(2020) 02 CAL CK 0084

In the Calcutta High Court

Case No : General Application (GA) No. 571 Of 2019, Civil Suits (CS) No. 178 Of 2018

Pyari Devi Chabiraj Steels Pvt. Ltd — APPELLANT

Vs

Axis Bank Limited — RESPONDENT

Date of Decision : 28-02-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code Of Civil Procedure, 1908 — Section 9, Order 7 Rule 11
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13, 13 (2), 13(4), 14, 17, 17(1), 17(3), 17(4), 18, 34, 34(4)
Recovery Of Debts And Bankruptcy Act, 1993 — Section 17, 17(1), 18, 19, 19(6), 19(7), 18(8), 19(9), 19(10), 19(11), 24
Maharashtra Rent Control Act, 1999 — Section 33

Citation : (2020) 02 CAL CK 0084

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Subhasis Sengupta, Avirup Chatterjee, Swatarup Banerjee, J. Roy, Arijit Dey

Final Decision : Dismissed

Judgement

Debangsu Basak, J

1. The defendant has applied for dismissal of the suit on the ground of bar under Section 34 of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Securities Interest (SARFAESI) Act, 2002 and Section 18 of the Recovery of Debts and Bankruptcy Act, 1993.

2. Learned Advocate appearing for the defendant has submitted that, the defendant sanctioned credit facilities to M/s. Padma Steel Industries, a

partnership firm of Mr. Binay Pandey who is one of the promoters of the plaintiff. The plaintiff took over the business of M/s. Padma Steel Industries along with credit facilities that M/s. Padma Steel Industries enjoyed from the defendant. There being defaults in payment of the credit facilities by the

plaintiff, the defendant issued a notice under Section 13 (2) of the Act of 2002 on August 27, 2018. The plaintiff filed the present suit on August 20,

2018 and presented the plaint on September 5, 2018. The suit is therefore to be considered to be instituted as on September 5, 2018. The defendant

having invoked the provisions of the Act of 2002 by the issuance of the notice under Section 13(2) of the Act of 2002, prior to the institution of the suit,

the instant suit therefore is barred under Section 34 of the Act of 2002. Moreover, the defendant filed a proceeding under Section 19 of the Act of

1993. Consequently, by virtue of the provisions of Section 18 of the Act of 1993, the instant suit is also barred.

3. Learned Advocate appearing for the defendant has submitted that, Section 9 of the Code of Civil Procedure, 1908 recognises that, the jurisdiction of

the Civil Court is ousted if there is an express or implied bar imposed by a statute in filing a suit. In the present case, there is a bar under Section 34 of

the Act of 2002 and a bar under Section 18 of the Act of 1993 in the Civil Court deciding the suit.

4. In support of the contention that the instant suit is barred by law, learned Advocate for the defendant has relied upon 2014 Volume 1 Supreme

Court Cases page 479 (Jagdish Singh v. Heeralal & Ors.) ,AIR 2018 Supreme Court (Supp.) page 2472 (M/s. Sree Anandhakumar Mills Ltd. v. M/s.

Indian Overseas Bank & Ors.), 2016 Volume 2 Calcutta Law Journal page 457 (Chhanda Hazra v. Mani Prasad Hazra & Anr.), AIR 2004 Supreme

Court page 2371 (Mardia Chemicals Ltd. v. Union of India & Ors.,) 2014 Volume 6 Supreme Court Cases page 1 (Harshad Govardhan Sondagar v.

International Assets Reconstruction Company Ltd. & Ors.).

5. Learned Advocate appearing for the plaintiff has submitted that, each and every suit filed by a borrower against a bank or a financial institution is

not barred under the provisions of the Act of 2002 or the Act of 1993. He has relied upon 2017 Volume 4 Calcutta High Court Notes (Cal) page 410

(Kaaiser Oils Pvt. Ltd. v. Allahabad Bank), 2015 Volume 4 Calcutta Law Times page 108 (Housing Development Finance Corporation Limited

(HDFC Ltd.) & Anr. v. Dorjee Dolma Bhutia & Ors.), 2011 Volume 3 Calcutta High Court Notes (Cal) page19 in support of such contentions.

Relying upon 2015 Volume 13 Supreme Court Cases page 635 (Bank of Rajasthan Ltd. v. VCK Shares and Stock Broking Services Ltd .l)earned

Advocate for the plaintiff has submitted that, the Supreme Court noticing divergent views on the issue as to whether Section 18 of the Act of 1993

bars the jurisdiction of the Civil Court absolutely made a reference with regard thereto to a larger bench. The issue is yet to be finally decided by the

larger bench.

6. The issues that have fallen for consideration in the present application are as follows:-

(i) Is a suit for damages against a secured creditor barred under Section 34 of the Act of 2002?

(ii) Is the present suit barred under Section 18 of the Act of 1993?

(iii) To what relief or reliefs are the parties entitled to?

