MHSN150031692020

(Bank of India Branch: Kharsundi V/s. Ankush Dashrath Gaikwad-2)

ORDER BELOW EXHIBIT 34 IN
SPECIAL CIVIL SUIT No.710/2020

{OLD SPECIAL CIVIL SUIT No.653/2020}

1. This is an application filed by the defendant No.3, vide Order 7 Rule 11(d) of *Code of Civil Procedure* for rejection of the plaint against defendant No.3.

2. Perused application and reply filed by the plaintiff *Exhibit 35*. Heard both side at length.

3. ***Undisputed facts;-***

The plaintiff Bank lent a loan to defendant No.1, who is one amongst the 439 H & T contractors, to whom defendant No.2, Sugar Factory stood guarantor. Inconsequence thereof, defendant No.2, Sugar Factory mortgaged its properties with the plaintiff Bank in security of the said loan arranged for the H & T contractors. It is not in dispute that, the properties, which were mortgaged with the plaintiff Bank are already mortgaged with defendant No.3 Bank. It is also not in dispute that, defendant No.3 Bank in order to realise the outstanding loan dues realized the mortgage by invoking the provisions of *the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002* (in short '*SARFAESI*' *Act*).

4. The plaintiff Bank alleging default at the instance of defendant No.1, filed this suit for recovery of money claim to the tune of Rs.16,43,797.83, against the principal borrower : defendant No.1, the guarantor Sugar Factory : defendant No.2 and also impleaded defendant No.3 Bank seeking an injunction for restraining from transferring, alienating or creating third party interest in the mortgaged properties.

5. It is in these circumstances, defendant No.3 Bank filed this application claiming that, the suit is barred by Section 34 of '*SARFAESI*' *Act* as defendant No.3 Bank with the knowledge of the plaintiff Bank initiated the proceeding for recovery vide the provisions of '*SARFAESI*' *Act* and took the mortgaged properties in possession and thus sought to reject the plaint. Defendant No.3, also disputed the second charge made by the plaintiff Bank despite defendant No.3 Bank already having first charge and having already mortgaged the properties with defendant No.3 Bank. And claimed only D.R.T. has jurisdiction and therefore the plaintiff Bank had to approach D.R.T..

6. The plaintiff Bank denied the application, claiming that defendant No.3 Bank never raised any objection or complaint against the second charge made by the plaintiff Bank and thus had consented for the same. The suit for recovery of money and to decide other civil rights, only Civil Court has jurisdiction and thus the suit is not barred. So also, dispute regarding the mortgage is to be decided before the Civil Court and thus the suit is not hit by the provisions of Section 34 of '*SARFAESI*' *Act* and thus sought to reject the application.

7. Having heard both sides at length and having considered the pleadings of the plaintiff Bank, reliefs claimed and documents filed on record, following points arises for my consideration. I have recorded my findings thereon along with reasons as under;

Sr. No.	Points	Findings
1.	Whether the suit seeking injunction against defendant No.3 Bank is maintainable in view of express bar by Section 34 of *SARFAESI Act* ?	***Yes.***
2.	If yes, whether the plaint can be rejected in part only against defendant No.3 Bank ?	***No.***
3.	What order ?	**As per order.**

R E A S O N S

AS TO POINT No.1 TO 3:-

8. All these points being interlinked, thus, taken together simultaneously to avoid repetition.

9. The provisions of Section 34 of *SARFAESI Act* provides express bar to the jurisdiction of the Civil Court entertaining the civil suit for injunction etc,. The provisions of Section 34 of *SARFAESI Act* is quoted below for ready reference;

> ***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).*

10. A bare perusal of the provisions and the relief claimed by the plaintiff Bank against defendant No.3 Bank, it can be seen that, the suit against defendant No.3, Bank is expressly barred vide Section 34 of *SARFAESI Act*, as defendant No.3 Bank already initiated the proceeding vide Section 13, 14 etc., of *SARFAESI Act* and attached the properties and took its possession. The dispute about the mortgage *qua* respective charge over properties can be raised before the D.R.T.. Therefore, the suit for injunction and consequential relief is not tenable vide Section 34 of *SARFAESI Act*. Therefore, the Civil Court remains with very limited jurisdiction to entertain the suit of civil nature only in case of fraud is claimed.

