

(2008) 03 BOM CK 0038

In the Bombay High Court

Case No : Civil Rev. Application No. 148 of 2004

Yuth Development Co-Operative Bank Ltd.

APPELLANT

Vs

Balasaheb Dinkarrao Salokhe and Others

RESPONDENT

Date of Decision : 26-03-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 9A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3), 13(4), 17
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2008 Bom 167 : (2009) 1 BomCR 444 : (2008) 5 MhLj 326

Hon'ble Judges : J.H. Bhatia, J

Bench : Single Bench

Advocate : A.A. Kumbhakoni and A.M. Kulkarni, for the Appellant; P.S. Dani, for the Respondent

Final Decision : Allowed

Judgement

J.H. Bhatia, J.—Heard the learned Counsel for the Parties.

2. To state in brief, the respondent No. 1 before this Court is the original plaintiff and the applicant is the original defendant No. 1. Respondent Nos. 2 and 3 are the original defendant Nos. 2 and 3. Admitted facts are that the respondent Nos. 1 and 3 are real brothers. They are also partners in the firm, M/s Sudin Motors, which is the respondent No. 2. Both the partners approached the applicant bank for cash credit facility and as the applicant is a co-operative bank, all the three respondents became members of Class A and the bank agreed to provide cash credit facility to the limit of Rs. 10 lakhs. Respondent No. 3 was authorised to operate the bank account. On the basis of the authorisation and as per instructions from the respondent No. 3, certain amounts from the cash credit loan account of the respondent No. 2 firm were transferred to the personal loan account of the respondent No. 3. On 1-3-2004 the applicant issued a notice to all the respondents u/s 13(2) under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (In brief "Securitisation

Act") for recovery of Rs. 8,10,713/-. Initially, the respondent No. 1 filed a dispute before the Co-operative Court seeking injunction against the bank for recovery of the amount. However, thereafter the respondent No. 1 filed Regular Civil Suit No. 353 of 2004 seeking a declaration that the said notice issued u/s 13 of the Securitisation Act was illegal, unauthorised, without jurisdiction, null and void and he also sought perpetual injunction restraining the applicant from implementing the said notice. He also sought temporary injunction of the same nature.

3. After service of the suit summons, applicant/bank challenged the jurisdiction of the Court on the ground that u/s 34 of the Securitisation Act, jurisdiction of the Civil Court is barred and the suit is not tenable. In view of this, the respondent No. 1 himself made an application u/s 9A of the CPC before the trial Court for raising preliminary issue about the jurisdiction and tenability of the suit and accordingly, following preliminary issue came to be framed:

Whether this Court has jurisdiction to entertain, try and decide the suit in view of the contentions regarding Sections 91 and 164 of the M. C. S. Act and Securitisation Act?

About the preliminary issue, oral and documentary evidence was led by the respondent No. 1 alone. After hearing the parties, the learned trial Court observed that the suit was filed seeking declaration that the notice u/s 13 of the Securitisation Act was illegal and void and, therefore, the suit is not barred u/s 91 of the Maharashtra Co-operative Societies Act. The learned trial Court after referring to the provisions of Sections 13(2), 13(4), 17 and 34 came to conclusion that the respondent No. 1 could challenge the action of the bank by filing an appeal u/s 17 before the Debts Recovery Tribunal only if the action was actually taken u/s 13(4)(a) to (d) and as no such action is yet taken and only notice was issued, the appeal could not be preferred and, therefore, the Civil Court has jurisdiction to entertain the suit. This order has been challenged in the present Revision Application by the defendant No. I/Bank.

4. Mr. Kumbhakoni the learned Counsel for the applicant has taken me through the contents of the application as well as relevant documents and oral evidence. He also relied upon Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., in support of his contention that the jurisdiction of the Civil Court is barred to entertain a suit even in respect of action, which may be taken by the creditor under the Securitisation Act. On the other hand, Mr. Dani the learned Counsel for the respondent No. 1 contended that in paragraph 51 of the judgment in Mardia Chemicals Ltd. exceptions have been carved out where there may be jurisdiction with the Civil Court particularly when plaintiff can point out that the fraud was played and the act of the creditor is fraudulent.

5. Section 13(2), (3) and (4) of the Securitisation Act are the relevant provisions. They read as follows:

13. Enforcement of security interest.--(1) Notwithstanding anything contained in

Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(c) appoint any person (hereafter referred to as the manager) to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

6. From this it is clear that where any borrower, who is under a liability to a secured creditor under security agreement, commits default in repayment of the debt or any installment thereof, and his account has been classified by the secured creditor as non-performing asset, then, the creditor may issue a notice under Sub-section (3) giving all the details of the debt as well as the secured assets intended to be enforced and call upon the borrower to make payment within 60 days from the receipt of notice. If the borrower fails to pay, the secured creditor may take action u/s 13(4). Section 17 provides that any person, including borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorized officer, may make an application to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken. u/s 17, the Debts Recovery Tribunal has to hear the appeal and take a

decision and pass appropriate order. Any person, who is aggrieved by the order of the D.R.T. passed u/s 17, may prefer an appeal to an Appellate Tribunal u/s 18. Thus, complete mechanism has been provided for redressal of grievance under the Securitisation Act.

7. Section 34 specifically provides that 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. In *Mardia Chemicals Ltd. v. Union of India*, Their Lordships of the Supreme Court considered the scope of Section 34 in the light of Section 13(4) and observed as follows in paragraph 50:

50. It has also been submitted that an appeal is entertainable before the Debts 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 Debts 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 the respondents that there would be no bar to approach the Civil Court. Therefore, it cannot be said that 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 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

8. From these observations, it is clear that the Civil Court has no jurisdiction to entertain the matter where an action has been taken or even in matter in respect of which an action may be taken later on. In the present case, even though the action u/s 13(4) under the Securitisation Act was not taken, such action could be taken in future in view of the notice, which was issued under Sections 13(2) and (3) of the Securitisation Act. In view of the observations of the Supreme Court and in view of language of Section 34, it is clear that the jurisdiction of the Civil Court is barred in respect of any action taken or to be taken in pursuance of any powers under the Securitisation Act. Merely because no action was yet taken u/s

13(4), the Civil Court could not have the jurisdiction.

9. In paragraph 51 of *Mardia Chemicals Ltd. v. Union of India* it was held that if the creditor has played certain fraud and on the basis fraudulent act, he has taken or is likely to take action under the Securitisation Act, the Civil Court may have limited jurisdiction. But in the present case, there is not a word in the plaint or oral evidence given by the respondent No. 1 to show that the applicant/bank had committed any fraud or any fraudulent act. All the allegations about the fraud are against the respondent No. 3 alone. The respondent No. 3 was admittedly authorised to operate cash credit loan account of the firm and, therefore, there was nothing wrong on the part of the bank in acting on the directions given by the respondent No. 3 about transfer of certain amounts from the cash credit loan account of the firm to the personal account of the respondent No. 3. It appears that authority in *Mardia Chemicals Ltd. v. Union of India* was not brought to the notice of the trial Court and, therefore, the learned trial Court wrongly came to conclusion that it had jurisdiction in the matter.

For the aforesaid reasons and circumstances, it is clear that the Civil Court has no jurisdiction to entertain the suit in view of specific bar of Section 34.

10. In the result, Revision Application is allowed. Impugned order is hereby set aside and it is hereby declared that the Civil Court has no jurisdiction and the civil suit stands dismissed on the ground of want of jurisdiction.