

(2011) 05 MAD CK 0021

In the Madras High Court

Case No : O.S.A. No. 59 of 2007 and M.P. No. 1 of 2007

V. Thulasi

APPELLANT

Vs

Indian Overseas Bank

RESPONDENT

Date of Decision : 05-05-2011

Acts Referred:

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

Citation : (2011) 3 BC 556 : (2011) 3 CTC 801

Hon'ble Judges : V. Periya Karuppiyah, J;R. Banumathi, J

Bench : Division Bench

Advocate : Satish Parasaran, for the Appellant; F.B. Benjamin George, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Being aggrieved by the order dated 5.3.2007 allowing Application No. 3294 of 2006 filed Under Order 7 Rule 11(d) CPC read with Order 14 Rule 8 of Original Side Rules and thereby rejecting the suit - C.S. No. 265 of 2006, Appellant/ Plaintiff has preferred this appeal.

2. The background facts of the appeal and suit - C.S. No. 265 of 2006 are as follows:

The Plaintiff is the owner of the plaint schedule property - Plot No. 12/C-1 (SP), Industrial Estate, Guindy, Chennai - 600 032 measuring 7711 sq.ft. having purchased the same on 11.3.1994. Defendants 2 and 3, who were then running a partnership business under the name and style of M/s. Balaji Fashions, became the tenants under the Plaintiff on monthly rental basis for their business activities. Defendants 2 and 3 requested the Plaintiff to put up additional floor space in the second floor for their business and promised that they would arrange for a bankloan from their bankers for putting up such additional space.

Under Liquirentscheme, the 4th Defendant - Indian Overseas Bank, Sow carpet Branch sanctioned Rs. 30lakhs to the Plaintiff on 18.5.2004. Under the Liquirent scheme, loan is sanctioned against the rents receivable from the secured asset. The term loan ofRs.30 lakhs is repayable in sixty equated monthly instalments commencing from June2004. For the said loan, the 2nd Defendant furnished continuing personal guarantee by executing guarantee deed on 18.5.2004. The Plaintiff has also created a mortgage over the plaint schedule property in favour of the Bank by way of deposit of title deeds and the same is evidenced by letter of confirmation dated 19.5.2004. The Plaintiff has also executed a power of attorney deed on 18.5.2004 appointing the Bank as its power agent to receive the rent payable by M/s. Balaji Fashions. As per the terms and conditions, Balaji Fashions was remitting the rents directly to the Bank. However, the payment was irregular and the cheques issued by Balaji Fashions towards rents were returned dishonoured on presentation, which was brought to the notice of Plaintiff in April-May, 2005.

3. The 1st Defendant was originally a partnership firm under the name and style of M/s. Balaji Fashions. In May, 2003, a cash credit limit of Rs. 50 lakhs was sanctioned to the said Balaji Fashions and the same was not availed by the said firm. The business of the said Balaji Fashions was closed and its assets and liabilities were transferred to the 1st Defendant - Cavin Cally Fashions (India)Pvt. Ltd. By sanction letter dated 4.6.2004, the Bank had sanctioned cash credit limit of Rs. 55 lakhs to the 1st Defendant. For the cash credit facility availed by the 1st Defendant, the Plaintiff stood as guarantor and the plaint schedule property was also under the equitable mortgage to the Bank to secure the outstanding in the Liquirent loan. According to the Bank, the Plaintiff and the 1stDefendant agreed that the residual value of the plaint schedule property has to betaken as a collateral security for the cash credit limit sanctioned to the 1stDefendant. In pursuance of the same, the Plaintiff is stated to have authorised the Bank to continue to hold the documents already deposited by the Plaintiff on18.5.2004 as security to the cash credit limit availed by the 1st Defendant also. On 17.6.2004, the Plaintiff confirmed the said constructive deposit of title deeds in writing. The 1st Defendant operated the cash credit account for its business needs.

4. On 5.1.2006 the Bank received a notice from Defendants 2 and 3 from which the Bank came to know that the Defendants 2 and 3 have been declared as insolvents in I.P. No. 4 of 2006 by the High Court, Chennai. In pursuance to the Insolvency of the promoters, the Bank classified the account as Non-Performing Asset (NPA) and thereafter Bank proceeded to recover dues by proceeding against the secured assets under SARFAESI Act. Accordingly, a notice of demand was issued on 7.2.2006.

