CS 187/23
KRISHAN KUMAR GARG Vs.
PARMOD KUMAR RATHORE AND ANR

16.04.2025

Present: Sh. Anil Anand, Ld. Counsel for plaintiff with plaintiff.
None for LRs of D-1.
Ld. Counsel for D-2 with Mr. Shailender Singh, Asstt. Vice President (Legal).

1. Certain documents filed by D-2 in Court in support of his application U/O VII Rule 11 CPC. As per Counsel for D-2, a consolidated amount of Rs. 13,13,312.13 is stated to be lying with D-2 which was received in excess by D-2 against loan account No. 6586633 and 4959803 after selling the secured asset of D-1. The said amount, as per Counsel for D-2, was received by D-2 on 11.11.2019 and thereafter, five drafts cumulatively of the said amount, are lying with them which are stated to be drawn *inter alia* in name of D-1 and other co-borrowers.

2. To understand the reason of filing of the above documents and the background which led D-2 to make the aforesaid submission, the background of the case needs to be understood and considered. The issue in this case is with respect of recovery of Rs. 80 lac which plaintiff wants to recover from D-1 and D-2.

3. It is the case of the plaintiff that D-1 had agreed to sell him **first floor** of a property No. B-3/4, Yamuna Vihar, Delhi and a sale deed in this regard was executed on 07.04.2016 by D-1 in favour of plaintiff.

4. Thereafter, as per plaintiff, D-1 offered to sell the remaining property i.e. its **ground floor and second floor**. But, it was informed by D-1 to plaintiff that the same is lying mortgaged with D-2.

5. D-1 and officials of D-2, as per plaint (see para 5), told the plaintiff that the mortgage can be settled by paying Rs. 61 lac.

6. Plaintiff claims that he paid Rs. 46 lac to D-2 against loan account No. 4959803. Subsequently, a further sum of Rs. 15 lac is stated to have been paid through RTGS to D-2 for settling the said loan account.

7. Thus, as per plaintiff, a total amount of Rs. 61 lac was paid by him to D-2 for settling the loan against the ground floor and the second floor of the above described property and a sale deed was executed by D-1 in favour of plaintiff on 09.11.2017. It may be noted that the said sale deed is stated to have been executed after plaintiff had paid Rs. 51 lac to D-2 and the remaining amount of Rs. 10 lac was eventually paid on 10.08.2018.

8. Plaintiff claims that despite he settling the entire loan account (on the representation of officials of D-2, at the behest of D-1) D-2 has transferred the suit property to a third person and it is his case that D-1 and D-2 had defrauded him.

9. It is his case that he had paid Rs. 19 lac to D-1 with respect to the first floor of the property in question and a further sum of Rs. 61 lac (with respect to ground floor and second floor) to D-2. He claims that D-1 and D-2 have defrauded him and have even sold the property to a third party. It is his case that neither he has received the property in question nor the money.

10. **As per plaint, he has even lodged an FIR No. 525/20 U/S 406/420/120B/34 IPC. The said FIR is *inter alia* against both D-1 and D-2 and plaintiff has placed on record copy of the same.**

11. Thus, in nutshell, plaintiff has sued both the defendants to recover a sum of Rs. 80 lac from the defendants on the ground that he has been defrauded of the said sum by the act of cheating/fraud causing wrongful loss to him.

12. In response to the said suit, D-1 had entered appearance but he never filed his written statement. Eventually, he expired and now the suit is being pursued against the LRs of D-1. They have not entered appearance despite having notice.

13. Again, D-2 has also entered appearance in this case and it has preferred an application U/O VII Rule 11 (a) and (d) CPC r/w Section 34 of Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 **(SARFAESI Act)** on the ground that they have been sued without any cause of action and the suit is barred in law.

14. Now, it was in the aforesaid background and for deciding the aforesaid application of D-2, part arguments were heard and during the course of said arguments, it transpired that D-2 has

actually sold the property in question and after said sale, some money is lying with D-2 which is in excess to the amount which was payable to D-2 under two loans taken by D-1. In the said background, today, D-2 disclosed that the said excess money available with them is Rs. 13,12,313.13.

15. Arguments on the application of D-2 U/O VII Rule 11 CPC heard. Record perused.

16. As per the said application, against the entire property described above, two loans were extended by D-2 to D-1 having loan account No. 4959803 and 6586633. The said loans were for Rs. 1.61 Crore and Rs. 25 Lac respectively extended on 31.05.2015 and 23.10.2016. It is argued that the entire property was eventually sold in auction and since the property was a secured asset of D-2, provisions of SARFAESI Act bars this Court from entertaining this suit. It is further argued that plaintiff had earlier approached concerned Debt Recovery Tribunal and DRAT seeking stay to the sale of the above described property which was not granted to them and now, after sale of the aforesaid property, nothing can be recovered from D-2.

17. It is pertinent to note that D-2 has not filed any written statement in this case and it was argued that only after the present application is decided, would the said defendant file his written statement.

