(2009) 10 DEL CK 0349

In the Delhi High Court

Case No : IA No. 5814 of 2009 in CS (OS) No. 527 of 2009

Sunayana Malhotra and Others — APPELLANT

Vs

ICICI Bank — RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 10, 11, 13, 17, 18
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 2(1), 34

Citation : (2009) 163 DLT 602 : (2010) 7 RCR(Civil) 1658

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Y.P. Narula and Sugandha Anand, for the Appellant; Paras Khattar, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—Application of the defendant under Order 7 Rule 11 of the CPC for rejection of the plaint for the reason of the relief claimed in the suit being barred by Section 18 of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (DRT Act) r/w Section 34 of the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Securitization Act) is for consideration.

2. The plaintiffs have instituted the suit for declaration and permanent injunction. They have pleaded that they along with others had promoted M/s Sudarshan Consolidated Limited since known as M/s Willy Agrotech Limited; that the said company had obtained certain credit limits from the defendant and had executed the loan documents in favour of the defendant bank; that the plaintiffs had also executed personal guarantees in favour of the defendant; that the plaintiffs have sold their shareholding in the company and have resigned from the Board of Directors of the company and are left with no concern with the company; that

the defendant had got issued notice dated 31st December, 2008 claiming the plaintiffs to be jointly and severally liable for the debts of the company; that the plaintiffs are not so liable for the debts of the company not only for the reason of having transferred their shares and resigned from the Board of Directors of the company but also for the reason of the defendant having altered the terms & conditions of the credit facility with the company. The plaintiffs have further pleaded that notwithstanding the aforesaid and in breach of the RBI guidelines with regard to "willful defaulters", the defendant had threatened to declare the plaintiffs as willful defaulters and which would interfere with the plaintiffs'' right to carry on other businesses. The plaintiffs have claimed the relief of declaration that the personal guarantees executed by the plaintiffs in favour of the defendant stand discharged, the relief of perpetual injunction restraining the defendant from invoking the personal guarantees and for mandatory injunction directing the defendant to produce the documents of personal guarantee and for cancellation thereof.

3. The suit came up first before this Court on 20th March, 2009 when the senior counsel for the plaintiffs was asked to satisfy the court as to how the relief''s claimed in the suit were not barred by the DRT Act. On the next date i.e. 24th March, 2009, the counsel for the defendant appeared and sought time to file the written statement. In the circumstances, the plaint was registered as a suit. On the application of the plaintiffs for interim relief the defendant was restrained from declaring the plaintiff as willful defaulters, subject to the condition that the plaintiffs shall not alienate any of their immovable property save in the normal course of business and not deal with/conduct their affairs to the detriment of the defendant. The plaintiffs were also directed to file list of their assets in the court. Thereafter, the application under consideration was filed. Since it involved only legal questions, arguments thereon were heard without calling for a reply. The senior counsel for the plaintiffs on 1st May, 2009 also clarified that the interim order restraining the defendant from declaring the plaintiffs as defaulters was not intended to be an embargo to the defendant initiating proceedings against the plaintiffs before DRT. It was further clarified that in the event of the defendant initiating proceedings against the plaintiffs before DRT, the plaintiffs shall not before the DRT take up the plea of those proceedings being not maintainable owing to pendency of this suit. The interim order was clarified accordingly.

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; that even a set off or a counter claim permitted to be raised under

sub Sections 6 - 11 of Section 19 of the DRT Act can be lodged only if the proceedings have been initiated by a bank; such set off or counter claim can also be directed to be instituted in civil court on an application of the bank; an order of injunction for attachment or appointment of a receiver can be initiated only at the instance of the bank; DRT can issue a certificate only for recoveries of dues of a bank - it cannot pass a decree; that the statutory provisions contained in Sections 17 & 18 of DRT Act cannot be said to have ousted the jurisdiction of the civil court qua the suits filed by the debtor - the jurisdiction of the civil court is barred in relation only to the applications from the bank or recovery of debts due to such bank; that the jurisdiction of a civil court is preemptive in nature - unless the same is ousted expressly or by necessary indication it will have jurisdiction to try all types of suits; that the possibility of a debtor filing a preemptive suit and obtaining orders of injunction cannot be ruled out but that by itself cannot be a ground for ousting the jurisdiction of the civil court. The court quoted portion of judgment in Indian Bank Vs. ABS Marine Products Pvt. Ltd., laying down that Sections 17 & 18 of DRT Act had not been amended and jurisdiction had not been conferred on DRT even after amendment of Section 19 to try independent suits or proceedings initiated by borrowers or others against Banks/Financial Institutions; nor the jurisdiction of civil court barred in regard to such suits/ proceedings.

