(2022) 03 GAU CK 0002

In the Gauhati High Court

Case No : Civil Revision Petition (IO) No. 393 Of 2019

Punjab National Bank APPELLANT

Vs

Bhaben Chandra Baishya And 4 Ors. RESPONDENT

Date of Decision : 02-03-2022

Acts Referred:

Constitution Of India, 1950 — Article 227
Code Of Civil Procedure, 1908 — Order 7 Rule 11(d)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 2(zd), 2(zf), 13, 13(1), 13(2), 13(4), 17, 18, 34

Citation : (2022) 03 GAU CK 0002

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : A. Parvez, R. Sarma

Final Decision : Allowed

Judgement

1. In this Civil Revision Petition under Article 227 of the Constitution of India, the petitioner, Punjab National Bank, has put to challenge the order, dated 26.08.2019, passed by the learned Civil Judge No. 1, Kamrup (M), Guwahati, in Title Suit No. 323/2014. It is to be mentioned here that vide the impugned order, the learned Civil Judge No. 1, Kamrup (M), Guwahati, had rejected the petition No. 805/2015, filed by the petitioner under Order VII Rule 11(d) of the Code of Civil Procedure read with Section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

2. The factual background leading to filing of the present petition is briefly stated as under:-

"The respondent No. 1, Dr. Bhaben Chandra Baishya, being the plaintiff, instituted a Title Suit No. 323/2014, seeking declaration of his right, title and interest over the suit property and also seeking a declaration that there is no valid and genuine mortgage of the suit property created by respondent No.2 Shri Partha Pratim Das. It is to be mentioned here that the respondent No. 2, Shri

Partha Pratim Das (defendant No. 2 in the Title Suit), has availed a term loan from the petitioner Bank (defendant No. 1 in the Title Suit No. 323/2014) after verification of his title in respect of the suit land and property sanctioned a term loan of Rs. 14,90,000/(Rupees Fourteen Lacs and Ninety Thousand only). But, subsequently, the respondent No. 2 had defaulted in payment of the loan to the petitioner Bank and the said loan became non performing asset (NPA). Thereafter, the petitioner Bank had initiated its proceeding under SARFAESI Act by publication of notice through the newspaper. But, the respondent No. 2 had never filed any representation against the said notice. Thereafter, the respondent No. 1, Dr. Bhaben Chandra Baishya (plaintiff in the Title Suit), had served a legal notice to the petitioner Bank that he had purchased the suit property from the respondent No. 2 vide registered Sale Deed No. 5644/2012. In its reply, the petitioner Bank submitted that the respondent No. 1 (plaintiff) purchased the suit property on 18.06.2012 and his right over the suit property is subject to earlier mortgage created in favour of the Bank. The petitioner Bank also stated that the Bank has taken symbolic possession of the suit property on 26.08.2014 and also published the possession notice on 31.08.2014 and as such, the suit comes under the ambit of the SARFAESI Act and in view of the provision of Section 34 of the said Act and under Order VII Rule 11(d) of the Code of Civil Procedure, the petitioner Bank has prayed for rejection of the Suit.

The respondent No. 1 (plaintiff) filed written objection and cited that the petitioner Bank and respondent No. 2 have committed fraud and the respondent No. 2 suppressed the material facts regarding the loan and mortgage because the loan account of respondent No. 2 was closed on 21.11.2011, on payment of entire money paid by the respondent No. 1 (plaintiff) and by showing the land to be free from all encumbrances and that the respondent No. 2 has mortgaged the suit property and availed loan from the petitioner Bank on 25.05.2011. The respondent No. 1 (plaintiff) also claimed that the petitioner Bank has sanctioned the loan fraudulently without receiving the copy of the Title Deed and that after the purchasing of the land by the respondent No. 1 (plaintiff), the petitioner Bank hurriedly took away the Sale Deed from the Office of the Sub-Registrar by swearing false affidavit and that there was conspiracy hatched between the respondent No. 2 and the petitioner Bank to deprive him from getting the suit land which he had purchased genuinely. The respondent No. 1 (plaintiff) also brought it to the notice of the Court that while sanctioning the loan by the petitioner Bank to the respondent No. 2, the RBI norms have not been followed. Therefore, it was contended to dismiss the petition.

