, submitted that even the Apex Court has observed that even in exercise of discretion under Article 226 of the Constitution of India, the Court should be slow, for which, he referred to and relied upon the observations made in Para Nos. 49 and 50 and again emphasized the observation made in Para No. 50, which reads as under:

50. In Punjab National Bank Vs. O.C. Krishnan and Others, this Court considered the question whether a petition under Article 227 of the Constitution was

maintainable against an order passed by the Tribunal u/s 19 of the DRT Act. and observed:

5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appeasable u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the Respondent to take recourse to the appeal mechanism provided by the Act.

13. He, therefore, submitted that the interim order may not be interfered with and the present Civil Application may be rejected.

14. Learned Counsel, Mr. A.L. Shah has again referring to the affidavit-in-reply submitted that the applicant-bank does not have the consent or the support of not less than three-fourth of the secured creditor and, therefore, is not entitled to take any action u/s 13(4) of the Securitization Act. Again, he referred to Section 13(4) of the Securitization Act and submitted that before such power could be invoked, consent of third-fourth of the secured creditor has to be obtained. He, therefore submitted that BIFR are pending and in fact, the applicant bank is making false and contradictory statements on affidavit. He pointedly referred to the affidavit-in-reply and submitted that before the BIFR, the statement has been made and BIFR and AAIFR have taken a note of the fact that the applicant bank has published a notice in Times of India dated 03.11.2007 that the possession of the assets of all the Companies has been taken over. At the same time, in the affidavit dated 03.11.2007 filed by the very bank before the Additional Senior Civil Judge, Palanpur, it is stated on oath that no steps have been taken under the Securitization Act. Therefore, referring to this aspect, learned Counsel, Mr. Shah submitted that this has been taken note of and BIFR has issued show cause notice u/s 33 of the Securitization Act to the Managing Director of the Company and against which, Appeal was preferred,

which has also been rejected and the show cause notice issued to the Managing Director of the applicant-bank u/s 33 of the Securitization Act is still pending.

15. Learned Counsel, Mr. Shah, therefore, again submitted that while passing interim order, the Court has considered the questions of law posed before it and, therefore, when the applicability of the Securitization Act or whether the jurisdiction of the Civil Court can be said to be totally barred itself is required to be considered. It cannot be said that the judgment of the Apex Court will have any bearing. At the same time, at the cost of repetition, learned Counsel, Mr. Shah strenuously submitted that the Apex Court by the aforesaid judgment reported in JT 2010 (10) SC 599 has only permitted the assignment of debt inter se between the banks under the Banking Regulation Act keeping aside other issues open, for that, he referred to the said judgment of the Hon'ble Apex Court and emphasizing observations made in that judgment, which has been specifically observed that the issues which arose including the applicability of the provisions of the Registration Act are not considered by the Division Bench. He, therefore, submitted that this is also one of the aspects, which is required to be considered.

16. In view of the rival submissions, it is required to be considered whether the present Civil Application for vacating interim order passed after bi-parte hearing can be entertained or not.

17. Main thrust of the submission made by the learned Counsel, Mr. Pahwa is on two folds namely (i) the jurisdiction of the Civil Court is barred by special statute as stated above; and (ii) the judgment of the Hon'ble Apex Court reported in JT 2010 (10) SC 599 permitting the assignment of debt by deed of assignment. Therefore, the applicant, who has been assigned the debt of the ICICI Bank from who the Respondent had availed the advances will step in the shoes of the ICICI Bank i.e. lender bank, who would be entitled to proceed for recovery of the outstanding dues without compliance with other statutory provisions like Transfer of Property Act as well as Registration Act is required to be considered. There could be no doubt with regard to the fact that special statute has been made as a part of the financial policy to achieve the objects as stated in the object and reasons. However, a close look at the statements of the object and reason, which has been stated that there are certain areas, in which, the banking and financial sector do not have any level playing field as compared to other participants in the financial market in the world. There is no legal provision for facilitating the securitisation of financial assets of banks and financial institution.

18. There is a reference to the fact that in light of the guidelines issued under the Banking Regulation Act as clarified in the judgment of the Hon'ble Apex Court reported in JT 2010 (10) SC 599, it has now been permitted the assignment of debt by assignment deed inter se among the banks under the Banking Regulation Act. However, it is an independent aspect that such assignment of debt pursuant to the execution of the assignment deed qua that particular debt is permitted and enforcement of the provisions of other laws including the

Securitization Act on the basis thereof is another aspect. For the exercise of the right of the vendor bank like ICICI Bank in the present case, when the applicant claims to have stepped in the shoes of that Bank cannot be permitted to straightway proceed under the Securitization Act in light of other statutory provisions like the Transfer of Properties Act as well as Registration Act. The word securitisation as defined in the Securitization Act provides as to how the interest in the financial assets could be claimed. Further, Section 13 Securitisation Act refers to the acquisition of financial assets by such Securitization Company under the Securitisation Act subject to the compliance with the procedure as provided in Section 13 of the Securitisation Act. However, Sub-section (9) of Section 13 of the Act provides that no secured creditor shall be entitled to exercise any or all the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditor representing not less than three-fourth in value of the amount outstanding as on a record date. This has a reference of more than one secured creditor having a claim over the same assets of the borrower, who would be claiming their rights and, therefore, the procedure has been provided.

