

Bhopal Thapa Vs Bina Boro

Court: Gauhati High Court

Date of Decision: Sept. 1, 2014

Acts Referred: Civil Procedure Code Amendment Act, 1999 " Section 17

Civil Procedure Code, 1908 (CPC) " Order 14 Rule 1, Order 14 Rule 2(2), Order 41 Rule 2(2), Order 6 Rule 4, Order 7 Rule 11

Companies Act, 1956 " Section 442, 446, 537

Constitution of India, 1950 " Article 226, 227

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 " Section 13, 17, 18, 19, 20

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) " Section 34

Citation: (2015) 3 BC 209

Hon'ble Judges: Nishitendu Chaudhury, J

Bench: Single Bench

Advocate: H. Das, Advocate for the Appellant

Judgement

Nishitendu Chaudhury, J.

In this application under Section 115 of the Code of Civil Procedure read with Section 151 of the Code of Civil

Procedure read with Article 227 of the Constitution of India, the petitioner, namely, Sri Bhopal Thapa who is defendant No. 8 in Title Suit no. 344

of 2011 has challenged the order dated 02.07.2014 rejecting the prayer for holding the suit as not maintainable.

2. To understand the case it is necessary to state the essential facts. The plaintiff Smt. Bina Boro instituted Title Suit No. 344 of 2011 in which one

Deepak Kumar Jain was arraigned as defendant No. 1. Central Bank of India was impleaded as Defendant No. 2 where as the defendants No. 3

& 8 are private opposite parties. It is the case of the plaintiff that one Smt. Charu Prabha Baruah became owner of a plot of land measuring 1

Bigha covered by Dag No. 351 of K.P. Patta No. 87 in Revenue Village Jyotikuchi in Beltola Mouza, Kamrup, Guwahati, by purchasing the same

from its original owner Guna Ram Mikir vide registered deed dated 04.06.1967. This Guna Ram Mikir was the father of the defendant No. 3 in

the present case. The seller handed over the possession of the land to Charu Prabha Baruah following execution of sale deed and thereafter, she

obtained mutation in her favour in the records of rights in place of Guna Ram Mikir. She also had been paying land revenue regularly in respect of

the land described in Schedule-B to the plaint and being in the peaceful possession and enjoyment thereof sold 2 Kathas out of the said suit land to

the plaintiff on 21.07.2005 by executing a registered sale deed No. 8794 of 2005 with due and prior permission of the concerned authorities.

Plaintiff was handed over possession of the land by Charu Prabha Baruah and she also obtained mutation in the records of right with respect to the

same land. While the plaintiff was in continuous and peaceful possession of the Schedule-A land which is a part of land described in Schedule-B of

the plaint, she was dispossessed by the police personnel on 29.08.2011 forcefully. Upon enquiry she discovered that her dispossession was done

consequent to a decree passed by Debts Recovery Tribunal, Guwahati at the instance of defendant No. 2, Central Bank. The plaintiff came to

know on enquiry that defendant No. 1 had mortgaged Schedule-A land in favour of the defendant no. 2 Central Bank while standing Guarantee for

loan granted to defendants No. 4, 5 & 6. The plaintiff thereafter obtained certified copies of the orders and found that the aforesaid orders were

passed in O.A. 25 of 2011 by the Debt Recovery Tribunal, Guwahati. The records reveals that the defendant No. 1 claimed to have purchased

the same land on 16.07.1983 from the defendant No. 3 who is none other than the son of Guna Ram Mikir i.e. the person who had sold the whole

of the land described in Schedule-B including the Schedule-A land to Charu Prabha Baruah, the vendor of the plaintiff, on 16.07.1983. The

plaintiff was astonished to find that when father of the defendant No. 3 had exhausted his title by sale of the Schedule-B land to Smt. Charu Prabha

