

(2024) 03 GAU CK 0066

In the Gauhati High Court

Case No : Civil Revision Petition No. 57 Of 2023

UCO Bank And Anr

APPELLANT

Vs

Arif Hussain And Anr

RESPONDENT

Date of Decision : 20-03-2024

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code of Civil Procedure, 1908 — Section 115, Order 7 Rule 11
Security Interest (Enforcement) Rules, 2002 — Rule 8, 8(6), 9, 9(1), 9(2), 9(5), 9(6), 9(9), 9(10), 13, 13(2)(e)
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(1), 13(4), 13(8), 17, 17(1), 17(2), 17(3), 17(4), 17(7), 17A, 18, 18A, 18B, 19, 34

Citation : (2024) 03 GAU CK 0066

Hon'ble Judges : Devashis Baruah, J

Bench : Single Bench

Advocate : A. Ganguly, A. Sattar

Final Decision : Allowed

Judgement

1. This is an application under Section 115 of the Code of Civil Procedure, 1908 (for short, "the Code") challenging the order dated 28.04.2023 passed by the learned Civil Judge No.2, Kamrup (M) at Guwahati in petition No.1703/2022 arising out of the Title Suit No.177/2022. By the said impugned order, the application which was filed by the petitioners under Order VII Rule 11 of the Code was rejected.

2. For deciding as to whether the said rejection of the application vide the impugned order dated 28.04.2023 can be interfered with in the instant proceedings under Section 115 of the Code, this Court finds it relevant to take note of the statements made in the plaint.

3. The respondent No.1 herein as plaintiff had filed Title Suit No.177/2022. The facts as stated in the plaint are that the defendant No.1 had issued an e-auction sale notice for sale of four numbers of immovable properties under the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act , 2002 (for short, "the Act of 2002") read with proviso to Rule 8(6) of the Security Interest (Enforcement) Rules, 2002 (for short, "the Rules of 2002") on 23.12.2020 by publishing the said in the newspaper. The plaintiff upon perusal of the said advertisement participated in the online question bid in respect to one of the properties to be auctioned which has been specifically described in Schedule-A to the plaint. Upon participation of the plaintiff, he became the highest bidder for bidding an amount of Rs.75,60,000/- for the property described in Schedule-A. Under such circumstances, the plaintiff received an e-mail on 30.01.2021 at 7:05 PM with the titled as 'Sale Intimation Letter' confirming that the quoted amount of Rs. 75,60,000/- for the property described in Schedule-A and also stating therein that the status of the lot is Subject to Approved (STA). Subsequent thereto, another e-mail was received by the plaintiff at 7:32 PM from the Authorized Officer of defendant No.1 who is the defendant No.2 in the suit which contained details regarding the e-auction and the acceptance of the same as the highest bidder, and accordingly, declared the plaintiff as the "H1 bidder for the said property". The plaintiff thereupon was required to deposit 25% of the bid amount, which came to Rs.18,90,000/-. Apart from that the plaintiff was also directed by a message received from the defendants No.1 & 2, to deposit the remaining 75% of the entire bid amount within the next 15 days i.e. on or before the 14.02.2021 in the account provided by the defendants. It was also mentioned in the message as stated in the plaint that in the circumstance, the plaintiff failed to deposit the said amount, it would result in the cancellation of the sale and any amount deposited relating to the bid shall be considered to be forfeited. The plaintiff thereupon deposited Rs.13,78,000/- on 01.02.2021 and on 12.02.2021 deposited the remaining amount of Rs.56,70,000/-, and therefore, in total had deposited Rs. 75,60,000/- on 12.02.2021. The confirmation of the payments 01.02.2021 and 12.02.2021 was communicated vide a letter dated 17.02.2021 which was sent by the defendant No.1. Thereupon, the plaintiff was asked on 02.09.2021 to be present on the spot of the mortgaged property i.e. Schedule-A property on 04.09.2021, i.e. the date on which the learned Magistrate would bestow the physical possession of the mortgaged property to the plaintiff. However, on that date, the plaintiff could not visit on account of the health condition of his niece. Be that as it may, a letter was written to the plaintiff dated 06.09.2021 by the defendant No. 1 & 2 stating inter-alia that the Bank on 04.09.2021, in the absence of the plaintiff along with the learned Magistrate and other police personnel reached at the spot for taking physical possession of the mortgaged property. However as the guarantor one Shri Dharnya Ram Koch had offered a compromise proposal for Rs.1,05,00,000/- on the spot for settlement of the NPA of the proforma defendant No.3 and also deposited the said sum in the 'No Lien Account' alleging inter-alia that there was mass agitation against physical possession as the guarantor wanted to settle the loan account, so the learned Magistrate refused to take physical possession of the mortgaged property taking into consideration the apprehended breach of peace and tranquility and law and order situation as