7. The plaintiff has filed the instant suit claiming a decree for damages for a sum of Rs. 9.39 crores in terms of the particulars at paragraph 35 of the

plaint. The prayers in the plaint are as follows:-

â??a) Decree for Rs. 9.39 crore against the defendant as particularized in paragraph 35 hereinabove;

b) Decree for interest on the aforesaid amount of Rs. 9.39 crore, as particularized in paragraph 35 hereinabove, at the rate of 18% per annum from

March, 2018 till realisation thereof;

c) Attachment before Judgment ;

d) Injunction ;

e) Receiver ;

f) Costs ;

g) Such further or other reliefs ;â??

8. Paragraph 35 of the plaint is as follows:-

â??35. Due to the aforesaid acts and conduct of the defendant, the plaintiff has suffered damages to the tune of Rs. 9.39 crores, particulars whereof

are as follows:

a) 4.14 Crore â?" Total deficit of 23 crore in the projected sales figure. Plaintiff suffered a loss of 4.14 Crore.

b) 5 Crore â?" Due to SME 1 & SME O Plaintiff had lost all the reputation and goodwill in all financial sector, even in local market. For which

Plaintiff had to pay more rates to purchase the raw material to run his factory.

c) Around Rs. 25 Lakhs â?" Total amount illegally debited by the defendant in the loan account of the plaintiff.â??

9. According to the plaintiff, it availed of a cash credit facility from the defendant of a limit of Rs. 9.5 crores against collateral security. The plaintiff

applied for enhancement of the cash credit limit to Rs.

15 crores in June 2016. The defendant issued a sanction letter dated September 29, 2016 enhancing the cash credit facility to Rs. 15 crores but

capping the enhanced limit to Rs. 13 crores till March 31, 2017. The plaintiff not being satisfied with such conditions, requested the defendant to

modify the same. The defendant issued a revised sanction letter dated October 21, 2016 basically making minor modifications while continuing with

the original terms and conditions of capping the limit. Since the plaintiff did not agree to such modified terms, it approached another bank namely

Punjab National Bank for such bank to take over the credit facilities. Punjab National Bank issued a sanction letter dated October 27, 2016 agreeing to

take over the credit facilities. The defendant however demanded penal and preclosure charges. The plaintiff denied such claim. The plaintiff however

was compelled to pay penal and prepayment charges to the defendant in order to ensure that the plaintiff could avail of the offer of Punjab National

Bank. Thereafter, the defendant coerced the plaintiff to leave Punjab National Bank. The defendant issued a sanction letter dated March 7, 2017

which the plaintiff accepted. The account of the plaintiff was however classified as Special Mentioned Account (SMA) by the defendant. According

to the plaintiff, such classification was done wrongfully and in order to prevent the plaintiff from migrating to other banks. The account was healthy

and could not have been classified as SMA. In fact, the plaintiff identified Federal Bank who wanted to grant credit facilities to the plaintiff. By reason

of the wrong doings of the defendant, such opportunity was lost to the plaintiff. The plaintiff suffered loss and damages on account of the conduct of

the defendant on various other fields also. Therefore, the plaintiff has sought compensation for the loss and damages suffered from the defendant.

10. The suit was filed on August 20, 2018. The plaint was presented on September 5, 2018. Consequently, the suit is to be treated as being instituted

on September 5, 2018.

11. The defendant issued notice under Section 13(2) of the Act of 2002 on August 27, 2018. The defendant also took measures under Section 13 (4)

of the Act of 2002. The plaintiff filed an application under Section 17 of the Act of 2002 before the relevant Debts Recovery Tribunal. Subsequently,

the defendant filed an application under Section 19 of the Act of 1993 before the Debts Recovery Tribunal inter alia against the plaintiff.

12. Section 9 of the Code of Civil Procedure, 1908 allows suits of civil nature to be filed before the Civil Court unless the same is expressly or by

necessary implication barred.

13. The defendant has relied upon Section 34 of the Act of 2002 and Section 18 of the Act of 1993 as the bar on the Civil Courts to receive the suit

filed by the plaintiff.

14. Section 34 of the Act of 2002 is as follows :-

â??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)â??

Section 18 of the Act of 1993 is as follows:-

â??18. Bar of jurisdiction. â?" 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:â??

15. The parties have relied upon various authorities on the nature and extent of the bar under Section 34 of the Act of 2002. The Supreme Court in

Mardia Chemicals Ltd. (supra) has held that, the bar of jurisdiction under Section 34 of the Act of 2002 covers matters over which the secured

creditor has taken measures under Section 13(4) of the Act of 2002 as also matters which may be taken cognizance of by the Debts Recovery

Tribunal later on. In this context, it is apposite to refer to paragraph 50 of Mardia

Chemicals Ltd. (supra) which is as follows:-

â??50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-

section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the

appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr.

Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to

the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction

of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any

action taken ""or to be taken in pursuance of any power conferred under this Act"". That is to say the prohibition covers even matters which can be

taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It

is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in

respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil

court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures

have already been taken under sub-section (4) of Section 13.â??