Baruah on 04.06.1967, the defendant No. 3 could not have been left with any title to Schedule-A land which is only a part of Schedule-B land and

thus, fraud was perpetrated by showing a sale of the Schedule-A land in favour of the defendant No. 1, who on turn mortgaged the land in favour

of defendant No. 2. Neither the defendant No. 1 had ever any possession over the land in question nor had he acquired any title to the suit land

and so purported sale in favour of defendant No. 1 followed by his mortgage of the same with defendant No. 2 in securing financial assistance to

defendants No. 4 to 6 was a fraudulent and collusive act and thus, purchase of defendant No. 1 and subsequent mortgage in favour of the

defendant No. 2 are vitiated by fraud. With these basic facts, plaintiff approached the learned Civil Court with a prayer for decree declaring that

sale deed dated 16.07.1983 executed by defendant No. 3 in favour of the defendant No. 1 and mortgaged by defendant No. 1 in favour of

defendant No. 2 vide deed dated 06.10.1994 and the consequent certificate issued by Debts Recovery Tribunal, Guwahati on 08.04.2003 and

28.04.2003 in O.A. No. 25 of 2001 are all fraudulent, null and void ab initio etc.

3. Defendant No. 8 submitted a written statement in the aforesaid suit denying the case of the plaintiff and stated that he purchased the suit land by

way of auction sale pursuant to order passed in O.A. No. 25 of 2001 of the Debts Recovery Tribunal, Guwahati. He being the bonafide purchaser

cannot be deprived from the fruit of the auction sale. Along with the written statement the defendant No. 8 submitted as many as 5 draft issues and

at the foot of the same he made a prayer that the application be admitted and the suit be dismissed as not maintainable. It is not shown under which

provision of law the application was filed. Although the defendant No. 8 claimed that the same was a preliminary objection but it does not appear

that the same was filed in appropriate time for framing preliminary issue under Order XLI Rule 2(2) of the Code of Civil Procedure. It also does

not appear that this is an application under Order VII Rule 11 of the Code of Civil Procedure. Be that as it may, the learned trial court heard both

sides on this application containing 5 draft issues and held that the case involved disputed question of fact which needs a full-fledged trial. In the

result, the preliminary objection was rejected.

4. I have heard Mr. H. Das, learned counsel for the petitioner who has placed reliance on following Judgments:

Allahabad Bank Vs. Canara Bank and Another,

United Bank of India, Calcutta Vs. Abhijit Tea Co. Pvt. Ltd. and Others,

Punjab National Bank Vs. O.C. Krishnan and Others,

5. Mr. Das submits that under Section 20 of the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (herein after referred to as

RDB), the plaintiff was at liberty to prefer an appeal before the appellate tribunal and certainly the suit is not maintainable in view of specific bar

under the RDB Act.

6. First of all, it is necessary to understand as to what was the nature and character of the application filed by the defendant No. 2 on 21.05.2012

leading to which the learned trial court heard parties and passed impugned order on 02.07.2014. The Defendant No. 8 in the meantime had filed

the written statement denying the averments made by the plaintiff on facts. While it is the case of the plaintiff that fraud has been perpetrated on her

by the defendants, more particularly defendants No. 1 & 3 and the defendants No. 4, 5 & 6, the defendant No. 8 is definitely not in a position to

answer the questions raised by the plaintiff as against other defendants. Defendant No. 8 came into the picture only after order was passed by the

Debt Recovery Tribunal at the instance of the defendant No. 2 and thereafter, issued certificate for auction sale of mortgaged property. The

defendant No. 8 came into the picture only after the property was to be sold and he had no occasion to answer as to the events that had taken

place on the prior dates. The defendant no. 8, however, by filing written statement has denied all the averments made in the plaint including

allegation of fraud perpetrated on the plaintiff.

7. When there is assertion of facts by one side and denial by the other side, the trial court is under obligation to frame issues under Order XIV Rule

1 of the Code of Civil Procedure. Issues are always of two kinds. While issues of facts are to be decided on the basis of evidence led by the

parties, the issues of law are capable of being decided either on the basis of the pleadings or in some cases on the basis of the pleadings as well as

proof. Thus, issues on law which relates to jurisdiction of the Court or on bar to the suit created by any law for the time being in force, they can be

taken as primary issues under Provision of Order XIV Rule 2(2) of the Code of Civil procedure. Here in this case, the suit has not passed on to

the date of first hearing and issues have not yet been framed. The stage for framing preliminary issues, therefore, is yet to come. However, the

defendant or defendants are at liberty to file an application under Order VII Rule 11 of the Code of Civil Procedure for rejection of the plaint. If

application filed by the defendant on 21.05.2012 which is available at Anneuxre-5 of this revision petition, is to be considered to be one under