claimed by the Bank. It is therefore the case of the plaintiff that the plaintiff had duly paid the amount and defendant Bank had also accepted the said amount and the defendant Bank cannot now resile from the proceedings of the e-auction. The plaintiff therefore claimed that the plaintiff was entitled to damages. Accordingly, the suit was filed seeking declaration to the effect that the cancelling of the auction sale by the defendant bank was highly illegal and without just cause for which the plaintiff was entitled to compensation as claimed for in the suit.

4. Pursuant to the issuance of the summons, a written statement was filed by the defendant Nos.1 & 2 denying to the entitlement of the plaintiff to the claim for damages and also raised the issue of maintainability of the suit in view of Section 34 of the Act of 2002. The said written statement was filed on 10.06.2022. On the same date, an application was filed under Order VII Rule 11 of the Code for rejection of the plaintiff on the ground that the suit was barred under Section 34 of the Act of 2002. To the said application seeking rejection of the plaintiff, the plaintiff duly filed the written objection. On the basis of the above, the learned Trial Court vide an order dated 28.04.2023 rejected the application filed by the defendant Nos.1 & 2 for rejection of the plaintiff under Order VII Rule 11 of the Code holding inter-alia that from the relief sought for in the suit and the statements made in the plaintiff, it revealed that the suit is a declaratory suit along with consequential relief in the form of damages and compensation. It was observed that from the averments made in the plaintiff, it transpired that the suit was not filed against any of the action taken by the secured creditor in terms with 13 (4) of the Act of 2002, and as such, the bar imposed under Section 34 of the Act of 2002 cannot be made applicable. Being aggrieved by the impugned order dated 28.04.2023, the instant application has been filed under Section 115 of the Code.

5. In the backdrop of the above, let this Court take note of the submissions made by the learned counsels appearing on behalf of the parties.

6. Mr. A. Ganguly, the learned counsel for the petitioners submitted that a perusal of Section 13 (4) read with Section 17 of the Act of 2002 would show that if any person is aggrieved by any of the measures taken under Section 13 (4) by the secured creditor or his authorised officer, the said person may make an application to the Debts Recovery Tribunal having the jurisdiction in the matter within 45 days from the date on which such measures have been taken. The learned counsel for the petitioner further drew the attention of this Court to Section 19 of the Act of 2002 which gives a remedy to the borrower or any aggrieved person who has filed an application under Section 17 or Section 17A or an appeal under Section 18 or Section 18A, as the case may be, for payment of such compensation and costs as may be determined by such Tribunal or Court of District Judge or Appellate Tribunal or the High Court referred to in Section 18B.

7. The learned counsel for the petitioners therefore submitted that in view of the action complained in the plaintiff comes within the ambit of Section 13 (4) of the

Act of 2002, the remedy of the plaintiff therefore would have been under Section 17 as well as Section 19 of the Act of 2002 and not by filing a suit. He further submitted that Section 34 of the Act of 2002 would clearly show that when the remedy lies before the Debt Recovery Tribunal or the Appellate Tribunal empowered under the Act of 2002, the Civil Court cannot entertain any suit or any proceedings. He therefore submitted that on the face of it, from a perusal of the statement made in the plaint, the suit was barred under Section 34 of the Act of 2002.

8. The learned counsel further referred to the judgment of the Supreme Court in the case of *Agarwal Tracom Private Limited vs. Punjab National Bank and Others*, reported in (2018) 1 SCC 626 and submitted that the jurisdiction of the Debt Recovery Tribunal extends from initiation of the proceedings under Section 13 (1) of the Act of 2002 and culminates till completion of the proceedings as envisages under Rule 9 of the Rules of 2002.