11. It is apposite to refer the decision of Hon'ble Supreme Court, in case of ***Mardia Chemicals Limited and others V/s. Union of India (2004)4 SCC 311*** wherein it is hold that, the issue as to the exclusion of the jurisdiction of Civil Court is, thus, seen no more *res intigra* and made following observations.

> *50. It has also been submitted that an appeal is entertainable before the Debt 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 Debt 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 respondents that there would be no bar to approach the civil court. Therefore, it cannot be said 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 Debt Recovery Tribunal or 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 Debt 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 Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

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 their 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 (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 22:

"The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: 'Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784).

12. In view of the above law and express bar under Section 34 of *SARFAESI Act*, the plaintiff Bank is not seeking any relief against defendant No.3 Bank under the ground of fraud and thus the bar under Section 34 of *SARFAESI Act* will be fully attracted.

13. However, the question would arise, whether the plaint can be rejected in part ? The answer would be no, the plaint can either be rejected as a whole or not at all, as has been held by the Hon'ble Supreme Court in case of ***Sejal Glass Limited V/s. Navilan Merchants Private Limited AIR 2017 SC 4477***, wherein the Hon'ble Supreme Court made following observations;

What the word claim as used in Rule 11 necessarily means the plaint as a whole and that if only a portion of the plaint, *as opposed to the plaint as a whole is to be struck out, Order VI Rule 16 of the C.P.C., which relates to striking out the pleadings would apply. The Hon'ble Supreme Court further clarified that, where the plaint is barred qua one defendant but maintainable vis-a-vis others, the plaint cannot be and should not be rejected as a whole. In all such cases, if the plaint survives against certain defendants and /or properties, Order VII Rule 11 will have no application at all, and the suit as a whole must then proceed to trial.*

14. The position was thereafter reconfirmed by the Hon'ble Supreme Court in the case of ***Madhav Prasad Aggarwal & Anr. V/s. Axis Bank Limited & Anr. (2019) 7 SCC 158***. In the said case, the Axis Bank being one of the respondents filed a notice of motion under Order 7 Rule 11(d) of *C.P.C.* on the ground that, the suit against it was barred under Section 34 of '*SARFAESI*' *Act*. Setting aside the order of the Hon'ble High Court's order that allowed the motion the Hon'ble Supreme Court held as following;

Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule 11(d) of C.P.C. on account of non-compliance of mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 of C.P.C.. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part. In that sense, the relief claimed by respondent No.1, in the notice of motion(s) which commended to the High Court, is clearly a jurisdictional error. The fact that one or some of the reliefs claimed against respondent No.1, in the concerned suit is barred by Section 34 of 'SARFAESI' Act or otherwise, such objection can be raised by invoking other remedies including under Order 6 Rule 16 of C.P.C.. at the appropriate stage.

15. In view of the clear and crisp observations on law, the plaint in part cannot be rejected though the suit against defendant No.3, Bank is found barred. Undisputedly, the suit against defendant No.1 & 2, for the recovery of dues of outstanding for the allegedly defaulted loan is maintainable and thus when the plaint is to be proceeded in part, it has to be proceeded as a whole. Thus, defendant No.3, Bank could follow the other available remedies under law as observed above. Thus, the application for rejection of the plaint is not maintainable, as the plaint cannot be rejected in part. Therefore, the application has to be rejected. Accordingly, I record the findings to point No.1 & 2 and in answer point No.3, following order is passed.

O R D E R

1. The application stands rejected.

2. Costs in cause.

XXX Sd/- XXX

Vita. (***Sudhir N. Shinde***)
Date: 02/02/2024. Jt. Civil Judge Senior Division, Vita.

I affirm that, the contents of this P.D.F. file Judgment/ Order are same, word to word, as per the original Judgment/Order.
Name of the Stenographer : S. P. Pethkar.
Court : Jt. Civil Judge Senior Division, Vita.
Judgment/Order signed by the Presiding Officer on : 02/02/2024.
Judgment/Order uploaded on : 02/02/2024.