OD – 12

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

IA NO. GA/5/2024
In CS/217/2013

FRONTLINE CORPORATION LTD
Vs
PUNJAB AND SIND BANK

BEFORE:
THE HON'BLE JUSTICE SUGATO MAJUMDAR
Date: 24th July, 2024

Appearance:

Mr. Aniruddha Mitra, Adv.
Ms. Nilanjana Adhya, Adv.
Mr. Kaushik Banerjee, Adv.
Ms. Rashmita Sen, Adv.

...for the Plaintiff

Ms. Sutapa Dutta, Adv.
Ms. Jayati Chowdhury, Adv.
Ms. M. Chaudhury, Adv.

...for the Defendant

The Court: GA 5 of 2014 is an application principally for rejection of the plaint.

Before delving deep into the merit of the instant application, it is apt to look into the plaint case. Nutshell of the plaint case may be summarized as follow:

a) By a registered deed of conveyance dated 17/02/2005, the Plaintiff acquired the entirety of the premises no. 8, Old Court House Street Kolkata – 700001 from Bharat Chamber of Commerce. The Defendant was a tenant of the said premises.

b) The said Bharat Chamber of Commerce had filed eviction suit bearing number Eviction Suit of 02 of 2003 in the City Civil Court of Calcutta.

c) The Plaintiff availed of certain credit facilities from the Defendant and for that purpose deposited the title deed with the Defendant.

d) It was agreed between the Plaintiff and the Defendant that the suit property would be developed and the Defendant, in the interregnum, would shift to another locale. But the Defendant failed to vacate the premises preventing the Plaintiff from developing the suit property. Finally, the parties reached an agreement detailed terms and conditions of which are set out in the plaint. Terms and conditions were documented named Terms and Settlement.

e) The suit pending in the City Civil Court ended in compromise and registered deed of lease was executed dated 11/02/2011 between the parties.

f) The Defendant vacated the premises in the end of the year 2010, though retained possession.

g) The Defendant issued earlier a letter dated 13/06/2012 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. However, as pleaded, by a subsequent letter dated 05/10/2012, that letter was waived.

h) The Plaintiff continued to negotiate with the Defendant for specific performance of the agreement. The Defendant published a possession notice in respect of the suit premises in exercise of power conferred under Section 13(4) of the SARFAESI Act, 2002 dated 19/01/2013.

i) The Plaintiff initiated a proceeding under Section 17 of the Act which is pending before the Debt Recovery Tribunal.

j) The Plaintiff instituted the present suit praying for specific performance of the agreement read with the registered deed of lease dated 11/02/2011 and the Settlement deed.

In the context of the facts set out in the plaint, the Defendant filed the instant application praying for rejection of plaint.

The Defendant pleaded in the instant application various factual aspects as well as issues of law. It is contended that since the Plaintiff defaulted in payment of debt, the asset of the Plaintiff was classified as non-performing asset. Accordingly the Defendant issued demand notice dated 13/06/2012 under Section 13(2) of the SARFAESI Act 2002 for recovery of Rs.44.89 crores. As demand was not paid, the Defendant issued notice of possession under Section 13(4) of the SARFAESI Act

2002. The Plaintiff filed an application under Section 17 of the Act before the Debt Recovery Tribunal – I, Kolkata. Simultaneously, the Plaintiff filed the instant suit. The Plaintiff moved an injunction application before this Court which was ultimately dismissed. The matter went upto the Supreme Court of India. The Supreme Court of India ultimately negated the plea of the Plaintiff, setting aside to the order passed by the Division Bench. While passing the order, the Supreme Court of India made certain observations though subsequently clarified in terms of the order dated 05/07/2023 that those observations were only for consideration of interim injunction application. It is pleaded that in view of the provision of Section 34 of the SARFAESI Act 2002, jurisdiction of the civil court is ex-facie barred. Under provision of Section 17 of the Recovery of Debts & Bankruptcy Act 1993, authority is entrusted upon the Debt Recovery Tribunal. The Plaintiff has alternative remedy before the Debt Recovery Tribunal. The present suit is filed on the basis of the self-same cause of action. Therefore, as pleaded, the instant suit is barred by law and the plaint is liable to be rejected.