16. The Division Bench of the Calcutta High Court in Kaaiser Oils Pvt. Ltd. (supra) has considered the provisions of Section 13 and 34 of the Act of

2002 in relation to a suit already filed. In the facts of that case, the borrower initially filed a writ petition assailing the conduct of the secured creditor

with regard to the disbursement of the credit facilities. Such writ petition was disposed of by permitting the borrower to pursue his remedies in

accordance with law before the appropriate forum. An appeal was carried from such order. Such appeal was disposed of by upholding the order

impugned. However the appeal Court permitted the borrower to approach any forum that he thinks fit and proper to avail of his remedies. A notice

under Section 13(2) of the Act of 2002 was issued. Measures under Section

13(4) of the Act of 2002 were also taken. The borrower approached the

Debts Recovery Tribunal under Section 17 of the Act of 2002. In such proceeding, the secured creditor claimed that the Tribunal did not have

jurisdiction to consider the issues raised by the borrower and that, the Civil Court would be the appropriate forum. The Tribunal held that, the reliefs

claimed by the borrower cannot be granted under Section 17 of the Act of 2002 as the same was beyond its jurisdiction. The Debts Recovery Tribunal

granted liberty to the borrower to approach the Civil Court for reliefs. The borrower thereafter filed the suit. The secured creditor challenged the

maintainability of such suit, inter alia, on the ground of bar under Section 34 of the Act of 2002. The application of the secured creditor was partially

allowed by the Trial Court by holding that, the suit was partially not maintainable in respect of the allegations against the statutory notice under the Act

of 2002 as well as the prayer relating to decree for mandatory injunction. The Division Bench in such factual background has held as follows:-

â??30. This Court has given an anxious consideration to the decisions cited at the bar. On perusal of those decisions, it appears to us that if the

amount of debt due to the Bank is more than Rs.10 lakh, no Civil Court, in view of Section 34 of the SARFAESI Act, will have jurisdiction to entertain

any suit or any proceeding in respect of any matter which a Debt Recovery Tribunal or Appellate Tribunal is empowered to determine by or under the

Act. However, there are some exceptions to the general principles which are as follows:-

(i) Civil Court's jurisdiction to entertain a declaratory suit is not barred as the DRT is not authorized to issue any declaration relating to title of the

parties etc. DRT' s jurisdiction is restricted only to issuance of certificate.

(ii) Civil Court's jurisdiction to entertain a civil suit is not barred when complicated questions of disputed facts are involved in the lis which is required

to be resolved by elaborate trial on evidence.

(iii) Civil Court's jurisdiction to entertain a suit is not barred when ultimate decision is to be taken on the allegations of fraud and misrepresentation.

(iv) Civil Court's jurisdiction to entertain any suit filed before the Bank takes any step for recovery of its dues by following the provisions of the Debt

Recovery Act or the SARFAESI Act, is not barred

(v) Civil Court's jurisdiction to entertain any suit in the nature of set off or counter-claim is also not barred, particularly when any of the actions of the

bank to recover its dues as per the SARFAESI Act is not challenged in the suit.â??

17. In Housing Development Finance Corporation Limited (HDFC Ltd.) & Anr. (supra) the High Court has dismissed an appeal against an order

rejecting an application under Order VII Rule 11 of the Code of Civil Procedure, 1908 filed in a suit of the borrower seeking declaration and

injunction. The High Court has found that, the suit was filed before any measure under Section 13(4) of the Act of 2002 was taken and that, the

plaintiff had set up a plea of fraud in the plaint. It has held as follows:-

â??22. What could be culled out from the ratio laid down in the above noted reports are that the expression â??any personâ? is a wide import and

amplitude and includes within its ambit a person other than the borrower or the guarantor who may be effected by any action taken under the

SARFAESI Act. A person who is neither a borrower or the guarantor has a right of an appeal under Section 17 of the said Act before the Debt

Recovery Tribunal assailing any measures taken under Section 13 (4) of the Act. The right of appeal is not restricted only to the measures taken

under Section 13 (4) but is further available if recourse is made to Section 14 of the said Act and even on mere apprehension of threat of

dispossession from the secured assets. Section 34 of the Act in explicit terms does not take away the jurisdiction of the Civil Court. The Civil Court

can exercise the jurisdiction within the limited extend, more particularly, when the ingredience under Section 17 (1) of the Act is not satisfied. It cannot

be said in absolute terms that the Civil Courtâ??s jurisdiction is taken away merely on an action taken under the SARFAESI Act.

23. In the present case, not only the plea of fraud has been set out in the plaint but there was no measures taken under Section 13 (4) or under Section

14 of the SARFAESI Act as on the date of the institution of a suit. Admittedly the notice under Section 13 (4) was issued after the institution of a suit.

The Court should confine its scrutiny under Order 7 Rule 11 of the Code to the averments made in the plaint when the rejection is sought under

Clause â??dâ? thereof. The Court should not look into the documents produced by the defendants at the stage of Order 7 Rule 11 and then to say

that the suit is barred.â??