Order VII Rule 11 of the Code of Civil Procedure praying for rejection of plaint, in that event the draft issues mentioned therein have to be read in

a manner to mean that the suit of the plaintiff is not maintainable under Sections 17, 18 & 20 of the RDB Act. This is because, from a perusal of

the impugned order it appears that at the time of hearing of the application, learned counsel for the petitioner in the suit did not rely on the 5 draft

issues mentioned in the application but made submissions on the maintainability of the suit by referring to Sections 17, 18 & 20 of the RDB Act.

These sections, therefore, are quoted below in seriatum:

(17) Jurisdiction, powers and authority of Tribunals-(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and

authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial

institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any

order made, or deemed to have been made, by a Tribunal under this Act.

(17A) Power of Chairperson of Appellate Tribunal-(1) The Chairperson of an Appellate Tribunal shall exercise general power of superintendence

and control over the Tribunals under his jurisdiction including the power of appraising the work and recording the annual confidential reports of

Presiding Officers.

(2) The Chairperson of an Appellate Tribunal having jurisdiction over the Tribunals may, on the application of any of the parties or on his own

motion after notice to the parties and after hearing them, transfer any case from one Tribunal for disposal to any other Tribunal.]

(18) Bar of Jurisdiction-On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers

or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 & 227 of the Constitution) in relation to the

matters specified in Section 17.

[Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of

commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-

operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this Section shall, after such commencement, apply to such

proceedings.]

(20) Appeal to the Appellate Tribunal-(1) Save as provided in such-section (2), any person aggrieved by an order made, or deemed to have been

made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made, or

deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was

sufficient cause for not filing it with in that period.

(4) On receipt of an appeal under sub-section (1), The Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being

heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.

(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall

be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

8. Section 17 deals with jurisdiction, powers and authority of Tribunals constituted under RDB Act, 1993 and so it has nothing to do with the case

in hand. Section 18 of course deals with ouster of Civil Court's jurisdiction. It shows that on and from the appointed day, no Court or other

authority except Supreme Court or a High Court shall have jurisdiction to exercise any power in regard to authority in relation to the matters

specified in Section 17. This means that Civil Court also will have no jurisdiction or power to adjudicate a matter over which Tribunal constitute

under the RDB Act of jurisdiction. Section 20, on the other hand, provides that any person who is aggrieved by an order passed by Tribunal

constituted under the Act shall be entitled to prefer an appeal.

9. It is the case of Mr. Das, learned counsel for the petitioner that if the opposite party/plaintiff is in any way aggrieved at the order passed in O.A.

No. 25 of 2001 by the DRT, he would have preferred an appeal under Section 20 of the RDB Act, 1993. The suit, therefore, is not maintainable

for two reasons. First, because the subject matter falls within the jurisdiction of the DRT under Section 17 of the RDB Act, 1993 and secondly,

because an appeal lies against the order passed by the DRT under Section 20 of the RDB Act before National Tribunal.

10. Now let us see as to whether judgments relied on by the learned counsel for the petitioner along with the submissions made as aforesaid in the

preceding paragraphs entitle the revision petitioner, to an order under Order VII Rule 11 of the Code of Civil Procedure for setting aside the

impugned order dated 02.07.2014 passed by the learned Civil judge, Kamrup. Allahabad Bank Vs. Canara Bank and Another, is the judgment

delivered by the Hon'ble two judges of the Supreme Court, wherein Allahabad Bank had obtained a decree from DRT at Delhi against the debts.

