(2013) 09 DEL CK 0572

In the Delhi High Court

Case No : IA No. 16579 of 2011 in CS (OS) 2228 of 2011

M/s. KBM Gems and Jewellers Pvt. Ltd. APPELLANT

Vs

PNB RESPONDENT

Date of Decision : 05-09-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19(11), 19(6)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(10), 17, 34

Citation : (2013) 8 AD 321

Hon'ble Judges : Jayant Nath, J

Bench : Single Bench

Advocate : Rajshekhar Rao, for the Appellant; Rajinder Wali, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Nath, J.—This is an application filed by the defendant under provisions of Order VII Rule 11 CPC for rejection of the plaint. The accompanying plaint has been filed by the plaintiff pointing out that the plaintiff has been availing of numerous credit facilities offered by the defendant Bank since May 2009. On 26.05.2009, it is stated that the defendant sanctioned credit facilities in favour of the plaintiff for Rs. 17.5 crores against collateral comprising of six immovable properties. On 15.10.2009, it is stated that the sanction limit of the plaintiff was enhanced to Rs. 33.5 crores without insisting on any additional collaterals. Thereafter, in March 2011, the defendant suddenly without any provocation or justification refused to negotiate any export bills or other requests for credit facilities by the plaintiff Company. It is stated that this resulted in a sudden and serious breakdown of commercial operations. It is stated that the defendant due to its negligence has landed the plaintiff in severe financial distress. Hence, the present suit has been filed by the plaintiff seeking declaration and recovery of money. On 14.5.2013, learned counsel appearing for the plaintiff had stated that the present Suit qua reliefs other than relief stated in prayer (b) and (e) of the prayer clause of the plaint would not be maintainable in view of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the fact that the plaintiff has also taken recourse to Section 17 of the said Act.

Prayer (b) and (e) of the plaint which are the only relief that survives read as follows:-

(b) Pass a decree directing the defendant that the amount of Rs. 18,87,48,649/- (Rupees Eighteen Crores Eighty Seven Lakhs Forty Eight Thousand Six Hundred & Forty Nine Only) be excluded by the from the total liability of the Plaintiff;

(e) Pass a decree directing the defendants to pay to the plaintiffs an amount of Rs. 5,00,00,000/- (Rupees Five Crores only) as damages for business loss caused to the plaintiff due to the conduct of the defendant at the rate 18% interest.

2. The present application is filed by the defendant bank stating that the relief sought in the present Suit is barred u/s 34 of SARFAESI Act, which debars jurisdiction of a Civil Court to entertain any Civil Suit in respect of any manner in which the Debt Recovery Tribunal is empowered under this Act to determine. It is further stated that even under provisions of Section 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 this Court would have no jurisdiction.

3. Learned counsel appearing for the plaintiff submits that as far as Securitization Act is concerned he has already clarified that he does not seek reliefs which are covered by the said Act, namely, prayer a, c and d which he has already given up.

4. Regarding the DRT Act he submits that presently there are no proceedings filed by the bank under the DRT Act and hence Section 17 of the said Act would have no application. Hence, it is submitted that the bar of filing a suit as stated in Section 18 of the DRT Act would not be applicable in the present case. He relies upon a judgment of this Court passed in the case of Sunayana Malhotra and Others Vs. ICICI Bank, to submit that the ouster of jurisdiction u/s 18 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, would come into play only in case the defendant files a petition before DRT. It is only then that the jurisdiction of this Court would stand ousted and the present claim of the plaintiff would have to be adjudged as a Counter-Claim before DRT.

5. Learned counsel appearing for the defendant on the other hand submits that the defendant has taken steps under the Securitization Act and four of the properties have been sold. He submits that the plaintiff had proceeded u/s 17 of the Act to challenge these proceedings and hence u/s 34 of SARFAESI Act the present Suit would be barred. He further submits that having sold the said properties, the defendant would be filing a proper petition before the DRT within

three months from today. He relies on Section 13(10) of the Securitization Act to contend that the bank has to first liquidate the secured assets and then only it could move an appropriate petition before the DRT for recovery of the balance amount from the borrower. Hence, he submits that even otherwise the suit would be barred u/s 18 of DRT Act. He relies on Swadeshi Cement Ltd. and Others Vs. Union of India (UOI) and Others, to submit that the present Suit is barred.

6. The contention of the learned counsel for the defendant that the suit is barred u/s 34 of the SARFAESI Act cannot be accepted. The only two reliefs which are now pressed by the plaintiff are a decree for Declaration that Rs. 18.87 crores to be excluded from the total liability of the plaintiff and a decree against the defendant to pay an amount of Rs. 5 crores as damages for loss of business. The learned counsel for the defendant has not been able to show as to how this relief is connected with any of the provisions of the SARFAESI Act. This relief does not pertain to any security interest created in favour of any secured creditor. This relief could at best be pleaded by the plaintiff as a counter claim in case any proceedings were initiated by the defendant Bank under the DRT Act. Hence, Section 34 of the SARFAESI Act has no application to the facts of the present case as now pending after the statement of learned counsel for the plaintiff on 14.05.2013.

7. In my view, regarding the issue of applicability of Section 18 of the DRT Act, the judgment of this Court in the case of Sunayana Malhotra & Ors. versus ICICI Bank, (supra) is fully applicable to the facts of this case. In that case, this Court held that as no proceedings are pending before the DRT, the Suit could not be said to be barred u/s 18 of the DRT Act. This Court further held that the question of plaintiff being entitled to file a counter-claim against the defendant before DRT could not arise, as there is no petition before DRT. Hence the provisions of Section 19(6) to 19(11) of the DRT Act would not be attracted. Relevant portions of paragraph 4 of Sunayana Malhotra & Ors. versus ICICI Bank (supra) reads as follows:-

4. The matter does not require detailed discussion in view of the judgment of the Supreme Court in Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, pronounced since the orders were reserved in the present case. The Supreme Court has held that no independent proceedings can be initiated by a debtor before DRT; a debtor under the common law of contract as also in terms of the agreement may have an independent right; no forum has been created for endorsement of that right-jurisdiction of civil court is barred only in respect of matters which strictly come within the purview of Section 17 of DRT Act and not beyond the same; the civil Court therefore will continue to have jurisdiction.

8. A reference may also be had to relevant portion of para 117 of the judgment of the Hon''ble Supreme Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation,

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 counterclaims 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....

9. The judgment cited by the learned counsel for the defendant in the case of Swadeshi Cement Ltd. & Ors. versus Union of India & Ors.(supra) would have no application to the facts of this case. That was a case where on a meaningful reading of the plaint, it was clear that the plaintiff had challenged in the said suit the auction proceedings of the secured assets of the plaintiff by defendant in pursuance of a notice u/s 34 of the SARFAESI Act. Hence, in that case it was held that the suit is barred u/s 34 of the SARFAESI Act. In the present case, no proceedings are pending before DRT. Merely because the counsel for the bank contends that it would be filing appropriate proceedings before the DRT, it cannot be held that the jurisdiction of a Civil court stands ousted. Hence for the present, the application is premature and dismissed.

CS(OS) 2228/2011

List before the Joint Registrar on 28th November, 2013 for further proceedings.