18. Application is opposed by the Counsel for plaintiff who argued that even if it is taken that the property in question was a secured asset of D-2, still, both the defendants can be sued by the plaintiff for seeking recovery of money paid by him to D-1/D-2 as he has premised his cause of action on

misrepresentation and fraud. It was argued that while deciding an application U/O VII Rule 11 CPC, only the plaint and the documents filed therewith are to be read by the Court. Counsel for plaintiff points out that plaintiff has disclosed that he was made to believe by officials of D-2 that after paying the money to the tune of Rs. 61 lac, the entire loan account against the property in question shall be settled and it was on the basis of the said specific assurance given to plaintiff that plaintiff paid money to D-2. It was argued that if plaintiff was aware that despite making a large payment of Rs. 61 lac, the property shall still go in auction and nothing would remain after settling of accounts, why would plaintiff enter into any such transaction at all?

19. It was argued that for the first time during the course of arguments, D-2 has admitted before this Court that in fact they are in possession of Rs. 13,13,312.13 which is in excess to the amount allegedly payable against the two loan accounts/facilities being availed by D-1 from D-2. It is his argument that before today, D-2 has never disclosed the fact that they were holding some excess amount with them and this itself shows that D-2 and its officials are involved in financial fraud because if that was not true, atleast while filing the present application, they should have disclosed this fact.

20. The law for deciding an application U/O VII Rue 11 CPC is well settled. Such an application is to be decided only on the basis of the plaint and the documents filed therewith. Court cannot make any reference to the documents or the written statement of the defendant while deciding such application.

21. Now, plaintiff has specifically alleged in para 5 of his plaint that he was made to believe that the entire loan amount against loan account No. 4959803 would be settled on payment of Rs. 61 lac to D-2. It is not disputed before this Court that the plaintiff had actually paid a sum of Rs. 61 lac to D-2. In fact, as noted above, Counsel for D-2 has submitted before this Court that about Rs. 13 lac is available with D-2 after settling of entire loan facilities given to D-1.

22. Now whether the plaintiff was made to believe that on payment of Rs. 61 lac, the entire loan account, as aforesaid would or would not be settled is disputed question of fact. It will require trial to conclude as to whether plaintiff was defrauded by D-1 or D-2 by making of false or misleading representations. At the very inception, the allegations of fraud/misrepresentation which persuaded the plaintiff to make payments for the loan taken by D-1 from D-2 shall have to be taken as a gospel truth. It means that it has to be believed that actually, D-1 and D-2 have made false representations before the plaintiff to persuade him to pay money to D-2 and he paid the said money under the belief that after paying the said money, the entire loan against the property shall be settled and he would become the owner of the property in question.

23. Plaintiff goes on to allege that despite said assurance of D-2 (through its officials), the loan account was not settled and the property in question was put to sale. He claims that this is a clear cut case of fraud and even if it is treated that the property in question was a secured asset of D-2, still, he has premised

his cause of action on the ground that the alleged fraud/misrepresentation led to wrongful loss to him.

24. Nothing has been brought to my notice to show that the said allegations can be decided by the Debt Recovery Tribunal U/s 34 of SARFAESI Act. The Civil Court is barred to entertain suits/proceedings where concerned DRT or DRAT is empowered by or under the said Act. Nothing has been brought to my notice to show that the question of fraud or misrepresentation and the loss suffered by the plaintiff on that count can be decided by DRT/DRAT.

25. The assertion that plaintiff had approached DRT/DRAT before is not borne out from the plaint. But, plaintiff does not dispute the fact before this Court that he did approach DRT/DRAT. But, it is argued that he did so to try and protect the aforesaid property and not to seek recovery from D-2.

26. In other words, plaintiff is before this Court alleging damages on account of fraud and misrepresentation done by D-1 and D-2. This is for the first time it transpired before this Court that in fact D-2 has admittedly received an amount in excess of Rs. 13 lac on closure of the above described two loan accounts. This fact has transpired during arguments of this application and neither in the present application nor during the course of earlier hearings in the present application, did D-2 disclose this fact before this Court. Only after a query was put in this case by this Court, did D-2 come up with the said explanation.

27. Be that as it may, fact of the matter remains that if I read the plaint alongwith the documents filed by plaintiff, plaintiff has set up a case for compensation for the loss suffered by him on

account of false/misleading representation made by D-1 and D-2 qua settling the entire loan account on payment of money. Based on the said representation, plaintiff has paid Rs. 19 lac to D-1 (at the time of execution of first sale deed qua first floor of the property) and Rs. 61 lac to D-2. If I look at the plaint and the documents filed, an FIR inter alia U/S 420 IPC is also under investigation against D-2. Even though, it was argued that there is a stay to the investigation, no order in that regard was brought to my notice by D-2.

28. Be that as it may, in my humble opinion, plaintiff has disclosed substantial cause of action against both the defendants and has made specific pleadings of fraud and misrepresentation against both of them.