Canara Bank also claimed money against same debtors and when Allahabad Bank filed O.A. on 109 of 1995 before DRT Delhi under Section 19

of the RDB Act, a simple money decree was passed on 13.01.1998 with interest @ 18%. Recovery case was filed by the Allahabad Bank before

Recovery Officer and debtor company filed appeal their against being appeal No. 270 of 1998 before the appellate tribunal. In the meantime,

Canara Bank filed O.A. No. 784 of 1996 against the same debtor company before DRT Delhi. The O.A. filed by Canara Bank was pending

before DRT Delhi. While recovery appeal was continuing before the appellate tribunal against the decree obtained by Allahabad Bank, at this

stage Canara Bank filed interlocutory application before the Recovery Officer for being impleaded as party seeking pro-rata distribution of the sale

proceeds from auction of the debtor company's properties which was strictly rejected by the Allahabad Bank. The application was dismissed

holding it to be pre-mature. Thereafter, property of Debtor Company was sold on 08.01.1999 & 16.02.1999 by the Recovery Officer. Another

property was sold on 15.01.1999 but the Recovery Officer declined to confirm the same and issued order for fresh action against which Allahabad

Bank filed writ petition under Article 226 & 227. Thereafter, Canara Bank also filed applications in DRT under Section 22 of the RDB Act

seeking stay of recovery proceedings initiated by the Allahabad Bank. They were heard on 25.02.1999 and thereafter adjourned. In the meantime,

Canara Bank informed the Recovery Officer that it had filed company petition under Sections 442/ 537 of the Companies Act for stay of the

recovery case initiated by Allahabad Bank. The Company judge passed order on 09.03.1999 staying further sale of assets of the company in

recovery case and restrained disbursement of the money already released in other sales. This order dated 09.03.1999 was brought under

challenge before the Hon"ble Supreme Court, wherein one of the questions arose as to whether the provisions of RDB Act and over ride the

provision of Sections 442, 537 & 446 of the Companies Act. The Hon"ble Supreme Court having considered the nature and character of the

RDB Act held, inter alia, the money released under the RDB Act has to be dealt only by the tribunal and not by the company Court and thus, the

RDB Act was given precedence over the Companies Act although both the Acts are Special Acts operating in two different fields. The facts of this

case and law laid down, prima facie, does not appear to have laid down any precedent governing the present case in question where as point

arising for determination in the present case is whether the plaint is to be rejected under Order VII Rule 11 of the Code of Civil Procedure

because of the provisions of Section 18 & 20 of the RDB Act. This judgment, therefore, is of no help in the present case.

11. The next case relied on by Mr. Das is the judgment of the Bench of the Hon"ble Supreme court consisting of two Hon"ble judges in the case

of United Bank of India, Calcutta vs. Abhijit Tea Company Private Ltd. & Others reported in (2002) 7 SCC 357. In that case plaintiff was United

Bank of India, Calcutta which claimed about Rs. 31.18 Crores from the respondent Abhijit Tea Company and initially a compromise decree was

passed by a Single Bench of the Hon"ble Calcutta High Court in its original side on 29.03.1994 and as the Bank challenged the same before the

Division Bench of the High Court, the initial judgment passed on 29.03.1994 was set aside on 11.08.1998 with cost of Rs. 75,000/-. The suit of

the appellant Bank, therefore, stood restored before the Single Judge again and in the meantime RDB Act, 1993 came into force. The Debtors

Company at this stage filed an application with prayer that suit to be retained in the original side of the Calcutta High Court and not be transferred

to the tribunal under the Act as the same was not pending on 27.04.1994 but only the appeal was pending before the Division Bench. The Act

came into force on 27.04.1994 in West Bengal and so it was contended that the suit was not ""immediately pending"" on the original side of the High

Court before 27.04.1994 as required under Section 31 of the Act and so Section 31 was not applicable. The learned Single Judge allowed the

prayer on 03.09.1999 and suit of the appellant Bank was directed to be tried by the original side of the High Court of Calcutta. This order was

challenged by the Bank before the Hon"ble Supreme Court leading to delivery of the judgment under reference. The point for determination before

the Hon"ble Supreme Court in this case was whether Title Suit No. 410 of 1985 instituted at the original side of the Calcutta High Court was

covered by the clause ""immediately pending"" on the original side of the High Court before 27.04.1994 within the meaning of Section 31 of the Act

and consequently, whether the suit was liable to be transferred to the Tribunal under the RDB Act. Considering the provision of Section 18 of the