18. The Supreme Court in Jagdish Singh (supra) has expressed the view that,

Civil Courtâ??s jurisdiction is completely barred so far as the measures

taken by a secured creditor under Section 13(4) of the Act of 2002 is concerned. It has noted Mardia Chemicals Ltd. (supra) and held as follows:-

â??24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed

against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrowerâ??s debt. One of the measures

provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing

the secured assets. Any person aggrieved by any of the â??measuresâ? referred to in sub-section (4) of Section 13 has got a statutory right of appeal

to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or

proceeding â??in respect of any matterâ? which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The

expression â??in respect of any matterâ?? referred to in Section 34 would take in the â??measuresâ? provided under sub-section (4) of Section 13

of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any â??measuresâ? taken by the borrower under sub-

section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such

circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the

Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation

Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

25. We are of the view that the civil court jurisdiction is completely barred, so far as the â??measureâ? 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 â??measuresâ? taken. The bank, in the instant case, has proceeded only against

secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystalised, before creating security interest in respect of the secured assets.â??

19. The Supreme Court in M/s. Sree Anandhakumar Mills Ltd. (supra) has taken note of Jagdish Singh (supra) and allowed the second respondent

before it to approach the jurisdiction of the Debts Recovery Tribunal within 45 days. The suits filed by the second respondent were directed to be

closed with the liberty as granted by the Supreme Court.

20. In Chhanda Hazra (supra) the Court has considered whether, jurisdiction of the Civil Court is barred when a measure under Section 13(4) of the

Act of 2002 was taken or not. It has also considered whether any person can approach the Debts Recovery Tribunal under Section 17 of the Act of

2002 against a measure taken by a secured creditor under Section 13(4) of the Act of 2002 or not. It has noted Jagdish Singh (supra) and Harshad

Govardhan Sondagar (supra). It has upheld the order of the Trial Court refusing to grant ad interim order of injunction. However, it did not enter into

the arena as to whether the Civil Court was competent to entertain the suit in which the borrower sought relief against a secured creditor. Chhanda

Hazra (supra) is not an authority for the proposition as to whether by a suit is barred under Section 13(4) of the Act of 2002 or not.

21. Harshad Govardhan Sondagar (supra) has considered the issue as to whether the tenant has any right in respect of a property in which security

interest is created in favour of a secured creditor. It has answered such question in paragraph 35 which is as follows:-

â??35. A further question of law raised in these appeals is whether the tenants have remedies under the tenancy law concerned. In the State of

Maharashtra, the Maharashtra Rent Control Act, 1999 is in force and this Act applies to premises let for the purposes of residence, education,

business, trade or storage specified in Schedule I and Schedule II to the Act as well as houses let out in areas to which the Bombay Rents, Hotel and

Lodging House Rates Control Act, 1947 applied before the commencement of the Act. Section 33 of the Maharashtra Rent Control Act is titled

â??jurisdiction of courtsâ? and it provides that the courts named therein â??shall have jurisdiction to entertain and try any suit or proceeding between

a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the Act and the

applications which are to be decided by the State Government or an officer authorised by it or the competent authorityâ?. The question of law that we

have to consider is whether the appellants as tenants of premises in the State of Maharashtra including Mumbai will have any remedy to move these

courts having jurisdiction under Section 33 of the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking

possession of the secured asset from the appellants. The answer to this question is in Sectiion 34 of the SARFAESI Act, which is extracted

hereinbelow:

â??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).â??

22. Subsequent to Harshad Govardhan Sondagar (supra), the Act of 2002 was amended and, Sub-Section (4-A) was introduced to Section 17 of the

Act of 2002 with effect from September 1, 2016. By such sub-section, the Debts Recovery Tribunal was empowered to decide claims of tenancy or

leasehold rights in respect of a secured asset.

23. For the sake of convenience, Section 34 of the Act of 2002 can be said to consist of three parts. The first part of Section 34 bars jurisdiction of

Civil Court to entertain a suit or proceeding in respect of any matter which the Debts Recovery Tribunal or the Debts Recovery Appellate Tribunal is

empowered by or under the Act of 2002 to determine. Section 17 of the Act of 2002 empowers a Debts Recovery Appellate Tribunal to decide

whether any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor for enforcement of the security are in

accordance with the provisions of the Act of 2002 and the Rules made thereunder or not. Sub-Section (3) of Section 17 of the Act of 2002 empowers

the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, on arrival at a conclusion

that any of the measures referred to in Sub-Section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of the

Act of 2002 and the Rules made thereunder, direct restoration of the management or possession to the borrower of the aggrieved person as the case

may be. It also empowers the Debts Recovery Tribunal to declare the recourse to any one or more measures undertaken by the secured creditor to

be invalid and to pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken of the secured creditor

under Sub-Section (4) of Section 13. Section 18 of the Act of 2002 empowers the Appellate Tribunal to decide an appeal from an order made by the

Debts Recovery Tribunal under Section 17 of the Act of 2002. Both Section 17 and Section 18 of the Act of 2002 allows not only a borrower to

approach the Debts Recovery Tribunal or the Appellate Tribunal as the case may be, but also, any person who is aggrieved by a measure taken by the

secured creditor under Section 13(4) of the Act of 2002 or any order passed by the Debts Recovery Tribunal under Section 17 of the Act of 2002, as

the case may be.