5. At that stage, Plaintiff filed suit -C.S. No. 265 of 2006 alleging that the 1st Defendant along with Defendants 2, 3 and 5 to 7 grossly misused the trust reposed on them and misused the documents executed by the Plaintiff for the purpose of availing loan of Rs. 30 lakhs. Alleging that holding Plaintiff's property

as security for the loan sanctioned to the 1st Defendant by the 4th Defendant Bank is null and void, Plaintiff has filed the suit - C.S. No. 265 of 2006 praying (i) to declare that the creation of guarantee in the Plaintiff's name for the loan advanced to 1st Defendant is null and void; and (ii) for permanent injunction restraining the Defendants from proceeding against the Plaintiff or the plaint schedule property.

6. The 4th Defendant Bank filed application - A. No. 3294 of 2006 under Order VII Rule 11(d) of CPC read with Order XIV Rule 8 of Original Side Rules to reject the plaint. In the application, the Bank raised preliminary objection as to the maintainability of the suit in view of bar u/s 34 of SARFAESI Act. The Bank further averred that since no reply was given by the Plaintiff for the notice issued on 7.2.2003, there was no cause of action for filing the suit and in view of effective remedy provided u/s 17 of SARFAESI Act, the suit is liable to be rejected.

7. Upon consideration of the rival contentions, the learned single Judge held that in view of Section 34 of SARFAESI Act, no Civil Court shall have jurisdiction to entertain the suit. The learned single Judge further held that even though prayers in the plaint are carefully and tactfully worded, the plaint prayer is only to avoid the embargo created under the statute. Finding that the suit is barred in view of Section 34 of SARFAESI Act, the learned single Judge allowed Application - A. No. 3294 of 2006 filed by the Bank and rejected the plaint. Hence this appeal.

8. Mr. Satish Prasaran, learned Counsel for the Appellant/Plaintiff has contended that u/s 17 of SARFAESI Act, the borrower or any other person can challenge only the measures taken by the secured creditor for enforcement of security. It was further argued that in terms of Sections 17 and 18, the Tribunal is empowered to the limited extent of going into the act of secured creditor in terms of Section 34. It was further submitted that when creation of security interest itself is in dispute, the jurisdiction of Civil Court is not barred. The learned Counsel would further contend that when a litigant is having a grievance of civil nature, the right to institute a suit in the Civil Court cannot be prevented unless impliedly or expressly barred. Placing reliance upon the decision of the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, learned Counsel would contend that when Plaintiff has alleged misuse of the documents and fraud committed on him by the Defendants 2 and 3, Tribunal cannot go into such disputed questions and therefore the Civil Suit is well maintainable.

9. Taking us through various documents, learned Counsel for the Respondent Bank has contended that the materials on record would clearly show that the Plaintiff is the guarantor/mortgagor to the loan availed by the 1st Defendant and the suit has been filed by the Plaintiff only with an intention to escape from its liability. The learned Counsel would further submit that Section 34 of SARFAESI Act bars the jurisdiction of the Civil Court and in view of the express bar u/s 34,

the suit is not maintainable and the learned single Judge rightly allowed the application and rejected the plaint.

10. We have carefully gone through the plaint averments, materials on record and the impugned order and considered the rival contentions.

11. As we have pointed out earlier, for putting up additional space in the second floor, Rs. 30 lakhs was sanctioned to the Plaintiff on 18.5.2004 under Liquirent Scheme. Case of bank is that as per the terms and conditions of the Liquirent scheme, rent was directly remitted to the Bank by Balaji Fashions. For the said loan of Rs. 30 lakhs granted to the Plaintiff, the 2nd Defendant stood as guarantor and executed the guarantee for cash credit sanctioned to the Plaintiff. For the said loan of Rs. 30 lakhs under Liquirent Scheme, the Plaintiff had created equitable mortgage of the plaint schedule property and evidencing the same, he has deposited his title deeds. On 19.5.2004, the Plaintiff has given letter of confirmation of deposit of title deeds. Cash credit facility of Rs. 55 lakhs was sanctioned to the 1st Defendant for which the Plaintiff stood as guarantor. The Plaintiff is said to have deposited the original title deeds in respect of the suit property as security for the loan sanctioned to the 1st Defendant, which was already deposited by the Plaintiff with the Bankers under Liquirent scheme. The Plaintiff disputes having stood as guarantor for the cash credit facility to the 1st Defendant and the Plaintiff also disputes having created equitable mortgage for the cash credit facility sanctioned to the 1st Defendant. The Plaintiff stated that he neither had knowledge nor paid any part in respect of loan advanced to the 1st Defendant and never given his property as security. The Plaintiff alleges that the 1st Defendant along with Defendants 2, 3 and 5 to 7 have grossly misused the trust reposed in them and misused the documents executed by the Plaintiff for the purpose of availing Rs. 30 lakhs.