5. In the light of the aforesaid dicta, the plea for rejection of the plaint in so far as on the ground of the relief claimed therein being barred by Section 18 of DRT Act is not tenable and is rejected. It is significant to note that the plaintiffs have in the plaint para 14 expressly stated that no proceeding for recovery had been filed by the defendant against them till the institution of the suit. The defendant in the application under Order 7 Rule 11 of the CPC has not stated having filed any proceeding against the plaintiffs before DRT. For this reason also the question of the plaintiffs being entitled to make any counter claim against the defendant before DRT under the provisions of Section 19(6) to (11) of DRT Act does not arise.

6. That leaves for consideration the ground of rejection of the plaint owing to the bar of Section 34 of the Securitization Act. The said provision was not under consideration in Nahar Industrial Enterprises Ltd. aforesaid.

7. Section 34 of the Securitization Act bars the jurisdiction of the civil court to entertain any suit or proceeding (i) in respect of any matter which DRT is empowered by or under the Securitization Act to determine and (ii) prohibits the civil court from issuing any injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Securitization Act or under the DRT Act.

8. Section 13 of the Securitization Act provides for enforcement of a "security interest" created in favour of any secured creditor. Section 2(1)(zf) defines "security interest" as any right title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes a mortgage,

charge hypothecation and assignment. Section 17 provides for appeal to the DRT against a measure of enforcement of "security interest" u/s 13 of the Act. Thus the DRT under the Securitization Act is empowered to determine the validity of the measure of enforcement of "security interest" under the said Act.

9. The defendant in the application under consideration has nowhere pleaded that it has any "security interest" over any property of the plaintiffs or that the plaintiffs have created any mortgage, charge, hypothecation or assignment of any of their properties in favour of the defendant. On the contrary, the defendant has in the application repeatedly averred that the plaintiffs had furnished "personal guarantees" to secure the defendant qua the liability of the company. Thus the question of any matter which DRT is empowered by or under Securitization Act to determine does not arise. Thus of the two limbs carved out herein above of Section 34 of the Securitization Act the first is not applicable.

10. The second limb prohibits the civil court from granting any injunction in respect of any action taken or to be taken in pursuance of any powers under the Securitization Act or the DRT Act. In the absence of any plea of any "security interest" having been created by the plaintiffs in favour of the defendant, the question of the defendant taking any action against the plaintiffs under the Securitization Act does not arise. As far as the prohibition with respect to any action to be taken by the defendant against the plaintiffs under or in pursuance to the DRT Act is concerned, the senior counsel for the plaintiffs has already made a statement that in the event of the defendant initiating any proceedings against the plaintiffs before DRT the plaintiffs shall not set up a plea of the same being not maintainable owing to the pendency of the present suit. Even otherwise in the suit no relief restraining the defendant from taking any action under the DRT Act has been claimed.

11. I may however record that the possibility of a conflict in the judgment of this Court in this suit and of the order of the DRT in the proceedings, if any, initiated by the defendant against the plaintiffs before the DRT cannot be ruled out. The relief claimed by the plaintiffs in this suit if granted would tantamount to holding the plaintiffs not liable for any claims of the defendant against the company. In the event of proceedings against the plaintiffs being initiated before the DRT, the DRT would also be called upon to decide whether the guarantees furnished by the plaintiffs stand discharged or not. It is this aspect which had bothered this Court in even admitting the suit. However, I find Nahar Industrial Enterprises Ltd. to have dealt with this aspect of the matter also. It has in paras 44 & 45 of the judgment referred to judgment of this Court in Cofex Exports Ltd. Vs. Canara Bank, This Court had held that finality shall attach to the findings arrived at and reached by each of the two within its respective jurisdictional competence; issues heard and decided by the DRT shall operate as res judicata and shall bind the parties in the suit - however the civil court shall be free to decide such issues as lie within its jurisdictional competence and if the civil court must decide an issue seized by it and within its competence and if there be an unavoidable conflict

between the findings of civil court and the DRT, the findings of the civil court would override and supercede the findings of DRT. It thus appears that in such eventuality, if the civil court has decided the matter first, the finding of the civil court would be binding on the DRT.

12. I, therefore, do not find any merit in the application. The same is dismissed, however no order as to costs.