RDB Act, the Hon"ble Supreme Court held that the order passed by the Hon"ble Single Judge directing the trial of the Title Suit in the original side

of the High Court Calcutta was not maintainable and that it was the Tribunal to which the suit should be transferred for adjudication. Thus, in this

judgment, the simple money suit filed by United Bank of India was found to be covered by Section 17 of the RDB Act and consequently, the

Hon"ble Supreme Court held that because of operation of Section 18 of the Act, the matter needed to be transferred to DRT Kolkata. The point

for determination and the spectrum of facts involved in this reported case, therefore, does not have any resemblance or identity with the case in

hand. Here is a suit based on the allegations of fraud and not a simple money suit warranting trial before the Tribunal. This case, therefore, does not

appear to be of any help for adjudication of the case in hand.

12. The last judgment relied on by Mr. Das is the case of Punjab National Bank Vs. O.C. Krishnan and Others, . The judgments given by a Bench

consisting of two Hon"ble Judges were confronted with a question regarding sale of mortgage property. A suit was filed by Punjab National Bank

for recovery of money from the Principal debtor as well as guarantors on being transferred to DRT Calcutta. The suit was decreed on 17.05.1996

against the Principal debtor as well the guarantors along with interest with direction to the Recovery Officer to proceed to realise the amount by

sale of hypothecated plant and machinery and mortgaged property belonging to respondent No. 5 & 4. Consequently, certificate was issued and

recovery proceeding started at this stage. The guarantor who is stated to have mortgaged his property, approached the Calcutta High Court under

Article 227 of the Constitution of India and the High Court allowed the petition by observing that mortgaged property was constituted in Chennai

and so, DRT at Calcutta had no jurisdiction in respect of the same. The Punjab National Bank challenged the order of the High Court to the

Hon"ble Supreme Court referring to Section 20 of the RDB Act. The Hon"ble Supreme Court held that in view of the appeal provision, the

application under Article 227 of the Constitution should not have been entertained by the High Court. Consequently, the order of the High court

was set aside. The facts involved in this case are conspicuously divergent from the nature by the one under consideration of this court. Here is a

case involving allegation of fraud by the plaintiff. We are required to see as to whether on the basis of the pleadings of such nature, a plaint is

required to be rejected at the threshold without allowing a full fledged trial.

13. There is no denying the fact that vexatious and useless litigations take considerable part of judicial time and in the process the bonafide litigants

suffer. Keeping in view, this aspect of the matter the law makers thought of a device to shoot down undesired litigations by rejecting the plaint at

the threshold. Order VII Rule 11 of the Code of Civil Procedure is the instrument by which Court has been empowered to shed off the avoidable

litigations. Initially there were only four clauses under Order VII Rule 11 of the Code of Civil Procedure. By Section 17 of the CPC Amendment

Act, 1999, the fifth Clause under (e) & by CPC Amendment Act of 2002 the sixth clause, namely, Clause (f) was added to this provision.

14. The original provisions warranting rejection of plaint were prescribed under Clauses (a), (b), (c) and (d) of Rule 11 of Order VII Rule 11(a)

provides that where plaint does not disclose a cause of action, the plaint shall be rejected. In so doing court is required to peruse the plaint in

entirety and to find whether on a liberal view of the matter, the material facts disclosed in a plaint constitute any cause of action. It is not necessary

to look into the averments made in the written statement or any other materials other than plaint. In the case of Bhau Ram Vs. Janak Singh and

Others, , the Hon"ble Supreme Court held that only averments made in the plaint can be looked into while deciding application for rejection of

plaint. (also see, Abdulla Bin Ali and Others Vs. Galappa and Others, . The power to reject plaint under this clause can be exercised only if the

Court arrives at objective satisfaction that even if all averments made in plaint are proved, the plaintiff would not be entitled to any relief. In such

case, even before issuance of summons court can reject a plaint. But at the same time, mere formal reading of the plaint would not be sufficient.