12. The learned Counsel for Appellant/Plaintiff Mr. Satish Parasaran contended that the Plaintiff never gave the plaint schedule property as security for the loan availed by the 1st Defendant and creation of security over the plaint schedule property is seriously disputed. Such disputed question concerning creation of security is vested only with the Civil Court. The learned Counsel would further contend that in terms of Sections 17 and 18 of the Act, the Tribunal is vested with the power to go into the questions only regarding the measures taken u/s 13 to see as to whether enforcement of security is in accordance with the procedure set out in the Act. The main contention of the Appellant is that in terms of Sections 17 and 18 of the Act, the creation of security in favour of the secured creditor is assumed to be existing and valid and the present issue raising dispute relating to the creation of security itself does not come within the purview of the Tribunal and therefore only the Civil Court has jurisdiction to adjudicate upon the same.

13. In terms of Section 34 of SARFAESI Act, jurisdiction of the Civil Court is barred. Section 34 of the SARFAESI Act reads 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).

14. By a reading of Section 34, it is clear that bar of jurisdiction is two fold:

(i) no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a DRT or the Appellate Tribunal is empowered by or under the Act;

(ii) 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 order conferred under the Act or under the RDDB Act.

15. The contention of the Appellant is that despite the bar u/s 34, the jurisdiction of the Civil Court can be invoked. In support of his contention, learned Counsel placed reliance upon *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* , wherein at Paragraph No. 51 of the said judgment, the Supreme Court held as under:

51. 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 his 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 cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, *V. Narasimhachariar v. Egmore Benefit Society* AIR 1955 Madras 135....

16. As per the above decision of the Hon"ble Supreme Court, jurisdiction of the Civil Court can be invoked only when the action of the secured creditor is alleged to be fraudulent or his claim is so absurd and untenable. In *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* , at paragraph No. 33, the Supreme Court inter alia formulated the questions, which fell for determination, the relevant portion of which reads as under:

i)

ii) Whether provisions as contained under Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/ disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court u/s 34 of the Act?

iii) Whether the remedy available u/s 17 of the Act is illusory for the reason it is

available only after the action is taken u/s 13(4) of the Act and the appeal would be entertain able only on deposit of 75% of the claim raised in the notice of demand?

iv)

17. Elaborating upon the safeguard available to a secured creditor within the framework of the Act, in Paragraph No. 50 of the above judgment, the Supreme Court held as under:

50. ...A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an 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 Debts 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 Debts Recovery Tribunal, apart from those matters in which measures have already been taken under Sub-section (4) of Section 13.

18. In the said Judgment, the Supreme Court further held as under:

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures u/s 13(4) of the Act have been taken, a mechanism has been provided u/s 17 of the Act to approach the Debts Recovery Tribunal. The above noted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days- notice before proceeding to take any of the measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal u/s 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the property it

would be open for the borrower to file an appeal (petition) u/s 17 of the Act before the Debts Recovery Tribunal.

....

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

19. Considering the scope of Section 17 of SARFAESI Act, in *M/S. Lakshmi Shankar Mills (P) Ltd. v. The Authorised Officer/Chief Manager, Indian Bank* 2008 (2) CTC 529, referring to the *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, the First Bench of this Court held that "Section 17 has to be construed to advance object of enactment and not to thwart it. Purposive interpretation should be applied while construing Section 17 and object of enactment is to provide speedy and summary remedy for recovery of huge amounts due to Banks and Financial Institutions. Acceptance of contention of borrower would defeat the very object of enactment in question. Whenever and wherever legislature wanted to grant statutory stay specific provision is made there under. No such provision is found u/s 17 which would indicate that Legislature intended that there would be no automatic stay of provisions u/s 13(4) on filing Application u/s 17. There will be no automatic stay on filing of Application u/s 17 of Securitisation Act and Tribunal has power to grant stay by imposing conditions." In the said judgment, the First Bench held as under:

11. Under Sub-section (1) of Section 17 any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor can prefer an appeal (application) to the Debts Recovery Tribunal within 45 days from the date on which such measures had been taken. Under Sub-section (2) of Section 17, the Tribunal is bound to consider whether any of the measures referred to under Sub-section (4) of Section 13 taken by the secured creditors are in accordance with the provisions of the Act. Under Sub-section (3) of Section 17, after examining the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal comes to the 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 and the rules, and require restoration of the management of the business or restoration of possession of the secured assets to the borrower, it may declare such action as invalid and restore possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be. As a necessary corollary, Sub-section (4) of Section 17 provides that if the Tribunal declares that the recourse taken by the secured creditor under Sub-section (4) of Section 13 was in accordance with the provisions of the Act and the rules made there under, then, notwithstanding anything contained in the Act or any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of

Section 13 to recover his secured debt.

12. On a plain reading of Section 17, it is seen that the Tribunal has wide powers to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is declared invalid. Even where the property is sold or dealt with, pending hearing of the application u/s 17, the Tribunal is not rendered powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is declared invalid. In such an eventuality, Sub-section (3) of Section 17 gives ample powers to the Tribunal to direct restoration of the possession or restoration of management, as the case may be or to pass such other order, as it may consider proper and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

20. In Paragraph No. 21, referring to *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , the First Bench of this Court has further held that all such grounds, which would render the action of the Bank/Financial Institution illegal, can be raised before the Tribunal in the proceedings u/s 17 and that it is for the Tribunal to decide in each case whether the action of the Bank was in accordance with the provisions of the Act and legally sustainable.

21. The learned Counsel for the Appellant contended that litigant having genuine grievance of civil nature has a right to institute the suit and in such case exclusion of jurisdiction of Civil Court is not to be readily inferred. In support of his contention, the learned Counsel has placed reliance upon the decision of Supreme Court in *Dhulabhai and Others Vs. The State of Madhya Pradesh and Another*, , in which the Supreme Court has opined as under:

32. ... The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

(1)

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

....

(7) An exclusion of the jurisdiction of the civil court is not readily to be inferred unless the conditions above set down apply.

22. On the question of exclusion of jurisdiction, reliance was placed by the learned Counsel for the Appellant upon a decision of the Supreme Court in *Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation*, wherein the Hon"ble Supreme Court elaborately considered the question of exclusion of jurisdiction and the matters pertaining to DRT and bar under Sections 17 and 18 of RDDBFI Act. Holding that litigant having grievance of civil nature has a right to institute a suit in the Civil Court unless its cognizance is either expressly or impliedly barred. Referring to *Dhulabhai and Others Vs. The State of Madhya Pradesh* and *Another*, and other cases, the Supreme Court in the above said decision held as under:

105. The Civil Court indisputably has the jurisdiction to try a suit. If the suit is vexatious or otherwise not maintainable action can be taken in respect thereof in terms of the Code. But if all suits filed in the Civil Courts, whether inextricably connected with the application filed before the DRT by the banks and financial institutions are transferred, the same would amount to ousting the jurisdiction of the Civil Courts indirectly. Suits filed by the debtor may or may not be counter claims to the claims filed by banks or financial institutions but for that purpose consent of the Plaintiff is necessary.

106. It is furthermore difficult to accept the contentions of the Respondents that the statutory provisions contained in Section 17 and 18 of the DRT Act have ousted the jurisdiction of the civil court as the said provisions clearly state that the jurisdiction of the civil court is barred in relation only to applications from banks and financial institutions for recovery of debts due to such banks and financial institutions.

....

108. Although some arguments have been advanced before us whether having regard to the provisions of Sections 17 and 18 of the Act the civil court jurisdiction is completely ousted, we are of the view that the jurisdiction of the civil court would be ousted only in respect of the matters contained in Section 18 which has a direct co-relation with Section 17 thereof, that is to say that the matter must relate to a debt payable to a bank or a financial institution. The application before the Tribunal would lie only at the instance of the bank or the financial institution for the recovery of its debt. It must further be noted in this respect that had the jurisdiction of the civil courts been barred in respect of counterclaim also, the statute would have said so and Sections 17 and 18 would have been amended to introduce the provision of counterclaim.