Affidavit-in-Opposition is filed by the Plaintiff refuting the contentions of the application. It is averred that in terms of the last and the final order dated 05/07/2023, it is made clear by the Supreme Court of India that the suit should be proceeded on its own merits. Since, the Supreme Court of India has decided that the suit should be so proceeded with, agitating the same dispute is redundant. It is further contended that trial is at the fag-end. Examinations of witnesses are completed almost. At this stage, the instant application is infructuous and not tenable. All other contentions made in the application re denied.

The Defendant also filed Affidavit-in-Reply.

The Learned Counsel for the Defendant argued that in view of the observation made by the Supreme Court of India and in view of express bar of the jurisdiction of the civil court under SARFAESI Act 2002 the suit is barred.

On the contrary, the Learned Counsel for the Plaintiff argued that all the observations made by the Supreme Court of India was only for considering the injunction application, as clarified in the subsequent order dated 05/07/2023. More so, at the fag-end of the trial, the instant suit is not tenable.

After hearing rival submissions, this Court considers that the first question which should be addressed is whether the instant application can be filed at this belated stage when witness action is about to be closed, as argued by Mr. Mitra.

There is no specific bar or restriction in Order VII Rule 11 of CPC as to the specific stage of the suit when such application cannot be filed; the provision is silent as on which stage or at which point of time of a pending proceeding, an application can be filed. There is no express provision that the application under Order VII Rule 11 of CPC cannot be filed after framing of issues. This is unlike the provision of Order VI Rule 17 of CPC where the proviso has restricting tenure, in allowing or preferring such an application after commencement of trial. Whereas Order VI Rule 17 of CPC provides that no application for amendment of plaint shall be allowed after commencement of trial without leave of the court, no such like or corresponding provision is there in Order VII Rule 11 of CPC. Order VII Rule 11 of the CPC confers power on a Court to reject a plaint on grounds stated therein. Thus, if a suit is barred by law or if a suit fails to disclose any cause of action, a Court should not bear the burden of that suit or proceeded with the same. If exercise of power of a Court is barred by law then obviously it would be not in accordance with law to proceed with the or to adjudicate the suit, as that would be *de hors* the jurisdiction of the Court. This might be a reason why no time frame is there in Order VII Rule 11 of the CPC. This issue came up for consideration before the Supreme Court of India in **Azar Hossain Vs. Rajiv Gandhi [1986 (supp) SCC 315].** That was a proceeding for hearing election petition where an application under Order VII Rule 11 of CPC was filed. It was observed by the Supreme Court of India that the Courts, in exercise of their powers under the Code of Civil Procedure, 1908, can also treat any point going to the root of the matter, such as, one pertaining to jurisdiction or maintainability as a preliminary point and can dismiss a suit without proceeding to record, evidence and elaborate arguments. In the context of such evidence, if the Court is satisfied that the action would terminate, in view of the merits of the preliminary point of objection. In the words of the Supreme Court India:

> **"12.** Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. Even in an ordinary civil litigation the court readily exercises the power to reject a plaint if it does not disclose any cause of action."

In a subsequent case in **Samar Singh Vs. Kedar Nath [1988 (supp) SCC 663]** this **principle** was reiterated and it was laid down that if a suit does not disclose any cause of action, an application for rejection of plaint can be entertained even after framing of issues this was a case in respect of election petition. Subsequently, in **I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Ors. [(1988) 2 SCC 70]** the Supreme Court of India followed and reiterated the same principle and held that the fact that issues were framed cannot come in the way of consideration of an application filed under Order VII Rule 11 of the CPC.

Therefore, the instant application is tenable even at the stage when trial is at fag-end. The argument made by Mr. Mitra is not acceptable.