24. The second part of Section 34 of the Act of 2002 is an embargo on the Civil Court or any authority from granting any injunction in respect of any

action taken by the secured creditor in pursuance to the powers conferred on the secured creditor under the Act of 2002 and the Act of 1993. The

third part of Section 34 of the Act of 2002 is the bar on the Civil Court and any authority from granting any injunction in respect of any action to be

taken by the secured as conferred upon the secured creditor under the Act of 2002 and the Act of 1993.

25. Ouster of Civil Courtâ??s jurisdiction is to be strictly construed. On such principle of construction of Section 34 of the Act of 2002, the ouster of

jurisdiction of Civil Courts as enshrined therein is of limited impact. It is limited to the arena which a Debts Recovery Tribunal has jurisdiction under

Section 17 of the Act of 2002 to decide. Section 34 of the Act of 2002 ousts jurisdiction of Civil Courts when a measure taken by secured creditor

under the Act of 2002 against a secured asset or a measure which is capable of being taken by a secured creditor against a secured asset is

challenged. The subject matter of the suit has to involve a secured creditor and a secured asset in respect of which the secured creditor has either

taken a measure under Section 13(4) of the Act of 2002 or is capable of doing so, for the provisions of Section 34 of the Act of 2002 to apply in order

to bar the jurisdiction of the Civil Court. Civil Courtâ??s jurisdiction to try a suit will stand ousted when all of the following conditions are satisfied:-

(a) the suit is against a secured creditor claiming security interest in a secured assets

(b) the account, in respect of which the secured creditor claims to be secured by the secured assets involved in the suit, is a non-performing asset and

therefore the provisions of the Act of 2002 stands attracted

(b) the secured creditor undertook a measure under the provisions of the Act of 2002 in respect of the secured asset or the secured creditor is capable

of taking a measure against the secured asset involved in the suit under the Act of 2002

(d) the right of the secured creditor to invoke the Act of 2002 is not barred by the laws of limitation.

26. The bar under Section 34 of the Act of 2002 is limited to a suit of the nature which is within the competence of the Debts Recovery Tribunal to

decide under Section 17 of the Act of 2002. Section 17 of the Act of 2002 empowers a Debts Recovery Tribunal exercising jurisdiction under the Act

of 2002 to consider whether a measure taken by a secured creditor under Section 13(4) of the Act of 2002 was in accordance with the provisions of

the Act of 2002 and the Rules framed thereunder or not. Therefore, any and every dispute between the borrower and the secured creditor is not

within the competence of the Debts Recovery Tribunal to decide exercising jurisdiction under the Act of 2002. The Debts Recovery Tribunal

exercising jurisdiction under Section 17 of the Act of 2002 is competent to decide disputes between a borrower and a secured creditor which relates to

the validity of any measure taken or capable of being taken by the secured creditor under Section 13(4) of the Act of 2002. In view of the Sub-Section

(4-A) of Section 17 of the Act of 2002, with the Debts Recovery Tribunal being empowered to decide disputes relating to tenancy and lease rights in

respect of a secured asset, bar under Section 34 of the Act of 2002 on a suit relating to such subject matter also applies.

27. In an application under Section 17 of the Act of 2002, the Debts Recovery Tribunal may in a given case be faced with the issue as to whether, the

secured creditor could have invoked the provisions of the Act of 2002 at all since, the account could not have been classified as a non-performing

asset. In a given case, if the Debts Recovery Tribunal is called upon to decide such an issue then, the Debts Recovery Tribunal would be required to

proceed on the basis of the statement of account maintained by the secured creditor in respect of the transactions concerned. It is on the basis of such

statement of accounts of the transactions that, the Debts Recovery Tribunal has to return a finding as to whether, the account could have been

classified as a non-performing asset for the secured creditor to invoke the provisions of the Act of 2002 or not. In considering the statement of

accounts maintained by the secured creditor in respect of the transactions concerned, a Debts Recovery Tribunal, in my view is not called upon to

decide or adjudicate a claim for damages. In a given case, a borrower may claim that it suffered damages and therefore, in the event the claims of

such damages are taken into consideration, then the account could not have been classified as a non-performing asset. In my view, such an issue is

beyond the jurisdiction of the Debts Recovery Tribunal while deciding an application under Section 17 of the Act of 2002. Claim for damages is an

unascertained sum. The same obviously is not acknowledged by the secured creditor. The damages have to be ascertained on adjudication. The claim

for damages not being reflected in the statement of account maintained by the secured creditor in respect of the transactions, the Tribunal has to

proceed on the basis of the statement of account as produced by the Debts Recovery Tribunal to arrive at the finding as to whether the invocation of

the provisions of the Act of 2002 was correct or not. A Debts Recovery Tribunal can no doubt scrutinize the accounts maintained by the secured

creditor while deciding the issue as to whether, the account became a non-performing asset or not for the secured creditor to invoke the Act of 2002

in an application under Section 17 of the Act of 2002. Such powers of scrutiny, in my view, will not allow the Debts Recovery Tribunal to embark

upon adjudication as to a claim for damages made by a borrower or any person as against the secured creditor.