But, the learned Court below, after hearing learned Advocates of both sides, had rejected the petition on the ground that the transaction between the petitioner Bank and the respondent No. 2 was fraudulent and the same has been pleaded in the Title Suit and as the relief claimed by the respondent No. 1 (plaintiff) involves question relating to declaration of title as well as fraud committed by the respondent No.2 and the petitioner Bank in between themselves, the remedy of the respondent No. 1 (plaintiff), is apparently within the domain of Civil Court.

Being highly aggrieved, the petitioner approached this court challenging the legality and validity of the impugned order and contended to set aside the same.

3. I have heard learned Advocates of both sides.

4. Mr. A. Parvez, learned counsel for the petitioner, submits that in view of Section 34 of the SARFAESI Act, the Title Suit, instituted by the respondent No. 1 before the Court of learned Civil Judge, is not maintainable. It is further submitted that the respondent No. 2 has availed term loan from the petitioner Bank by mortgaging the suit property and that the mortgage was created earlier and the property was sold later on and security interest is created in favour of the petitioner Bank over the suit property and as such, the petitioner Bank has rightly issued notice and taken over symbolic possession and, therefore, the Suit is not maintainable and if the respondent No. 1 (plaintiff) has any grievance then he may approach the Debt Recovery Tribunal in view of Section 17 of the Said Act. Mr. A. Parvez, learned counsel for the petitioner, also referred to following case laws in support of his submissions:

1) Jagdish Singh Vs. Heeralal & Ors. (AIR 2014 SC 371);

2) Authorized Officer, State Bank of India Vs. M/s. Allwyn Alloys Pvt. Ltd & Ors. (AIR 2018 SC 2721); and

3) Authorized Officer, State Bank of Travancore & Anr. Vs. Mathew K.C. (AIR 2018 SC 676).

5. On the other hand, Mr. R. Sarma, learned counsel for the respondent No.1 submits that no mortgage was created over the suit property by the respondent No. 2 to the petitioner Bank and that the suit property was already mortgaged to UCO Bank and that the mortgage allegedly created by the respondent No. 2 to the petitioner Bank was not registered and it was a simple mortgage and no security interest was created and the SARFAESI Act is not at all applicable and the petitioner Bank has granted loan to the respondent No. 2 in violation of the norms of RBI and, therefore, it is contended to dismiss the petition.

6. Per contra, Mrs. S. Goswami, learned counsel for the respondent No. 5, submits that as fraud was pleaded by the respondent No. 1 in his Title Suit besides claiming for declaration of the title in respect of the suit property and that the Civil Court has jurisdiction to entertain suit and therefore, it is contended to dismiss the petition.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the impugned order, dated 26.08.2019, passed by the learned Civil Judge No. 1, Kamrup (M), Guwahati, in Title Suit No. 323/2014, and the record of the learned Court below and also the case laws referred to by the learned counsel for the petitioner.

8. It appears that the respondent No. 2, along with his wife, Mrs. Krishna Hazarika, availed a term loan of Rs. 14,90,000/- (Rupees Fourteen Lacs Ninety

Thousand) only from the petitioner Bank under United Mortgage Loan Scheme and as per terms and conditions mentioned in the Sanction Letter dated 25.05.2011, the respondent No. 2 has created mortgage over his land and structure situated at Janapath, Khanapra being H/No.11 constructed over a plot of land measuring 10 Lechas covered by Dag No. 628(old)/309(new) patta No. 30(old)/92(new) of village Khanapara under Beltola Mouza in Kamrup(M) District. The petitioner Bank, before creation of the equitable mortgage of the aforesaid plot of land, verified right, title and interest of the respondent No. 2 through its panel lawyer and having been satisfied that the property is free from all type of encumbrances, it has sanctioned the loan and created equitable mortgage over the aforesaid plot of land. It also appears that while equitable mortgage was created, the original Sale Deed No. 651/2009, was not ready for delivery and, therefore, the respondent No. 2 has executed one special power of attorney authorizing the petitioner Bank to collect the original Sale Deed from the Office of the Sub-Registrar, Kamrup(M), Guwahati, and accordingly, the petitioner Bank has obtained the same.