There is no cavil on the point that while considering an application for rejection of plaint it is only the plaint and the annexures, being treated as a part of plaint under Order VII Rule 14 of the CPC shall be considered and looked into. It is averred in the plaint that the property has been mortgaged to the Defendant bank; that the Defendant treated the asset as a non performing one and issued demand notice dated 13/06/2012 under Section 13(2) of the SARFAESI Act 2002 for recovery of Rs.44.89 crores. The Defendant also issued notice under section 13(4) of the SARFAESI Act 2002. It is also in the plaint that the Plaintiff took resort to the Debt Recovery Tribunal – I, Kolkata being aggrieved by issuance of the notice under section 13(4) of the SARFAESI Act, 2002 under section 17 of the SARFAESI Act, 2002. Prayers made in the plaint include determination of the amount due by the Plaintiff.

At this point, it is apposite to look into certain relevant provisions of the section 17 of the SARFAESI Act, 2002:

“17. Application against measures to recover secured debts.

(1) 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 authorised officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation. For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

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(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

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(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, 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 this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,

(a)declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and (b)restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c)pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

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(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in 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."

Ambit of power of the Debt Recovery Tribunal, conferred by section 17 of the Act is wide enough. In **Agarwal Tracom (P) Ltd. v. Punjab National Bank, [(2018) 1 SCC 626]** it was observed by the Supreme Court of India that 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). In **Electrosteel Castings Ltd. v. UV Asset Reconstruction Co. Ltd., [(2022) 2 SCC 573]** question came before the Supreme Court of India was whether civil suit is maintainable in view of bar imposed by section 34 of the SARFAESI Act, 2002. Answering negative, it was observed by the Supreme Court of India that proceeding under section 13 of the Act can be challenged by way of application under section 17 of the Act, before the Debt Recovery Tribunal; civil suit is not maintainable, therefore.

Next section 34 of the SARFAESI Act,2002 should be looked into:

> "**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)."

Scope of section 34 was extensively discussed by the Supreme Court of India in **Mardia Chemicals Ltd. & Ors vs Union of India & Ors.[(2004) 4 SCC 311]** where it was held that limited jurisdiction of a civil court can be invoked where 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. It is further observed by the Supreme Court of India:

> "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."

Coming to the case in hand the plaint discloses that the Plaintiff took recourse to efficacious remedy provided by Section 17 of the SARFAESI Act, 2002, as discussed above. The Debt Recovery Tribunal has ample power to address the grievance of the Plaintiff. It is the domain of Debt Recovery Tribunal and issues are to be decided by the Debt Recovery Tribunal. The Plaintiff subjected himself to the jurisdiction of the Tribunal. There is no pleading that the claim of the Defendant is fraudulent, absurd or untenable for which the civil court's jurisdiction can be invoked as laid down in **Mardia Chemicals Limited's** case (supra). Plaintiff's one of the prayer is ascertainment of the amount due and payable by the Plaintiff. This is clearly the domain of Debt Recovery Tribunal. It is true that the decree for specific performance cannot be granted by a Debt Recovery Tribunal. However, a crafty drafting cannot be a masquerade to frustrate the operation of a statute in the guise of praying specific performance. The Plaintiff cannot circumnavigate the application of a statute. In the guise of specific performance of agreement a claim of a secured creditor arising under the SARFAESI Act, 2002 cannot be sent to graveyard. Such a plea of specific performance is a sham one. The Bar of the jurisdiction of civil court imposed by Section 34 of the Act, clearly applies here. Therefore, it is a fit case where the provisions of Order VII Rule 11 (d) should be applied.

In view of discussions made above, this Court is of considered opinion that the present application has a merit and should be allowed.

Accordingly, the plaint is rejected. The instant application is disposed of. The suit is accordingly disposed of.

Let the deemed decree be drawn up.

(SUGATO MAJUMDAR, J.)