Reading must be meaningful. (See, T. Arivandandam Vs. T.V. Satyapal and Another,). Plea taken by the defendant in the written statement is not

at all relevant for the purpose of deciding as to whether plaint is to be rejected or not. Court cannot presume that any averment made in the plaint

is not likely to be established in course of trial or that the stand taken by the plaintiff in its plaint is not factually correct. At the same time in the case

of I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others, , the Hon"ble Supreme Court has cautioned that Court has to ascertain as

to whether plaint created an illusion of cause of action by clever drafting.

15. It is thus settled law that in case of exercise of power under Order VII Rule 11 of the Code of Civil Procedure only averments made in the

plaint can be taken into consideration and nothing from written statement or other material which is extraneous to the plaint can be considered at

this stage. If upon appraisal of the statement made in the plaint it falls within the mischief of any bar under any law or that it does not disclose any

cause of action, in that event recourse can be taken under Provision of Order VII Rule 11 of the Code of Civil Procedure. So, there is no doubt

that apart from the materials in the plaint, Court cannot rely on any other materials for the purpose of deciding an application under Order VII Rule

11 of the Code of Civil Procedure. Once it is found that accepting the pleadings of the plaint at face value a cause of action has been made out and

that there is no illusion of cause of action by clever drafting, a plaint cannot be thrown out under VII Rule 11 of the Code of Civil Procedure at

such initial stage.

16. Keeping in view, the law relating to exercise of power under Order VII Rule 11 of the Code of Civil Procedure, it is to be seen as to whether

the plaint in question is liable to be rejected. In view of bar under Section 18 of the RDB Act, 1993, or due to existence of appellate remedy under

Section 20 of the RDB Act, the question as to maintainability of civil suit visa-a-visa proceeding before Debt Recovery Tribunal came for

consideration before the Hon"ble Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . In

paragraph 50 of the said judgment the Hon"ble Supreme Court held that jurisdiction of Civil Court is ousted because of Section 34 of the

SARFAESI Act, 2002 but in the following paragraph Hon"ble Supreme Court held in the same breadth that the position would be different if there

is prima facie materials as to allegation by fraud against the plaintiff.

17. Paragraphs 50 & 51 of the judgment in Mardia Chemicals (Supra) are quoted below:

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. Narasimhachariars case (supra) a judgment of the learned Single Judge where it is observed as follows in.

22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are two fold 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 (249). 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) (p. 143).

18. It is established fact that fraud vitiates all. If existence of fraudulent act can over ride the bar imposed under Section 34 of the SARFAESI Act,

2002, there is no reason as to why the same cannot be applicable to bar under Section 18 of the RDB Act as well. Recapitulating the facts

mentioned in the preceding paragraphs of this judgment that Charu Prabha Bruah purchased the land from Guno Ram Mikir on 04.06.1967, the

defendant No. 1 does not dispute that original owner of Schedule-B land was Guno Rann Mikir. It is not in dispute that suit land described in

Schedule-A is included in Schedule-B to the plaint which was owned by Guno Ram Mikir and sold to Charu Prabha Baruah on 04.06.1967. This

Charu Prabha Baruah came into possession of the land, paid land revenue continuously, got her name muted in the records of rights and being in

physical possession thereof sold the same to the plaintiff by registered deed dated 21.07.2005 and handed over possession to her. The plaintiff

thus prima facie appears to have acquired valid title to the land in question but the defendant No. 1 purported to have purchased the same on

16.07.1983 from son of Guno Ram Mikir. If Guno Ram Mikir had exhausted his title for sale on 04.06.1967 in favour of Charu Prabha Baruah

then defendant No. 1 did not acquire any title to the land by purported purchase on 16.07.1983. If the plaintiff is to be believed, the defendant No.

1 was never in the vicinity of the suit land and it is the plaintiff's vendor who continued in possession since her purchase on 04.09.1967 till her sale

in favour of the plaintiff on 21.07.2005. It is on this set of facts, the plaintiff has alleged fraud against the defendants No. 1, 3, 4, 5, 6 & 7. The

defendants No. 4 to 7 availed financial assistance from the defendant No. 2 Bank and this financial assistance was purportedly secured by the

defendant No. 1 as a guarantor by allegedly creating mortgage of Schedule-B property. On the pleadings made by the plaintiff, a prima facie case

of fraud has been made out by plaintiff against such purported mortgage by defendant No. 1 in favour of defendant No. 2. This being the position

applying the law laid down in paragraph 51 of Mardia Chemical (Supra) the suit filed by the plaintiff in the present case cannot be said to be

barred under Section 18 of the RDB Act.

