Sudha Khemka Vs Central Bank of India

Court: Calcutta High Court

Date of Decision: Sept. 5, 2012

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 7 Rule 11
Companies Act, 1956 â€" Section 446(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) â€" Section 13, 13(1), 13(2), 13(4), 13(4)

Citation: (2013) 1 CHN 117

Hon'ble Judges: I.P. Mukerji, J

Bench: Single Bench

Advocate: P. Chatterjee, R. Mitra, M. Das, R. Sarkar, H.K. Mitra and S. Ghosh, for the Appellant; A. Singh, U. Doshi and R. Sikdar, for the Respondent

Judgement

I.P. Mukerji, J.
This new motion was heard over three days. As all the relevant papers are on record, I think it fit, not to invite any

affidavits and dispose of this application on the existing papers, by this order. The plaintiffs are guarantors. The borrower was the fourth defendant,

which is now in liquidation. The lender was the first defendant bank.

2. Ms. Sikdar for the Official Liquidator submitted that this suit was incompetent as no leave u/s 446[1] of the Companies Act, 1956 was taken

before institution of the suit. The reply of Mr. Reetobrata Mitra, learned advocate for the plaintiffs, to this, in my opinion is correct. The fourth

defendant is a proforma defendant and no reliefs are claimed against them in this suit. Therefore, no leave is required. This is a prima facie finding.

3. Now, the first defendant bank, acting u/s 5 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest

Act, 2002 [SARFAESI], assigned the ""loans"" of the fourth defendant to the second defendant. This assignment was made on 30th March, 2011.

4. There is no dispute with this proposition that once this kind of an assignment is made the assignee steps into the shoes of the lender.

5. Now, this assignment included the immovable properties of the plaintiffs described at page 96 of the petition. The properties are a residential flat

at Ballygunge Park, Kolkata, and two office spaces at 37, Shakespeare Sarani, Kolkata-17.

6. Having stepped into the shoes of the financial institution, the second defendant started exercising powers under the above Act. They issued a

section 13[2] notice on 1st June, 2012. This notice was replied to by the plaintiffs on 27th July, 2012, to which the second defendant once again

responded on 17th August, 2012.

7. The case of the plaintiffs is this. As guarantors, they had not only provided the above immovable properties as security but had also deposited

various valuable shares with the first defendant bank, as security. If those shares were sold, the proceeds thereof would be sufficient to satisfy the

debt of the company now in liquidation. Therefore, the bank ought to have used their discretion in selling the shares first. If there was any short fall

after such sale, then only should the rights in the above immovable properties been assigned by them to the second defendant.

8. The argument of Mr. Pratap Chatterjee, learned senior advocate for the plaintiffs was that the Debts Recovery Tribunal which hears complaints

against measures taken u/s 13[4] of the SARFAESI Act, u/s 17 thereof, had no jurisdiction to determine this dispute between the parties.

9. He referred me to a case decided by the Supreme Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking

Corporation, , where the Supreme Court discussed about the jurisdiction of the Debts Recovery Tribunal. He argued that the Debts Recovery

Tribunal could not entertain any original claim by a borrower or guarantor. They could only plead a set off or file a counter claim. Therefore, only

this Court had the jurisdiction to go into the question in dispute.

10. He further submitted that since the amount demanded from the guarantors was less than 20% of the total dues of the debtor company, now in

liquidation, powers under the SARFAESI Act could not be exercised. Thus, in deciding this question, the Debts Recovery Tribunal had not and

this Court had the exclusive jurisdiction.

11. He also cited the case of Transcore Vs. Union of India (UOI) and Another, to emphasize that the SARFAESI Act involved a non-

adjudicatory process and this kind of an adjudication was beyond the scope of this Act.

12. He also referred to some Reserve Bank of India guidelines. He urged that according to the Reserve Bank of India guidelines which the second

defendant was bound to follow, according to the case of Citicorp. Maruti Finance Ltd. Vs. S. Vijayalaxmi, the entire security had to be assigned.

13. On the other hand, Mr. Hirak Kumar Mitra, learned Senior Advocate for the second defendant took me extensively through the SARFAESI

Act and cited the case United Bank of India Vs. Satyawati Tondon and Others, to enable me to appreciate the purpose and ambit of this Act.

