

(2008) 02 MP CK 0036
Madhya Pradesh High Court
Case No: None

Swati Organics Ltd. and Others

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision: Feb. 6, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 2, 35A, 96
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13, 17, 18, 34, 35

Citation: (2008) 3 BC 80

Hon'ble Judges: S.R. Waghmare, J; A.M. Sapre, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

A.M. Sapre, J.

This is a First Appeal filed by plaintiff u/s 96 of C.P. Code against the judgment and decree dated 14.1.2005 passed by XII Additional District Judge, Indore in C.S. No. IA/05 whereby the plaintiffs suit has been dismissed as being not maintainable by rejecting the plaint under Order 7 Rule 11 of C.P. Code. So the question that arise for consideration in this appeal filed by plaintiff is: whether learned trial Judge was justified in allowing the application (I.A. 3) made by defendant Nos. 1/2 under Order 7 Rule 11 of C.P. Code and in consequence was right in rejecting the plaint?

2. Facts in brief are these.

3. Plaintiff is a limited Company registered as such under the Companies Act and is engaged in the business of manufacturing dye intermediates and pesticides.

4. The plaintiff obtained a loan facility from the defendant-Bank (State Bank of India) for their business purpose and mortgaged their immovable properties as detailed below by way of collateral securities for repayment of the loan taken. These

properties are:

(a) 403, Silver Sanchora Castle Building, Near Petrol Pump, RNT Marg, Indore.

(b) 405, Silver Sanchora Castle Building, Near Petrol Pump, RNT Marg, Indore.

(c) 1st Floor, Rajat Chambers 1166/2, Katkatpura, Juni Indore, Indore

(d) 2/3, Race Course Road, Pancham Ki Phel, Dr. R.S. Bhandari Marg, Indore.

5. It is not in dispute that plaintiff failed to repay the loan amount and hence Bank has filed a dispute i.e. O.A. No. 65/04 against the plaintiff before D.R.T., Jabalpur for recovery of Rs. 12,43,42,735/- which is pending. It is with this undisputed factual background, on 30.9.4, the plaintiff filed a suit out of which this appeal arises against the defendants/respondents i.e. Bank for injunction restraining the defendant Nos. 1/2 i.e. Bank and its officials from advertising the sale of property set out above and from committing breach of oral contract alleged to be entered by parties in relation to sale of aforesaid properties and for injunction against the defendant-Bank from causing any injury to plaintiff. A declaration was also sought that-plaintiffs were appointed and have acted as agents of defendant Nos. 1 and 2 i.e. Bank and their officials in selling the properties set out above.

6. It was alleged in para 5 of the plaint that defendants i.e. Bank approached to plaintiff for sale of all mortgaged properties mortgaged by plaintiff with the Bank for realisation of their huge outstanding dues and accordingly the plaintiff accepted the oral request made by defendant (Bank) and then acting upon such oral contract proceeded to sell the properties by giving advertisement in paper. It was alleged that contrary to this, now the defendants are resiling from the oral contract and not permitting the plaintiff to sell the properties. It is due to this action of the Bank, a suit to claim injunction, against the defendants restraining them from committing breach of such contract is filed. The suit though was valued at Rs. 42,50,000/- the same was filed by plaintiff on a Court fees stamp of Rs. 600/-.

7. The defendants on being served of the suit filed an application dated 28.10.1984 (IA-3) under Order 7 Rule 11(d) of C.P. Code. It was at the outset pointed out that defendants have already filed a suit being O.A. No. 65/04 against the plaintiff before Debts Recovery Tribunal, Jabalpur for recovery of Rs. 12,43,42,735/- and the said suit (O.A. No. 65/04) is pending. It was contended that the suit filed by the plaintiff is on the face of it not maintainable by virtue of bar contained in Sections 17, 18 and 34 of "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" (for short called "the Act").

8. It was, thus, contended that apart from various other fatal infirmities, which are apparent on the face of the plaint, which renders the plaint as being totally a misconceived one, it is liable to be rejected at its threshold by taking recourse to the provisions of Order 7 Rule 11(d) of C.P. Code read with Sections 17, 18 and 34 of "the Act" without calling upon the defendants to file written statement on the merits of

the case. The plaintiff contested this application by filing reply. By impugned order, the learned trial Judge allowed the application made by defendants (IA-3) and in consequence rejected the plaint by invoking the provisions of Order 7 Rule 11 of C.P. Code. It was held that the suit is hit by Sections 17, 18 and 34 of "the Act" and is, therefore, not maintainable. It was held as barred by Section 34 *ibid*. It is against this rejection of plaint and in consequence dismissal of suit, the plaintiff has filed this first appeal u/s 96 of the Code of C.P.C. because rejection of plaint is deemed to be a decree u/s 2(2) *ibid*.

Heard Mr. R.T. Thanewala, Advocate for appellant and Mr. V.P. Khare, Advocate for respondent.