....

117. The Act, although, was enacted for a specific purpose but having regard to the exclusion of jurisdiction expressly provided for in Sections 17 and 18 of the

Act, it is difficult to hold that a civil court's jurisdiction is completely ousted....

118. The liabilities and rights of the parties have not been created under the Act. Only a new forum has been created. The banks and the financial institutions cannot approach the Tribunal unless the debt has become due. In such a contingency, indisputably a civil suit would lie. There is a possibility that the debtor may file preemptive suits and obtain orders of injunction, but the same alone, in our opinion, by itself cannot be held to be a ground to completely oust the jurisdiction of the civil court in the teeth of Section 9 of the Code. Recourse to the other provisions of the Code will have to be resorted to for redressal of his individual grievances.

23. In *Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation*, , the Supreme Court was considering the question whether the High Court/ Supreme Court has the power to transfer a suit pending in a Civil Court situated in one State to DRT situated in another State. In that context, the Supreme Court observed that for redressal of individual grievances, recourse to the provisions of the Code will have to be resorted to. The principle that emerges is that the jurisdiction of the Civil Court could be resorted to for redressal of individual grievance or as held in *Mardia Chemicals* case, where fraud is alleged or where the claim is so absurd, that the Civil Court has the jurisdiction to entertain the suit.

24. It is fairly well settled that for considering the applications under Order VII Rule 11(d) C.P.C., the averments contained in the plaint alone should be looked into. While considering application for rejection of plaint, the facts pleaded by the Plaintiffs are to be taken as true.

25. As per the ratio laid down in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others* Etc. Etc., , where only the action of the secured creditor is fraudulent or where his claim is so absurd, the jurisdiction of the Civil Court could be invoked. In the light of the plaint averments and the plaint documents, it is to be seen whether the Plaintiffs have shown that the transaction is fraudulent or claim of secured creditor is so absurd so as to attract the jurisdiction of the Civil Court.

26. We have carefully gone through the plaint averments and also looked into the plaint documents. As pointed out earlier, the Plaintiff obtained loan under Liquefied Scheme. Under the sanction letter dated 18.5.2004 (plaint document No. 3), loan amount of Rs. 30 lakhs was sanctioned to the Plaintiff for which the 2nd Defendant gave personal guarantee. Plaint document No. 8 dated 4.6.2004 is a sanction letter sanctioning Rs. 55 lakhs to the 1st Defendant. In the said sanction letter, the Plaintiff had also signed. On 16.2.2004, the Plaintiff had also executed a deed of guarantee for the cash credit sanctioned to the 1st Defendant. The Plaintiff had also created equitable mortgage for the said loan sanctioned to the 1st Defendant and the Plaintiff has confirmed the same by his confirmation letter for supplemental mortgage. Along with the plaint, even though the Plaintiff has produced sanction letter dated 4.6.2004, the Plaintiff has

not produced the copies of documents/deed of guarantee dated 16.6.2004 and the confirmation letter for supplemental mortgage. By a cursory perusal of the various documents, it is seen that the Plaintiff stood as a guarantor for the cash credit limit of Rs. 55 lakhs sanctioned to the 1st Defendant.

27. The prayer in the plaint is two-fold as under:

a) Declaring that the creation of guarantee in the Plaintiff's name and the suit property as collateral security in respect of the loan given by the 4th Defendant bank in the 1st Defendant's favour under Cash Credit Account No. 9159 as null and void and not binding upon the Plaintiff and the suit property;

b) Grant permanent injunction restraining the Defendants, their men, servants, agents, assignees or any one claiming through or under them from in any manner proceeding as against the Plaintiff or his suit schedule property for the purpose of realization of the loan amount sanctioned to the 1st Defendant under cash credit account No. 9159.