19. Section 9 of the Code of Civil Procedure is general and wide. It is an enforcement of the maxim Ubi jus ibi remedium. A litigant thus having a

grievance of civil nature has a right to institute a civil suit in a competent Civil Court unless its cognizance is either expressly or impliedly barred. It is

established law that even in the case of express or implied ouster of jurisdiction of Civil Court, a suit may lie if it is made out by appropriate

pleadings that the fundamental principle of judicial procedure has been violated and/or that the provisions of Act which bars jurisdiction of the Civil

Court have not been strictly followed. The aforesaid view expressed by the Privy Council in the case of AIR 1940 105 (Privy Council) has been

subsequently adopted by the Hon"ble Supreme Court in various judgments. A Full Bench Judgment of this court in Daulat Ram Lakhani vs. State

of Assam & others reported in (1989)1 GLR 131 contains all the previous references in this regard. Apart from violation of the principles of

natural justice and/or violation of the provision of the Act, there is yet another exigency when a Civil Court alone can have the jurisdiction to decide

a lis. This is the allegation of fraud.

20. Chief Justice Edward Coke of England observed about three centuries ago ""Fraud avoids all judicial acts, ecclesiastical or temporal."" In the

case S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , Hon"ble Supreme Court took note of this view and

held ""A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is deception in order

to gain by another's loss. It is a cheating intended to get an advantage."" What have been pleaded in the plaint in question are material facts of such

a deliberate act of deception in concert among all defendants. These allegations ultimately may succeed or may not succeed. But on the face of the

allegations, a prima facie case has been made out to claim that fraud has been perpetrated on the plaintiffs. At this stage neither trial court nor this

court exercising revisional jurisdiction can venture to decide correctness or otherwise of the statements. That shall be task of the Civil Court during

trial. For limited purpose of decision within scope of order VII Rule 11(d) of the Code of Civil Procedure, the pleaded facts are sufficient to make

out case of prima facie fraud.

21. Now, the next question arises as to whether such disputed facts on fraud can be decided by Debt Recovery Tribunal (for short, "DRT"). Can

a DRT pass decree holding that there is fraud even if best of the evidence is adduced in support of the specific pleadings of fraud under order VI

rule 4 of the Code of Civil Procedure? Can it pass anything more than issuing a recovery certificate? All these questions came up for

considerations before the Hon"ble Supreme Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking

Corporation, and it is held that DRT is a tribunal constituted for a specific purpose and no independent issue can be initiated before it by a debtor.

It cannot pass a decree. It can only pass recovery certificates. In the present case there shall be oral and documentary evidence by both sides to

prove and disprove respective allegations on fraud going much beyond the books of accounts and banking notes and this would warrant

interrogatories as well as examinations and cross examinations of witnesses. Considering the nature, scope, power and jurisdiction of the DRT as

revealed in the discussions of the case of Nahar Industrial Enterprises Ltd. (supra), it does not appear that allegations of the nature mentioned in

the plaint under question, can be decided by a DRT. It can be done by the Civil Court only.

22. Now, coming to the fact of this case, there is no question of preferring an appeal by the plaintiff against the judgment and decree passed by the

DRT in this case because the plaintiff was not made a party to the proceeding by the defendant No. 2, Central Bank. The facts stated in the plaint

nowhere were brought on record in the proceeding before the DRT Act, Guwahati. The plaintiff has an independent case of fraud for which she

has made her own pleadings and obviously, it could not have been decided by DRT and so, the question of deciding the same by the appellate

tribunal also does not arise. On anxious consideration given to the totality of the facts and circumstances referred to above and upon perusal of the

order impugned in this revision petition, it appears that the learned trial court has not committed any jurisdictional error warranting interference.

23. Be that as it may, by revisional or supervisory jurisdiction, this application, therefore, is devoid of any merit. It is accordingly dismissed. No

order as to cost.