9. Learned Counsel for appellant (plaintiff) while challenging the impugned rejection of plaint, contended that it is illegal and without jurisdiction. According to learned Counsel, the suit as filed by plaintiff is not hit by any provision of "the Act" and hence it should have been allowed to be tried on merits. It was contended that it is a suit based upon a contract which is outside the preview of "the Act" and hence a party to a contract i.e. plaintiff has a right to seek injunction against the defendant-Bank (who is also a party to the contract pleaded in the plaint) not to commit the breach of such contract. Learned Counsel contended that such suit is very much maintainable on the facts pleaded. Learned Counsel, placing reliance on the decisions reported in I (1997) CLT 169 (SC) : [M.P. Electricity Board, Jabalpur Vs. M/s. Vijaya Timber Co.,](#) and [Ramesh Chand Ardawatiya Vs. Anil Panjwani,](#) , contended that the ouster of Civil Court's jurisdiction has to be strictly construed and hence keeping in view this well-settled principle in mind and applying the same to the provisions of "the Act", the trial Court should have held the suit to be maintainable for being tried on merits.

10. In reply, learned Counsel for the respondents (defendants) Bank while supporting the impugned dismissal contended that the same does not call for any interference. Learned Counsel placed reliance on the well known authority of Supreme Court rendered in the case of what is called "Mardia Chemicals case" reported in 110 (2004) DLT 665 (SC) : [Mardia Chemicals Ltd. Vs. Union of India \(UOI\) and Others Etc. Etc.,](#) wherein Their Lordships upheld the constitutional validity of "the Act" under consideration and contended that the filing of such suit by the plaintiff-borrower is an abuse of power. It is not at all maintainable by virtue of remedies and bar contained in Sections 17, 18 and 34 of the Act. Learned Counsel pointed out that a suit under the D.R. Act for recovery of huge amount of Rs. 12,43,42,735 (being O.A. No. 65/04) is pending and it is only to avoid the decree and forestall its execution, a misconceived suit on so-called oral contract on a stamp fee of Rs. 600 is filed. Learned Counsel contended that plaint was, thus, rightly rejected and hence this Court should also dismiss the appeal and uphold the dismissal.

11. Having heard the learned Counsel for the parties and having perused the record of the case, we are constrained to dismiss the appeal with exemplary cost.

12. Sections 17(1), 18(1), 34 and 35 of "the Act" are relevant for the disposal of this appeal. They read as under:

(1) Section 17(1). Right to appeal.--(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 authorized 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 Sub-section (1) of Section 17.

(2) Section 18. Appeal to Appellate Tribunal--(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under Section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

(3) Section 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

(4) Section 35. The provisions of this Act to override other laws--The provisions of this Act shall have effect, notwithstanding anything inconsistent herewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

13. Coming to Section 34 first, it provides for express exclusion of Civil Court's jurisdiction in entertaining any suit and takes away the jurisdiction of Civil Court in granting injunction in respect of any matter which a Debts Recovery Tribunal or its Appellate Authority is empowered by or under this Act to decide. Section 35 then gives overriding effect to the provisions of the Act on all the laws for the time being in force. Similarly Section 17 provides a remedy to any person including to borrower to make an application to Debts Recovery Tribunal if he is aggrieved of any action taken by the Bank in relation to measures provided in Section 13(4) *ibid*. Section 18

is an appellate provision which enables an aggrieved to file an appeal to Appellate Authority against the order of Debts Recovery Tribunal passed under the Act.

14. In our considered opinion, the suit filed by the plaintiff is directly hit by Section 34 of "the Act" and hence was rightly held as not maintainable being expressly barred by virtue of Section 34 *ibid*. Indeed, it is so apparent on perusal of plaint averments that no two arguments are needed to record this finding against the plaintiff. The fact that the relationship between the plaintiff and defendant is that of Creditor and Borrower, that it relates to a transaction between the Bank and Borrower, that it is governed by the provisions of "the Act", that it is already subject-matter of suit filed by the Bank (defendant) against the plaintiff (O.A. No. 65/04) for realization of their dues (Rs. 12,43,42,735/-) before Debt Recovery Tribunal, that the plaintiff satisfies the definition of borrower as defined u/s 2(f) and defendant as Bank as defined u/s 2(c) *ibid*, that the transaction in question satisfies the definition of debt as defined u/s 2(a) *ibid* that the property in question satisfies the definition of financial assets and property as defined u/s 2(I) and 2(F) respectively are enough to attract the provisions of "the Act" including obviously the bar contained in Section 34 *ibid*. Indeed, there can be no dispute on what we have taken note of these facts for holding that each and every provisions of "the Act" is attracted in the facts of this case pleaded by the plaintiff in the plaint and for which no documents are required to be looked into.