9. Further it appears that thereafter the loan availed by the respondent No. 2 became NPA and as per provision of SARFAESI Act, 2002, the authorized office of the petitioner Bank initiated action under SARFAESI Act by serving notice under Section 13(2) upon the borrowers on 07.10.2013 and published the same in the newspaper also. But, the respondent No. 2 did not filed any representation before the authorized officer of the Bank and as no representation was received, the petitioner Bank initiated proceeding under provision of SARFAESI Act and then the petitioner Bank received one legal notice from the respondent No. 1, Dr. Bhaben Chandra Baishya (plaintiff of the Title Suit), to the effect that he has purchased the property from the respondent No. 2 vide registered Sale Deed No. 5644/2012 and the petitioner Bank then replied that the respondent No. 2 has created mortgage on 25.05.2011 of the said plot of land in favour of the petitioner Bank. The petitioner Bank, vide its aforesaid reply, also intimated the respondent No. 1 that his purchased over the immovable property on 18.06.2012, his right there on is subject to earlier mortgage created in favour of the Bank. Thereafter, the petitioner Bank has taken symbolic possession of the property on 26.08.2014 and published the possession notice on 31.08.2014 and as per provision of SARFAESI Act, 2002, the respondent No. 1 was required to file application against the petitioner Bank action under Section 17 of the SARFAESI Act, 2002, in the Debts Recovery Tribunal. However, the respondent No. 1 instituted the present suit which, according to the petitioner Bank, is not at all maintainable.

10. It is to be mentioned here that Section 34 of the SARFAESI Act, 2002, read as under:-

"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)."

11. A cursory perusal of Section 34 of the SARFAESI Act, 2002, shows that jurisdiction of the Civil Court is specifically barred in entertaining any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the aforesaid Act to determine.

12. Here in this case, it appears that the respondent No. 2 has availed the term loan, along with his wife, for a sum of Rs. 14,90,000/- (Rupees fourteen lakhs ninety thousand) only on 25.05.20211 and created equitable mortgage in favour of the petitioner Bank over the plot of land, as aforesaid. The petitioner Bank, before creating equitable mortgage, has ascertained as to whether the land in question is free from all encumbrances and having been satisfied with the report, submitted by its panel lawyer, the petitioner Bank has sanctioned the loan and created equitable mortgage on 25.05.2011.

13. On the other hand, it also appears that respondent No. 1 has purchased the immovable property on 18.06.2012, vide registered Sale Deed No. 5644/2012. At the relevant point of time, the original Sale Deed No. 651/2009 was not available. The respondent no. 1 has not disputed that equitable mortgage was created in favor of the petitioner Bank by the respondent No. 2, on 25.05.2011, but it has been alleged that fraud was committed.

14. It is well settled that once it is admitted that the suit property has in fact been mortgaged with the Bank or financial institution, then it cannot be disputed that the "security interest" is created, as defined under Section 2(z-f) of the said Act in favour of a "secured creditor", as defined under Section 2(z-d) of the said Act in respect of the suit property. The secured creditor thereupon becomes entitled to enforce its secured interest without intervention of the Courts or the Tribunals, in accordance with the provisions of the said Act and Rules framed there under, as stipulated under sub-section (1) of Section 13 of the said Act and the Rules and the jurisdiction of the Debts Recovery Tribunal under Section 17 of the said Act, springs in.