28. The test that is required to be applied while deciding whether a suit is barred under Section 34 of the Act of 2002 or not is, whether the subject

matter of the suit falls within the jurisdiction of the Debts Recovery Tribunal under Section 17 of the Act of 2002 or not. The Civil Court has to return

a finding that, the subject matter of the suit relates to a secured asset over which a secured creditor claims security interest and that, such secured creditor has taken a measure under Section 13(4) of the Act of 2002 or is capable of taking a measure under such provision. Applying such test to the

facts of the present case, the suit is for damages. The plaintiff has not prayed any relief with regard to any secured asset over which the defendant as

a secured creditor of the plaintiff, claims security interest. The measure undertaken by the defendant as the secured creditor in respect of the secured

asset is not under challenge in the present suit.

29. In the facts of the present case therefore, the claim for damages made by the plaintiff in the instant suit is beyond the jurisdiction of the Debts

Recovery Tribunal under Section 17 of the Act of 2002 and therefore, the embargo under Section 34 of the Act of 2002 is not attracted. The suit

therefore cannot be dismissed as being barred under Section 34 of the Act of 2002. The first issue is therefore answered in the negative, in favour of

the plaintiff and against the defendant.

30. The Division Bench in VCK Shares and Stock Broking Services Ltd. (supra), while considering the bar under the Act of 1993 has held that, the

trial Court acted in error in directing return of the plaint since, it was not permissible to present the plaint before the Debts Recovery Tribunal.

Consequent upon the Division Bench setting aside the order for return of the plaint, the suit remained with the Civil Court. The Division Bench

directed the Civil Court to decide the issues raised, in accordance with law.

31. Bank of Rajasthan Ltd. (supra) is the pronouncement of the Supreme Court on appeal from VCK Shares and Stock Broking Services Ltd.

(supra). It has noted the difference of opinion between coordinate Benches of the Supreme Court rendered in 2000 Volume 7 Supreme Court Cases

page 357 (United Bank of India v. Abhijit Tea Company Pvt. Ltd.), 2006 Volume 5 Supreme Court Cases page 72 (Indian Bank v. ABS Marine

Products (P) Ltd. & Ors.), 2007 Volume 1 Supreme Court Cases page 581 (State Bank of India v. Ranjan Chemicals Ltd. & Ors.,) 2009 Volume 8

Supreme Court Cases 646 (Nahar Industrial Enterprises Ltd. v. Hongkong and Shanghai Banking Corporation).

32. In VCK Shares and Stock Broking Services Ltd. (supra) the Division Bench has considered Abhijit Tea Company Pvt. Ltd. (supra), ABS Marine

Products (P) Ltd. & Ors., Nahar Industrial Enterprises Ltd. (supra) and Ranjan Chemicals Ltd. & Ors. (supra).

33. In VCK Shares and Stock Broking Services Ltd. (supra), two suits were filed by a borrower in the Original Side of the High Court. The first suit

of the borrower was for a decree for sale of shares, a decree for accounts enquiry into the damages suffered and a decree for the sum found on such

enquiry and mandatory injunction. The borrower filed the second suit against the same secured creditor claiming a decree for declaration that, the

shares pledged by the borrower were void. In both the suits, the secured creditor applied for rejection of the plaint in view of the provisions of the Act

of 1993. The learned trial Court held that, the two suits of the borrower came within the purview of Sub-Section (6) to (11) of Section 19 of the Act of

1993 and therefore the suits filed were not entertainable by the Court. The trial Court directed the plaints to be taken of the file. The trial Court

granted the borrower liberty to place the same before the Debts Recovery Tribunal within three months. The Division Bench, after considering the

ratio laid down in Abhijit Tea Company Pvt. Ltd. (supra), ABS Marine Products (P) Ltd. & Ors., Ranjan Chemicals Ltd. & Ors. (supra) and Nahar

Industrial Enterprises Ltd. (supra) held that, a Civil Court can direct return of plaint only if it appears to such Court that it has no jurisdiction to

entertain the suit. In case of inherent lack of jurisdiction, by reason of a bar created by a statute the Civil Court will not return the plaint but will either

reject the plaint if it appears from the averments made in the plaint that the suit is barred by law or dismiss the suit as not maintainable without going

into the merits of the disputes. The Division Bench found the recourse of return of plaint for presentation before the Debts Recovery Tribunal as was

directed by the order impugned before it to be incorrect. The Division Bench in VCK Shares and Stock Broking Services Ltd. (supra) has held that,

since Nahar Industrial Enterprises Ltd. (supra) was later in point of time and that, the same having considered the earlier three pronouncements of the

Supreme Court being Abhijit Tea Company Pvt. Ltd. (supra), Ranjan Chemicals Ltd. & Ors. (supra) and ABS Marine Products (P) Ltd. & Ors.

(supra) the Division Bench was bound by the decision in the case of Nahar Industrial Enterprises Ltd. (supra). Today however, there is a reference to

the Larger Bench with regard to the issue of law involved in the four Supreme Court decisions.