28. Notice under SARFAESI Act was issued on 7.2.2006 and the plaint came to be filed on 27.3.2006. The declaration sought for by the Plaintiffs is to declare the creation of guarantee in respect of loan granted to the 1st Defendant is null and void. The Bank has proceeded under SARFAESI Act in respect of the property offered as guarantee by the Plaintiff. In view of the specific bar u/s 34 of the Act, the action initiated by the Bank under the provisions of SARFAESI Act cannot be the subject matter of the suit in the Civil Court. In so far as the second limb of prayer to grant injunction restraining the Defendants from in any manner proceeding against the Plaintiffs or the plaint schedule property for the purpose of realisation of the loan amount is barred u/s 34 of SARFAESI Act. Section 34 imposes a specific bar to grant any relief of injunction in respect of any action taken by the Bank under the provisions of SARFAESI Act.

29. By clever and astute drafting, the Plaintiff might create an illusion of cause of action by trying to bring civil suit within the parameters laid down by the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,* . Pointing that Court has duty to see if such allegations of fraud are thrown just for the purpose of maintaining a suit, in *Punjab National Bank v. J. Samsath Beevi* 2010 (3) CTC 310, Justice V. Ramasubramanian held as under:

8. But at the same time, the Court has a duty to see, if such allegations of fraud are thrown, just for the purpose of maintaining a suit and ousting the jurisdiction of the Tribunal and to keep the Banks and Financial Institutions at bay. If by clever drafting, the Plaintiff creates an illusion of a cause of action, the Court is duty bound to nip it in the bud. To find out if it is just a case of clever drafting, the Court has to read the plaint, not formally, but in a meaningful manner. So is the dictum of the Apex Court in *T. Arivandandam Vs. T.V. Satyapal and Another,* . It was again reiterated by the Court in *I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others,* , by holding that clever drafting, creating illusions of cause of action are not permitted in law. The ritual of repeating a word or

creation of an illusion in the plaint can certainly be unravelled and exposed by the Court while dealing with an application under Order VII, Rule 11(a).

9. A Court is obliged to see if the allegations of fraud and collusion made in the plaint, are themselves a product of "fraud and collusion" between the family members of the borrowers, so as to escape liability and save the secured assets, somehow or the other. In the recent past, there is a sudden spurt in the number of civil cases filed against the actions initiated by Banks and Financial Institutions, either under the 1993 Act or under the SARFAESI Act, 2002. All these cases fall under 3 or 4 categories viz.,

(i) cases filed by strangers claiming that their properties are brought to sale on the basis of forged documents or certified copies of documents submitted by borrowers to Banks

(ii) cases filed by guarantors claiming that they never signed letters of guarantee or offered their properties as securities

(iii) cases filed by close relatives of borrowers such as spouses, children, brothers and sisters, claiming that they have a share in the properties mortgaged by the borrowers and that they were never aware of and they never gave consent to the properties being offered as securities and

(iv) cases filed by third parties claiming that the properties were sold to them by the borrowers or guarantors by suppressing the creation of the mortgage and that they are bona fide purchasers for value without notice of the encumbrances.

10. It is not very difficult for a seasoned litigant or an intelligent lawyer to draft the Plaint in such a manner as to make a secured asset, come within anyone of the above 4 categories, by a clever drafting of the Plaint, thereby creating an illusion of fraud, collusion, misrepresentation and the like. Today, with the advancement of technology, the creation of an illusion and the creation of a virtual world are both possible. The moment the Civil Suit is taken on file, the proceedings before the Debts Recovery Tribunal or under the SARFAESI Act, 2002 gets slowed down. This results in two consequences viz., (i) out of frustration, the Banks agree for one time settlements, or (ii) third party rights get created by taking advantage of the situation. Therefore, the Courts have a greater responsibility to scan the pleadings and see if the allegations of fraud and collusion made in the Plaint are actually a product of fraud and collusion between the borrowers and those making such claims.

We fully endorse the above views of the learned single Judge.

30. In the present case, Plaintiffs seek for a declaration that the alleged guarantee created in the Plaintiff's name for the loan advanced to the 1st Defendant is null and void and seeks for permanent injunction restraining the Defendants from proceeding against the Plaintiff or the plaint schedule property. The Plaintiff has brought out the averments in the plaint to bring the suit within the purview of the exception carved out by the Supreme Court in *Mardia*

Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . In determining whether such a plea has to be accepted, the plaint as a whole has to be read. In Popat and Kotecha Property Vs. State Bank of India Staff Association, , the Supreme Court held that plaint averments cannot be compartmentalised or dissected, nor can the averments be read in isolation. As pointed out earlier, the limited exception, which is carved out by the Supreme Court, is whether the action of the secured creditor is so absurd and untenable that it would not require any probe, what so ever.