9. This Court has also heard Mr. A. Sattar, the learned counsel appearing on behalf of the respondent/plaintiff and submitted that the plaintiff would not come within the ambit of "any person" as envisages under Section 17 of the Act of 2002. Further to that, he submitted that for filing an application in terms with Section 17 of the Act of 2002, he has to deposit a huge amount of money and the plaintiff who is absolutely at no fault would be rendered remediless if the plaint is rejected. He therefore submitted that Section 17 of the Act of 2002 is neither applicable nor an efficacious remedy. The learned counsel for the respondents further submitted that in terms with Section 17 of the Act of 2002, the period of limitation for moving an application is within 45 days from the date on which the measures have been taken, and as such as on date, almost 3 years have passed by and in the circumstance of the instant case, if the plaint is rejected, the plaintiff/respondent would have no other available remedies for which Section 17 of the Act of 2002 cannot be said to an efficacious and effective remedy. He submitted alternatively that if the plaint is rejected being barred by law, the plaintiff ought to be granted some time to file appropriate proceedings under Sections 17 & 19 of the Act of 2002. The learned counsel for the plaintiff further submitted that from a perusal of the plaint, it would show that the plaint clearly discloses a cause of action in view of Section 13 (8) of the Act of 2002 as amended vide the amending Act w.e.f. 01.09.2016, and more so, in view of the clarity to the said provision expounded by the Supreme Court in its judgment rendered in the case of *Celir LLP vs. Bafna Motors (Mumbai) (P) Ltd.*, reported in (2024) 2 SCC 1.

10. Upon hearing the learned counsels for the parties also taking note of the statements made in the plaint it transpires that the plaintiff is aggrieved by the action of the respondent bank in not honouring the entire e-auction process wherein the plaintiff after duly depositing the entire consideration, the Defendant Bank had in violation of Section 13 (8) of the Act of 2002. The plaintiff is further aggrieved by the action of the respondent bank in not handing over the

possession of the property in question and rather refunding the amount which had been deposited by the plaintiff for which the plaintiff claims to be entitled to the damages on account of the same. Therefore, from a perusal of the statement of the plaint it would transpire that the allegation contained in the plaint are in relation to the violation of provisions of the Act of 2002 and the Rules of 2002.

11. This Court finds it very pertinent at this stage to take note of the judgment of the Supreme Court in the case of Celir LLP vs. Bafna Motors (Mumbai) (P) Ltd., reported in (2024) 2 SCC 1 wherein the Supreme Court categorically observed the right of the borrower to redeem the secured assets. It was observed by the Supreme Court that in view of the amended Section 13(8) of the Act of 2002, the right of right of the borrower to redeem the secured asset stands extinguished on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. The Supreme Court further categorically observed that the right of redemption available to the borrower in the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till the completion of the sale or transfer of the secured asset in favour of the auction purchaser. Paragraph No.110 and its sub-paragraphs is quoted therein under:-

"110. We summarise our final conclusion as under:

110.1 The High Court was not justified in exercising its writ jurisdiction under Article 226 of the Constitution more particularly when the borrowers had already availed the alternative remedy available to them under Section 17 of the SARFAESI Act.

110.2 The confirmation of sale by the Bank under Rule 9(2) of the Rules of 2002 invests the successful auction purchaser with a vested right to obtain a certificate of sale of the immovable property in form given in appendix (V) to the Rules i.e., in accordance with Rule 9(6) of the SARFAESI.

110.3 In accordance with the unamended Section 13(8) of the SARFAESI Act, the right of the borrower to redeem the secured asset was available till the sale or transfer of such secured asset. In other words, the borrower's right of redemption did not stand terminated on the date of the auction sale of the secured asset itself and remained alive till the transfer was completed in favour of the auction purchaser, by registration of the sale certificate and delivery of possession of the secured asset. However, the amended provisions of Section 13(8) of the SARFAESI Act, make it clear that the right of the borrower to redeem the secured asset stands extinguished thereunder on the very date of publication of the notice for public auction under Rule 9(1) of the Rules of 2002. In effect, the right of redemption available to the borrower under the present statutory regime is drastically curtailed and would be available only till the date of publication of the notice under Rule 9(1) of the Rules of 2002 and not till the completion of the sale or transfer of the secured asset in favour of the auction purchaser.