34. Section 18 of the Act of 1993 bars a Court or any other authority from exercising any jurisdiction, power or authority in relation to matters

specified in Section 17 of the Act of 1993. Section 17(1) of the Act of 1993 vest the jurisdiction, power and authority on the Debts Recovery Tribunal

to entertain and decide applications from banks and financial institutions for recovery of debts due to banks and financial institutions. Section 19 of the

Act of 1993 lays down that, where a bank or a financial institution has to recover any debt from any person, it may make an application to the Debts

Recovery Tribunal for the same. Sub-Section (6) of Section 19 allows the defendant in a proceeding under Section 19 of the Act of 1993 to claim set

of against the demand of the bank or financial institution. Sub-Section (7) of Section 19 allows the written statement of the defendant to have the

effect as that of a plaint in a cross suit so as to enable the Debts Recovery Tribunal to pass a final order in respect of both the original claim as also

the set of. Sub-Section (8) of Section 19 allows the defendant to lodge a counter claim in addition to the claim of set of. Sub-Section (9) of Section 19

allows such counter claim to have the same effect as a cross suit so as to enable the Debts Recovery Tribunal to pass a final order, both on the

original claim as also on the counter-claim. Sub-Section (11) of Section 19, however, allows the applicant being the bank or the financial institution, as

the case may be, before a Debts Recovery Tribunal, to raise the issue that, the counter-claim made by the defendant should be tried by way of an

independent action. The Debts Recovery Tribunal is empowered to decide on such issue.

35. Although Sub-Sections (6) to (11) of Section 19 of the Act of 1993 allows the Debts Recovery Tribunal to decide on an issue of set of or counter-

claim, as the case may be, and as raised by the defendant, in a proceeding under Section 19, Sub-Section (11) of Section 19 allows the Debts

Recovery Tribunal to direct the counter-claim to be decided in an independent action.

36. In a given case a borrower may have a claim against the bank or the financial institution concerned. Such bank or financial institution may not

invoke the provisions of Section 19 of the Act of 1993 till the last date of the limitation. Since Sub-Sections (6) to (11) of Section 19 of the Act of 1993

allows the Debts Recovery Tribunal to decide on a counter claim, and the laws of limitation applies to a proceeding under the Act of 1993 in view of

Section 24 of the Act of 1993, the possibility that, the counter claim of the borrower would stand defeated by reason of limitation is distinct. In order to save its claim, the borrower will have to institute a proceeding. A borrower is not allowed entry to a Debts Recovery Tribunal as an original applicant

under Section 19 of the Act of 1993. A borrower has to await the institution of a proceeding under Section 19 of the Act of 1993 by a bank or a

financial institution to make its claim for set off or counter claim. In a given case, this wait can be fatal to the claims of the borrower on the anvil of

the laws of limitation. When, the bank or the financial institution concerned do not file a proceeding under Section 19 of the Act of 1993, the borrower

has no option than to approach the regular Civil Court for its relief. As the scheme of the Act of 1993 obtains as on date, there is no scope for a

borrower to invoke the jurisdiction of the Debts Recovery Tribunal without the bank or the financial institution first applying under Section 19 of the

Act of 1993. The right of the borrower to approach the Debts Recovery Tribunal for its set of or counter-claim, as the case may be, arises only if the

bank or the financial institution concerned approaches the Debts Recovery Tribunal under Section 19 of the Act of 1993. As noted above, in a given

case, the bank or a financial institution may approach the Debts Recovery Tribunal on the last date of the limitation. In the event, the borrower did not

file any proceeding with regard to its claim, its counter claim in the proceeding under Section 19 of the Act of 1993 may stand barred by the laws of

limitation. Moreover, in a given case, a bank or a financial institution may not approach the Debts Recovery Tribunal under Section 19 of the Act of

1993 at all. In such a scenario, the bank or the financial institution cannot be allowed to contend that, since the subject matter of the claim in the suit of

the borrower can form subject matter of a proceeding under Sub-Sections (6) to (11) of Section 19 of the Act of 1993, the plaint filed by the borrower

should be rejected.

37. The eventuality of a civil suit being filed subsequent to the institution of the application under Section 19 of the Act of 1993 is not discussed herein

as such situation does not arise in the fact scenario of the present case.

38. In Abhijit Tea Company Pvt. Ltd. (supra), the borrower filed the suit prior to the Act of 1993 coming into force. The Court after noticing that, the

subject matter of the suit filed by the borrower was inextricably connected with the amount claimed by the bank, directed transfer of the suit filed by

the borrower to the Debts Recovery Tribunal for trial. In ABS Marine Products (P)

Ltd. & Ors. (supra) the Supreme Court has held that, the

jurisdiction of the Civil Courts are not barred with regard to any suit filed by a borrower against a borrower for any relief. Such jurisdiction is barred

only in regard to applications by a bank or a financial institution for recovery of its debt. On the provisions of Sub-Section (6) to Sub-Section (11) of

Section 19 of the Act of 1993, ABS Marine Products (P) Ltd. & Ors. (supra) has held that, such provisions do not confer jurisdiction on the Debts

Recovery Tribunal to try independent suits or proceedings initiated by the borrower. Such sub-sections provide and permit a cross action by the

defendant in a proceeding under Section 19 of the Act of 1993. It has held that, the borrower retained the option to file a separate suit before a Civil

Court and that, counter-claim before the Debts Recovery Tribunal was not the only remedy.