15. There is no doubt that when fraud is pleaded, the Civil Court has the jurisdiction to decide the matter, but, mere drafting of fraud/fraudulent action is not sufficient to surpass Section 34 of the SARFAESI Act. Though the learned Court below, in the impugned order, has held that fraud is pleaded here in this case and the learned counsel for the respondent No. 5, the HDFC Bank, also submitted that because of the fraudulent action of the petitioner Bank, the Civil Court has jurisdiction to try the suit. It is established that the fraud test must be satisfied in the event if a petition comprises allegation of fraud. Mere stating of fraud/fraudulent document is not enough to satisfy the test but need material evidence.

16. Here in this case, having gone through the record of the learned Court below and after perusing the plaint and the written statement, I find that mere allegation of fraud/fraudulent action is not enough to satisfy the test in absence of any material evidence.

17. In view of above, this Court left unimpressed by the submission of the learned counsel for the respondent No. 1 that the Section 34 of the SARFAESI Act is not attracted here in this case as there is absence of evidence to support the allegation of fraud/fraudulent action and in view of the fact that the mortgage was created by the respondent No. 2 in favour of the petitioner Bank, must before the alleged purchasing of the suit property by the respondent No. 1 from the respondent No. 2 and also in view of the admission of the fact of creating mortgage by the respondent No. 1 in favour of the petitioner Bank, this Court is inclined to hold that here in this case, Section 34 of the SARFAESI Act is attracted.

18. And, in view of Section 17 of the SARFAESI Act, the respondent No. 1, having been aggrieved by the action of the secured creditor under Section 13, can file objection before the Debts Recovery Tribunal. In such a situation, the normal jurisdiction of Civil Court cannot be invoked to decide the right of 'secured creditor' passed under Section 13 of the said Act and the jurisdiction exercised by the Debts Recovery Tribunal under Section 17 of the Act in view of the bar of jurisdiction provided under Section 34 of the said Act.

19. I have carefully gone through the case laws referred by the learned counsel for the petitioner. In the case of Jagdish Singh (supra) Hon'ble Supreme Court has dealt with section 13(4), 17 and 34 of the SARFAESI Act and held as under:-

"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."

On analyzing the facts, the Hon'ble Supreme court has further held that the expressions any person used in sec. 17 of the Act includes the plaintiff, who had filed a civil suit challenging sale of the secured property on grounds that the same was HUF property and allowed the appeal. In the case of Allwyn Alloys Pvt. Ltd & Ors. (supra) Hon'ble Supreme Court has held that no civil court can exercise jurisdiction to entertain any suit or proceeding in respect of any matter which the Debt Recovery Tribunal is empowered to determined. In the case of Mathew K.C. (supra) Hon'ble Supreme Court has disapproved entertaining writ petition in view of the adequate and alternative statutory remedy available to the respondent under section 17 and 18 of the SARFAESI Act. Thus, I find that the ratios laid down in the aforementioned cases, referred by the learned counsel for the petitioner, have fully supported the submissions advanced by him.

20. Again in the case of Mardia Chemicals Limited etc. vs. Union of India 2004(2) RCR (Civil) 665, in para 51, Hon’ble Supreme Court has held as under:-

"However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the case of English mortgages."

21. In the case in hand though the respondent No.1 has pleaded fraud/fraudulent action on the part of the petitioner and respondent No.2 in the plaint, yet except the bald averment, there is absence of materials to support the allegation of fraud/fraudulent action. Thus, the impugned order, dated 26.08.2019, passed by the learned Court below on the petition No. 805/2015, and thereby dismissing the prayer for rejection of the plaint, when tested on the touch stone of the principles discussed herein above, the same appears to be not justified and failed to withstand the test of propriety and correctness and therefore, it requires interference of this Court. Accordingly, the impugned order is interfered with.

22. In the result, the petition stands allowed. The impugned order, dated 26.08.2019, passed by the learned Civil Judge No. 1, Kamrup (M), Guwahati, in Title Suit No. 323/2014, stands set aside. Interim order, if any, stands vacated. Since the present suit is barred under Section 34 of the Act and the plaint is liable to be rejected, however, with the liberty to the plaintiffs to approach Debt Recovery Tribunal for any other relief.

23. Send down the record of the learned Court below immediately with a copy of this judgment and order. The parties have to bear their own costs.