110.4 The Bank after having confirmed the sale under Rule 9(2) of the Rules of 2002 could not have withhold the sale certificate under Rule 9(6) of the Rules of 2002 and enter into a private arrangement with a borrower.

110.5 The High Court under Article 226 of the Constitution could not have applied equitable considerations to overreach the outcome contemplated by the statutory auction process prescribed under the SARFAESI Act.

110.6 The two decisions of the Telangana High Court in the case of Concern Readymix (supra) and Amme Srisailam (supra) do not lay down the correct position of law. In the same way, the decision of the Punjab and Haryana High Court in the case of Pal Alloys (supra) also does not lay down the correction position of law.

110.7 The decision of the Andhra Pradesh High Court in Sri Sai Annadhatha Polymers (supra) and the decision of the Telangana High Court in the case of K.V.V. Prasad Rao Gupta (supra) lay down the correct position of law while interpreting the amended Section 13(8) of the SARFAESI Act.”

12. It is relevant herein to again reiterate that the publication of e-auction notice was made on 23.12.2020 and Section 13 (8) of the Act of 2002 was amended w.e.f. 01.09.2016. However, as seen from the perusal of the plaint, the Defendant Bank permitted the redemption post the publication of notice and at the time of handing over of possession, which prima-facie on the allegations made in the plaintiff appears to be in violation of Section 13 (8) of the Act of 2002.

13. Now coming back to the provision of Section 17 (2) of the Act of 2002, it would be seen that the power has been conferred upon the Debt Recovery Tribunal to consider as to whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for the enforcement of security are in accordance with the provisions of the Act of 2002 and the Rules made therein under. The very edifice of the case of the petitioners herein that in view of Section 17 (2) read with Sections 17(1), 19 and 34 of the Act of 2002 and Rules of the Rules of 2002, the suit was barred in view of the Debt Recovery Tribunal, Guwahati had the jurisdiction to decide the said dispute. In that regard, the learned counsel for the petitioners has referred to the judgment of the Supreme Court in the case of Agarwal Tracom Private Limited (supra).

14. This Court has duly taken note of the said judgment and from a perusal of the said judgment, it has been categorically observed that reading the provision of Section 17 (2) of the Act of 2002 and the Rule 9(5) of the Rules of 2002, it would clearly show that the action of the secured creditor in forfeiting the deposit made by the auction purchaser is a part of the measure taken by the secured creditor under Section 13 (4) of the Act of 2002. The Supreme Court further expanded the said observation by observing that Section 17 (2) of the Act of 2002 empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the

secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. It was observed that the expression, "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. The Supreme Court further observed that the expression "any of the measures referred to in Section 13(4) taken by the secured creditor or his authorized office" in Section 17 (1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section 13 (4) of the Act of 2002. In view of such exposition, the Supreme Court observed that the auction purchaser would come within the expression of "any person" as specified under Section 17(1) and hence would be entitled to challenge the action of the secured creditor before the DRT by filing an application under Section 17(1) of the Act of 2002. Paragraph Nos.22 to 30 of the said being relevant are reproduced herein under:-

"22. So far as Section 17 is concerned, it provides a remedy to a person who is aggrieved by the measures taken by the secured creditor or his authorised officer under Section 13(4) in relation to secured assets of the borrower. It says that "any person (including borrower)" may make an application to the DRT within 45 days from the date of measures taken under Section 13(4). Sub-section (2) of Section 17 was added by way of amendment w.e.f. 11-11-2004. It provides that the Tribunal, on such application being made under Section 17(1), shall consider whether the measures referred to and taken under Section 13(4) by the secured creditor are in accordance with the "provisions of this Act and the Rules made thereunder". Similarly, sub-sections (3), (4) and (7) of Section 17 which deal with the power of the DRT also use the expression "in accordance with the provisions of the Act and the Rules made thereunder".

23. Rule 8, which has 8 sub-rules, deals with the manner of sale of immovable secured assets and provides detailed procedure as to how and in what manner the sale of secured assets, is to be held. Rule 9 deals with time of sale, issue of sale certificate and delivery of possession.

24. Rule 9(6) empowers the authorised officer to issue sale certificate in favour of the purchaser. Rule 9(9) then empowers the authorised officer to deliver the properties to the purchaser whereas Rule 9(10) empowers the authorised officer to mention in the sale certificate that the property is free from encumbrances.