19. At the same time, it is required to be considered that what has been permitted under the Banking Regulation Act, 1949 is the assignment of debt but before any right or claim can be made on the assets or the immovable property, necessary procedure or the requirement for such transfer of rights or the interest as provided by other statutes like Registration Act as well as Transfer of Property Act or the Stamp Act will have to be considered. Therefore, if the deed of assignment is treated only for assignment of the rights as creditor by conveying the rights in the immovable properties or security interests, the requirement under the law like Transfer of Properties Act or the Registration Act, which provides for the documents to be registered would be without any meaning. Therefore, the assignment of debt entered among the bank is one thing, which is permitted under the Banking Regulation Act. However, as per the provisions of the Transfer of Properties Act read with the provisions of the Registration Act, when the right of immovable properties are conveyed, the document is required to be registered.

20. A useful reference can be made to the observations made by the Hon'ble Supreme Court in a judgment reported in Suraj Lamp and Industries (P) Ltd. thru. DIR Vs. State of Haryana and Another, referring to the Registration Act, 1908 and the purpose of compulsory registration of the documents. Section 17 of the Registration Act clearly provides that any document (other than testamentary instruments) which purports or operates to create, declare, assign, limit or extinguish whether in present or in future "any right, title or interest.... Therefore, as required u/s 17 of the Registration Act, the document required by Section 17 of the Act has to be registered for the purpose of conveying or transferring or right, title or interest in the immovable property, which includes any such right of assignment.

21. Similarly, a useful reference can also be made to the provisions of Section 49 of the Registration Act, which provides as to the effect of non-registration of the documents required to be registered. Section 49 of the Registration Act reads as under:

49. Effect of non-registration of documents required to be registered.- No document required by Section 17 [or by any provision of the Transfer of Property Act, 1882 (4 of 1882)], to be registered shall-

(a) affect the rights in the immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered:

[Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877), [***] or as evidence of any collateral transaction not required to be effected by registered instrument.]

22. Therefore, in absence of registration as provided u/s 49 of the Registration Act, the document, which is required to be registered for affecting the rights in the immovable properties of the borrower, shall not be conferred and in fact, it may not be received as an evidence for any transaction affecting any such right or the confer any right or interest. In other words, when the rights in the immovable properties are required to be affected or transferred or conveyed the registration of the document is required to be made. Admittedly, it is not the case of the present applicant as an assignee that such a provision is not required to be followed or documentation is not required to be registered. Further, the transaction regarding the conveyance of any right or in the immovable properties including by way of assignment is to be made. The compliance with the requirement of other statute like Transfer of Properties Act as well as Registration Act and also when the document is executed and registered subject to payment of stamp duty as per the Bombay Stamp Act will have to be considered. The submissions made by the learned Counsel, Mr. Pahwa are required to be appreciated referring to the judgment of the Hon''ble Apex Court, by which, the assignment of the debt is permitted under the Banking Regulation Act and the guidelines of the R.B.I. Therefore, permitting the sale and purchase of NPA by such permission under the Banking Regulation Act or the guidelines of the RBI cannot be construed as nullifying the operation of other statutes like the Transfer of Properties Act or the Registration Act or the Bombay Stamp Act. If the submission made by learned Counsel, Mr. Pahwa is to be accepted that he would step into shoes of assignor and he may proceed to recover the debt under the Securitization Act would amount to giving the total go bye to the statutory provisions of the Transfer of Property Act and Registration Act as well as Bombay

Stamp Act. In fact, under the financial policy allowing the assignment of debt under the Banking Regulation Act or the guidelines is one thing but it would require compliance of other provisions of law or the statute subject to which only right or claim could be exercised. Even in case of assignor, the lender bank while claiming any such right in the immovable property of the debtor, the procedure is required to be followed before affecting the rights and, therefore, merely because such guidelines have been issued or the assignment of debt has been permitted by the R.B.I., it cannot be a ground of overriding or ignoring the statutory provisions of law for conveying the right, title or interest in the immovable property and if that is permitted or even this submission canvassed by the learned Counsel, Mr. Pahwa is accepted, it would amount to giving such guidelines or such a permission for assignment of debt and overriding effect over the basic statutory provisions like Transfer of Properties Act or the Registration Act, which can never be the intention of the legislature even while enacting the special statute like Securitization Act or D.R.T. Act to speed up or expedite the recovery proceedings. The object of the enactment of Securitization Act is to recovery of the debt, which is one of the object and which may be sought to be achieved but it cannot be construed in such a manner that it negates or nullify the statutory provisions of other laws like Transfer of Properties Act. In fact, by such assignment of debt, which is permissible, by which the banks inter se may be permitted to assign the debt by such deed of assignment but subsequently for the purpose of recovery or claiming any right in the property, which is offered as a security the compliance with other statutory provisions like Transfer of Properties Act or the Registration Act has to be made. It is in this background, when the submission made by the learned Counsel, Mr. Pahwa is considered even though the jurisdiction of the civil court is barred, the present Second Appeal raising very substantial questions of law with regard to the applicability of the special statute like Securitization Act and also raising other important questions of law as discussed above with regard to the assignment of debt vis-?-vis the applicability of other provisions of Transfer of Properties Act or Registration Act or the Stamp Act subject to which further steps could be taken will have to be considered. Therefore, after by-parte hearing, when the interim relief has been granted in the Second Appeal, this Civil Application for modification based only on the judgment of the Hon''ble Apex Court, by which, the assignment of debt is made permissible by itself would not be sufficient to vacate the interim relief. Therefore, the present Civil Application cannot be allowed and deserves to be allowed.

23. A useful reference can be made to the observations made by the Hon''ble Apex Court in a judgment reported in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*,

24. Accordingly, the present Civil Application filed for vacating the interim relief granted vide order dated 10.08.2009 passed in Civil Application No. 395/2009 stands rejected. Rule is discharged.