39. ABS Marine Products (P) Ltd. & Ors. (supra) has considered Abhijit Tea Company Pvt. Ltd. (supra) and held that, an independent suit can be

deemed to be a counter claim and can be transferred to the Tribunal only if the subject matter of the proceeding of the bank and the subject matter of

the suit of the borrower against the bank is inextricably connected in the sense that, the decision in one would effect the decision of the other, and

when the parties to the suit filed by the borrower agree that such suit be considered as a counter claim in the application under Section 19 of the Act

of 1993. In Ranjan Chemicals Ltd. & Ors. (supra), the Supreme Court has held that, consent of the parties to transfer the suit to the Debts Recovery

Tribunal was not necessary as has been held in ABS Marine Products (P) Ltd. & Ors. (supra). In Nahar Industrial Enterprises Ltd. (supra), the

Supreme Court has considered Abhijit Tea Company Pvt. Ltd. (supra), ABS Marine Products (P) Ltd. & Ors. (supra) and Ranjan Chemicals Ltd. &

Ors. (supra) and held that, the view expressed in ABS Marine Products (P) Ltd. & Ors. (supra) that, the consent of the parties to the suit pending

before the Civil Court was required for transfer of such suit to the Debts Recovery Tribunal for final disposal, was correct.

40. ABS Marine Products (P) Ltd. & Ors. (supra) and Nahar Industrial Enterprises Ltd. (supra) have held that, the claims of the borrower in an

independent suit can be transferred only if the following two conditions exist :-

(i) Inextricable connection of the subject matter of the two proceedings and

(ii) The agreement of both parties that the suit should be transferred to the Tribunal.

Ranjan Chemicals Ltd. & Ors. (supra) however has held that, no consent of the parties is required for transfer of the independent suit of the borrower

from the Civil Court to the Debts Recovery Tribunal.

41. In appeal from VCK Shares and Stock Broking Services Ltd. (supra) the Supreme Court in Bank of Rajasthan Ltd. (supra) has, after noticing the

conflicting views, referred the question of law as to whether, a suit filed by a borrower against a secured creditor which applied for recovery of its

loan against the plaintiff under the Act of 1993 is liable to be transferred and tried along with the application under the Act of 1993 of the secured

creditor, by the Debts Recovery Tribunal or not to a larger Bench. It is apposite to refer to paragraph 14 of such report which is as follows:-

â??14. It is not possible to accede to the submissions made on behalf of the respondent as pointed out above. There is a difference of opinion

between several Benches of this Court on the issue. This is likely to create a doubt as to the true position in law, hence we consider it appropriate to

refer the following questions of law to a larger Bench:

14.1. (i) Whether an independent suit filed by a borrower against a Bank or Financial Institution, which has applied for recovery of its loan against the

plaintiff under the DRB Act, is liable to be transferred and tried along with the application under the RDB Act by the DRT?

14.2 (ii) If the answer is in the affirmative, can such transfer be ordered by a court only with the consent of the plaintiff?

14.3. (iii) Is the jurisdiction of a Civil Court to try a suit filed by a borrower against a Bank or Financial Institution ousted by virtue of the scheme of

the RDB Act in relation to proceedings for recovery of debt by a Bank or Financial Institution?â??

42. The present suit was instituted on September 5, 2018. Although the date on which the application under Section 19 of the Act of 1993 was filed by

the defendant is not on record, learned Advocate for the defendant has submitted in the course of his submissions that, the same was filed subsequent

to the institution of the instant suit. Given the subject matter of the instant suit it cannot be said that there is inherent lack of jurisdiction in receiving,

trying and determining the instant suit. The application of the defendant under

Section 19 of the Act of 1993 filed before the Debts Recovery Tribunal is not on record. In absence of evidence being placed on record which the defendant could have easily produced in this application, the Court need not hazard a guess that, there is inextricable connection between the subject matter of the suit and the application under Section 19 of the Act of 1993. When the Court is incapable of returning a finding that the subject matters of the two proceedings are inextricably connected, the Court need not find out whether the parties are consensus ad-idem on the issue of transfer of this suit to the Debts Recovery Tribunal or not. Moreover the issue as to whether a suit of the present nature can at all be transferred and tried along with an application under Section 19 of the Act of 1993 is pending consideration before the larger Bench of the Supreme Court.

43. When the present suit was filed there was no embargo on the plaintiff from instituting it. The maintainability of the suit has to be decided as on the date of institution of the suit. The plaintiff not suffering any embargo from instituting the present suit on the date of its institution, the Court not lacking in inherent jurisdiction to receive and try the suit on the date of its institution, there being no material on record to establish that the subject matter of the suit and the Section 19 application are inextricably connected, and the issue as to the effect of filing of an application under Section 19 of the Act of 1993 subsequent to the institution of a suit before a Civil Court being referred to the larger Bench of the Supreme Court, the second issue is answered in the negative, against the defendant and in favour of the plaintiff.

44. In view of the discussions above, the third issue is answered by holding that the defendant is not entitled to the reliefs as prayed for.

43. GA No. 571 of 2019 is dismissed without any order as to costs.