25. So far as this case is concerned, sub-rule (5) of Rule 9 is relevant. It provides that, if the auction-purchaser commits any default in payment of sale consideration within the time specified, the deposit made by the auction-purchaser shall be "forfeited" to the secured creditor and the auctioned property shall be resold and the defaulting purchaser shall "forfeit" all claims to the property or its part of the sum for which it may be sold subsequently.

26. Reading of the aforementioned sections and the rules and, in particular,

Section 17(2) and Rule 9(5) would clearly go to show that an action of secured creditor in forfeiting the deposit made by the auction-purchaser is a part of the measures taken by the secured creditor under Section 13(4).

27. The reason is that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. The expression "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. In other words, the measures taken under Section 13(4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets is fully complied with by the secured creditor. It is for this reason, the Tribunal has been empowered by Sections 17(2), (3) and (4) to examine all the steps taken by the secured creditor with a view to find out as to whether the sale of secured assets was made in conformity with the requirements contained in Section 13(4) read with the Rules or not?

28. We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction-purchaser in case the auction-purchaser commits any default in paying installment of sale money to the secured creditor. Such action taken by the secured creditor is, in our opinion, a part of the measures specified in Section 13(4) and, therefore, it is regarded as a measure taken under Section 13(4) read with Rule 9(5). In our view, the measures taken under Section 13(4) commence with any of the action taken in clauses (a) to (d) and end with measures specified in Rule 9.

29. In our view, therefore, the expression "any of the measures referred to in Section 13(4) taken by secured creditor or his authorised officer" in Section 17(1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section 13(4).

30. The auction-purchaser (appellant herein) is one such person, who is aggrieved by the action of the secured creditor in forfeiting their money. The appellant, therefore, falls within the expression "any person" as specified under Section 17(1) and hence is entitled to challenge the action of the secured creditor (PNB) before the DRT by filing an application under Section 17(1) of the SARFAESI Act.

15. From the above observations of the Supreme Court, it would therefore be seen that the respondent herein who is the plaintiff being a auction purchase, his grievances as raised in the plaint would come within the ambit of Section 17 of the Act of 2002 and further, the plaintiff would come within the meaning of "any person" as mentioned in Section 17 of the Act of 2002 would be a bar under Section 34 of the Act of 2002 for filing a suit. Under such circumstances, this

Court is of the opinion that the learned Trial Court has erred in law in not rejecting the plaint in view of Section 34 of the Act of 2002 for which the impugned order dated 28.04.2023 is set aside and in view of the above observations, the plaint of Title Suit No.177/2022 is also rejected.

16. This Court finds it also very pertinent now to take note of the submission of Mr. A. Sattar, the learned counsel for the respondent/plaintiff on the aspect of fees and the period of limitation of 45 days.

17. Mr. A. Ganguly, the learned counsel appearing on behalf of the petitioners submitted that as there is no dues of the plaintiff/respondent to the secured creditor, the applicable fees under 13 (2) (e) of the Rules of 2002 would be Rs.200/-.

18. This Court has also perused the said Rule 13 of the Rules of 2002 and from the Table it would be seen that the petitioners' application would come within the ambit of Rule 13 (2) (e) of the Rules of 2002 and the applicable fees is Rs.200/- only.

19. This Court has also duly taken note of that the plaintiff had filed a suit challenging the action of the defendants and seeking declaration as well as for damages. Thereupon, the plaintiff has been bonafidely and diligently pursuing the said remedies. It is on account of the order passed today, the plaint of the plaintiff has been rejected on the ground that the Civil Court had no jurisdiction. Consequently, this Court is of the opinion that the plaintiff is entitled to a reasonable period for filing the application under Section 17 of the Act of 2002.

20. Accordingly, this Court in exercise of the powers under Article 227 of the Constitution grants the plaintiff the liberty to prefer an application before the Debt Recovery Tribunal, Guwahati seeking remedies in terms with Sections 17 & 19 of the Act of 2002 within 45 days from the date of the instant order.

21. In addition to that, this Court also finds it pertinent to observe that the plaint having been rejected, liberty is given to the plaintiff to file appropriate application before the learned Trial Court for the purpose of seeking refund of the court fee.

22. With the above observations and directions, the instant revision petition stands allowed. No costs.