31. As held by the Supreme Court, the pleadings in an action for restraining a sale by a mortgagee must "clearly disclose a fraud or irregularity on the basis of which the relief is sought. The observations of the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., emphasized that the exception, which is carved out is a limited exception. Like all exceptions, the exception carved out by the Supreme Court has to be strictly construed. A borrower or a third party cannot be permitted to defeat the provisions of the Act merely by alleging the "gross misuse of the trust reposed" and "misuse of the documents executed by the Plaintiff. The above expressions used in the plaint cannot be compartmentalised and read in isolation. The plaint has to be read as a whole along with the documents produced by the Plaintiff. Considering the plaint averments, we are of the view that the learned single Judge rightly held that in view of the specific bar u/s 34 of SARFAESI Act, the Civil Suit filed by the Plaintiff is barred.

32. As pointed out earlier, on 7.2.2006, Bank issued the notice under SARFAESI Act and the suit came to be filed on 27.3.2006. As rightly pointed out by the learned Counsel for the Bank, the Plaintiff has not chosen to send any reply to the said notice dated 7.2.2006. On the other hand, the Plaintiff has produced a copy of the complaint purported to have been lodged with the Commissioner of Police on 23.1.2006.

33. Even though the Plaintiff has produced a copy of the plaint dated 23.1.2006, there is no material to show that the same has been lodged with the Commissioner of Police on 23.1.2006. If it is the case of the Plaintiff that he has never given his property as security for the loan availed by the 1st Defendant and that the Defendants 1 to 3 and 5 to 7 colluded together to misuse the documents, nothing prevented the Plaintiff from issuing suitable reply to the said notice dated 7.2.2006. But that was not to be so. In the absence of any contemporaneous denial from the Plaintiff, going by the plaint averments and the documents, in our considered view, the suit is barred u/s 34 of the SARFAESI Act.

34. Considering the scope of powers of the Tribunal under Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (in short, RDDBFI Act"), in Union of India and Another Vs. Delhi High Court Bar Association and Others, , the Supreme Court has held that there is no absolute right in any one that his dispute to be adjudicated upon only by a Civil Court and under RDDBFI Act Civil Court now stands replaced by a Banking Tribunal in respect of the dues to the

Bank.

35. There is no force in the contention of the Appellant that the Tribunal is not vested with the power to inquire into the issues concerning the creation of the security. It is not as if remedy available u/s 17 is illusory. The right to move an application u/s 17 of the SARFAESI Act accrues to any person aggrieved by any of the measures taken u/s 13(4). The expression "evidence produced by the parties" occurring in Section 17(3) would include evidence produced by the Appellant, though he is a person other than the borrower. u/s 17, it is open to Appellant to raise the points raised.

36. It is relevant to point out the subsequent events also. The impugned order was passed on 5.3.2007 and the bank has taken possession on 20.3.2007. The Plaintiff has filed this O.S.A. On 23.3.2007 in which the Bench has granted statusquo on 23.3.2007 and subsequently by order dated 29.3.2007, the same was modified as "Interim Injunction". Subsequently, the Bank has also filed Original Application - O.A. No. 157 of 2007 before the DRT under R.D.D.B. Act for recovery of Rs.61,04,076/- due from the Plaintiff and the other Defendants. In the said Original Application, the Appellant is the 4th Defendant and the Plaintiff is said to have entered appearance on 15.6.2007. In the said proceedings, the Appellant has also filed reply statement. Before the DRT, the matter is said to have been posted for arguments. The DRT, being vested with the powers, it is open to the Plaintiff to raise all the points before the proceedings in the DRT, in which the Plaintiff has entered appearance. In view of the specific bar u/s 34 of the SARFAESI Act, the learned single Judge rightly held that the suit is specifically excluded from the purview of the Civil Court and rightly allowed the application filed under Order 7 Rule 11(d) CPC. and rejected the plaint. We find that no substantial grounds are made out warranting interference with the impugned order.

37. For the fore-going reasons, this Appeal is dismissed. However, there is no order as to costs. Consequently, the connected miscellaneous petition is closed.