15. We have, therefore, no hesitation in rejecting the submission of learned Counsel for the appellant when he contended that the suit is based on oral contract between the parties for sale of mortgaged properties and hence such suit for grant of injunction is maintainable. To say the least, the submission has no merit whatsoever. In the first place, howsoever artistically the plaint may have been drafted the Courts are entitled to see its substance. Indeed this being the settled position in law, the same has full application to the undisputed facts of this case. Secondly and as held *supra*, when the whole transaction which is made subject-a matter of suit attracts in principle the provisions of "the Act" and when the entire subject-matter is actually seized of at the instance of Bank before the D.R.T. in their suit under the Act for realisation of huge dues then it necessarily follows that provisions of Section 34 *ibid* are attracted, so far as suit under consideration is concerned.

16. Thirdly, in the absence of any factual/documentary details, such as when then the so-called oral contract was entered into between the plaintiff and Bank--with whom it was entered into--on what date it was entered into, what were the terms and conditions of the contract who agreed on behalf of Bank for such contract--a filing of such suit with no such material averments is nothing but abuse, of exercise of legal remedies by the plaintiff. Fourthly, no document is either pleaded or relied on or/and filed by the plaintiff to show existence of any concluded c contract between the plaintiff and Bank (defendant) in relation to sale of mortgaged

properties. Fifthly, in the absence of any case what to say prima facie case either pleaded or/and made out by the plaintiff in the plaint so as to take out the same from the clutches of Section 34 *ibid*, the submission deserves to be simply rejected. It is, accordingly, rejected.

17. In our view, careful perusal of decision rendered by Supreme Court in *Mardia Chemical* case would show that the object of "the Act" is to enable the Bank to go for speedy recovery of their dues from the Borrower by taking recourse to the provisions of special Act i.e. "the Act". It is for this purpose, special Tribunals are constituted so that recoveries can be made faster as compared to civil suits, which take years to recover the decretal amount. It is for this reason, the exclusive powers are conferred on special Tribunal by excluding jurisdiction of Civil Court. In this case, it is clear to us that all efforts of plaintiff-borrower was to involve the Civil Court in fruitless litigation so that recovery and sale of mortgage properties gets delayed.

18. In our opinion, the decisions cited and relied on by the learned Counsel for the appellant as taken note of *supra* are well known authorities or the subject under consideration. Indeed there can be no quarrel with the legal proposition laid down in all these cases dealing with the exclusion of Civil Court's jurisdiction. We have gone through the ratio of these authorities. In our view, we cannot hold by placing reliance on these authorities that suit as filed by plaintiff in this case is maintainable and is not hit by Section 34 *ibid*. In our humble view, every case has to be decided on facts pleaded in the plaint. In this case, we have, in detail, pointed out as to how the undisputed facts of this case have resulted in attracting the provisions of The Act" and in consequence attract the bar contained in Section 34 *ibid*. In the light of this discussion, we do not consider it necessary to deal with the ratio of each case cited at the Bar.

19. Before parting with the case, we express our deep concern as to the manner in which a suit which involves more than 10 crores (Rs. 12,43,42,733/-) dues came to be filed by a borrower on a stamp paper of Rs. 600A. It was obviously to forestall the prosecution of suit filed by the Bank against the plaintiff before D.R.T. for recovery, which we are told is still pending. We do not, nor we can make any comment upon the merits of the claim filed by the defendants against the plaintiff because it is for the D.R.T. to decide the suit on merits in accordance with law. However, since, we are satisfied that filing of suit and its further prosecution in this appeal after its dismissal was an attempt on the part of plaintiff to abuse the exercise of legal remedies available in law, and hence we are constrained to impose a compensatory cost of Rs. 5,000/- on the plaintiff (appellant herein) u/s 35A of C.P.C. payable to respondent-Bank. Indeed, in our view, this is a fit case where the provisions of Section 35A are attracted against the plaintiff. It is for the reason that the suit and then this appeal is a false and vexatious suit filed by plaintiff, which has no cause of action much less subsisting cause of action against the Bank for seeking any injunction. Secondly, when the amount of loan involves more than 10 crores and till

date no steps are taken or could be taken for its recovery, it is a clear case where delay in its prosecution has benefited the plaintiff who is apparently the interest in saving their mortgaged property from sale and at the same time avoid making of outstanding dues.

20. What is more a matter of concern is that plaintiff went to the extent of suppressing the most material fact that a suit is filed by the Bank (defendant) against the plaintiff in relation to this very transaction in D.R.T., Jabalpur for realisation of dues and the same is pending against them. When the plaintiff comes to the Court for seeking equitable and discretionary relief of injunction then they must come to the Court with clean hands and disclose all material facts, which are within their knowledge. This principle, in our view, was not followed by the plaintiff in this case. It is for all these reasons we consider this case to be a fit one for imposing compensatory cost of Rs. 5,000/- on the plaintiff for being paid to respondent-Bank. If this amount of Rs. 5,000/- is not deposited by the appellant within one month from the date of this judgment, then respondent-Bank would execute this decree for its realization from the plaintiff.

`1. In view of foregoing discussion, the appeal fails and is dismissed with cost.