29. The relief of recovery of Rs. 80 lac against both the defendants cannot be granted by DRT and it is nobody's case that plaintiff had approached DRT for the said relief. The question raised before this Court qua alleged fraud and misrepresentation are questions which cannot be gone into by DRT.

30. Section 17 of the Recovery of Debts Due to Banks and Financial Institutions Act 1993 empowers DRT to entertain and decide applications for recovery of debts due to a given financial institution. The said Section does not authorise DRT to decide the allegations of misrepresentations and fraud of the nature being set up in this case. The argument that Section 34 of SARFAESI Act bars this Court from entertaining this suit is misconceived as the said bar only operates qua matters in which DRT has power to adjudicate.

31. In the present case, nothing was argued to demonstrate that if the allegations of the plaintiff are taken as gospel truth, can the said allegation be adjudicated by DRT. The answer to the said question has to be in the negative.

32. If that be the case, there is no question of rejecting the plaint U/O VII Rule 11 (a) or (d) r/w Section 34 of SARFAESI Act.

33. The application is misconceived. It is dismissed.

34. As already noted, none of the defendants has filed any written statement till date. As per record, both the defendants entered appearance in Court on 19.09.2023.

35. **As far as D-1 is concerned, he has already expired and his LRs have already been brought on record. They have not entered appearance before this Court till date despite notice. They are accordingly proceeded ex-parte in this case.**

36. As far as D-2 is concerned, despite expiry of statutory time to file written statement, D-2 has not filed any written statement and it was argued before this Court that only after this Court decides D-2's application U/O VII Rule 11 CPC would D-2 file written statement.

37. It is now settled law that pendency of an application U/O VII Rule 11 CPC shall not mean that the time to file written statement does not begin to run. As already noted, D-2 entered appearance in this case on 19.09.2023.

38. **As per record, the summons in this case were served on D-2 through ordinary means on 13.09.2023** and thus it can be safely said that atleast since said date, time for filing written statement began to run. D-2 should have filed its written statement as per

law. **<u>Since, despite expiry of statutory time, no written statement has been filed on behalf of D-2, right of D-2 to file written statement is closed.</u>**

39. I may reiterate even at the cost of repetition that only because D-2 had preferred an application U/O VII Rule 11 CPC shall not mean that D-2 was not liable in law to file its written statement.

40. At this stage, an oral prayer is made for and on behalf of plaintiff that D-2 should be directed to deposit the amount of Rs. 13,13,312.13 (which is admittedly lying in excess after closure of the aforesaid two loan accounts) in Court.

41. It is argued that the said money is lying with them, as per their own argument before this Court, since 11.11.2019 and in case they are directed to deposit the said amount in Court, it would atleast protect the interest of plaintiff to some extent.

42. Mr. Shailender Singh, Asstt.Vice President (Legal), who has appeared in Court with Counsel for and on behalf of D-2, submits that D-2 is willing to deposit the said money in Court in the form of an FDR drawn in the name of Court.

43. As per argument of D-2, the said money is payable to D-1 and/or to the other co-borrowers of the two loan accounts referred above and the said money is not payable to D-2 itself.

44. As already noted, plaintiff has claimed that he has paid Rs. 61 lac to D-2 and Rs. 19 lac to D-1 under a false pretext. Some money is found to be available with D-2 and no prejudice shall be caused to any of the parties in case the said money is ordered to be deposited in Court.

45. Accordingly, let D-2 deposit the said amount in the form of an interest bearing FDR drawn in the name of Court. The said FDR shall be in an auto-renewal mode. The same shall be without prejudice to the rights and contentions of the parties before this Court.

46. Let the deposit be made within 7 days from today.

47. At this stage, it is submitted by Mr. Shailender that they are in possession of Rs. 13,12,216.72 only and not Rs. 13,13,312.13.

48. It appears that D-2 is not even sure about the exact sum lying with them and they are flip flopping before this Court about the amount lying with them.

49. It is pointed out by the Counsel for D-2 that as per the 5 demand drafts filed today, 2 demand drafts are of Rs. 222/- and Rs. 173.41 and do not pertain to this case and they have been filed inadvertently.

50. I place on record my strong displeasure on the conduct of D-2 in as much as a large corporate entity like D-2 which is represented by able Counsels is making wrong submissions before the Court and only after the order is dictated in Court, a new submission is made. **Be that as it may, let the amount of Rs. 13,12,216.72 be deposited in Court by D-2 within 7 days from today in the manner indicated above.**

51. **Ahlmad is directed to tag the file properly and place all documents filed by defendants as per rules.** This is on account of the fact that the documents were not accompanied with any application to take them on record and have either been filed by

D-2 with the application U/O VII Rule 11 CPC or during course of arguments of the said application.

52. To come up for confirmation of deposition in compliance of this order and for PE on 21.05.2025.

Aashish Gupta
DJ-01/NE/KKD/DELHI
16.04.2025

AASHISH GUPTA

Digitally signed by AASHISH GUPTA
Date: 2025.04.16 15:37:21 +0530