14. He submitted at the very beginning that since unrealized debts of financial institutions had accumulated to an enormous extent the SARFAESI

Act was enacted by Parliament for speedy realization of unrealized loans. He showed me section 13(1) of the Act which permitted financial

institutions and consequently their assignees to realize debts without the intervention of the Court. He also cited me section 34 of the SARFAESI

Act. He submitted that the Civil Court had no jurisdiction to entertain matters over which the Debts Recovery Tribunal had exclusive jurisdiction

u/s 17 of the Act. Hence the suit was not maintainable and should be dismissed.

15. He relied on section 17 of the Act which provides that any person aggrieved by any action u/s 13(4) of the Act could make an application

before the Debts Recovery Tribunal and this Tribunal alone has the competence to decide the issues.

16. As submitted by Mr. Mitra, immediately, the second defendant proposed to take symbolic possession of the above properties. The process

for their sale would be initiated subsequently.

17. Now my prima facie findings:

Section 13(2) of the SARFAESI Act provides for a notice to be given by the financial institution to the borrower or guarantor before initiating any

action. Sub-section (3A) enacts that on receipt of this notice the borrower would have a right of making a representation against it, which the

financial institution is required to consider. This notice was issued by the second defendant on 1st June 2012 and replied to by the plaintiffs on 27th

July 2012, which was in turn responded to by the second defendant on 17th August 2012, as stated earlier. The proviso to sub-section (3A)

provides that any decision in this regard taken by the financial institution cannot be challenged before the Debts Recovery Tribunal u/s 17 or the

learned District Judge u/s 17A.

18. The scheme of the Act is that after rejection of the representation of the borrower or guarantor the financial institution would be empowered to

take measures mentioned in sub-section (4) of section 13 of the said Act.

19. On a first reading of section 17 of the Act it appears that only after the measures are taken by the financial institution, the borrower would have

a right to appeal, to be made in the form of an application before the Debts Recovery Tribunal. Sub-section (4) of section 17, however, says that if

the Debts Recovery Tribunal declares a particular challenged measure to be in accordance with law, then the financial institution could proceed

with the measure.

20. The wording of this sub-section and surrounding sub-sections are no doubt ambiguous. If the financial institution has already taken the

measure, there is no scope of adjudication of the challenge by the tribunal and taking ""recourse"" to it after such adjudication. Therefore, the

question which necessarily arises is whether the Debts Recovery Tribunal has any power to adjudge the validity of a contemplated measure.

21. The Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., which has been cited by Mr.

Chatterjee as well as Mr. Mitra, resolves this ambiguity. The Supreme Court says in paragraph 50:

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.

22. If the jurisdiction of the Civil Court to entertain the legality of a contemplated action is barred, an aggrieved borrower or guarantor cannot be

without remedy. The remedy is in section 17(4). A proposed measure may be challenged under this section. But this challenge does not extend to

the area covered by the proviso to section 17(3A).

23. Now the measures provided in sub-section (4) of section 13 are as follows:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured

asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the

secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the

borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the

management of such business of the borrower which is relatable to the security for the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the

secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money

is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

24. In the case at hand the disputed question is whether the bank had the right to make an assignment of the ""loans"" of the company, now in

liquidation, which included the above immovable properties, before trying to sell the shares deposited with the bank as security? Furthermore,

whether the SARFAESI Act could be invoked if it could be established by the plaintiffs that the sum claimed from there is less than 20% of the

total debt? As submitted on behalf of the plaintiffs, if the shares were liquidated the entire debt of the borrower would be satisfied. Therefore if the

bank was required to sell the shares first it could not have assigned the above immovable properties, without knowing that the sum realised was

insufficient to satisfy the debt. Now if the debt was satisfied there was no necessity of assignment of the immovable properties. Hence, no

requirement of any measure being taken u/s 13(4) of the Act.

25. If the claimed sum is less than 20% of the total debt, then also the Act could not be invoked and no measure could be taken.

26. Considering the dicta of the above Supreme Court cases, particularly of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc.

Etc., , this decision whether a measure can at all be taken is to be decided by the Debts Recovery Tribunal, in my opinion. This is so because when

the Debts Recovery Tribunal is empowered to consider the question whether the measure can be taken or not, all incidental questions like the ones

discussed above are within the province of the Debts Recovery Tribunal, in my opinion.

27. However, in my considered judgment, the suit has to remain in the file of this Court for two reasons. An application for taking the plaint off the

file under Order 7 Rule 11 of the CPC has not been taken out by any party. Secondly, this order cannot be the end of the suit because the findings

are prima facie. Therefore, I dispose of this application by passing the following orders, supersending the earlier interim order:

(a) At present the second defendant will be at liberty to take symbolic possession of the above immovable properties, but will not take any further

steps for six weeks.

(b) The plaintiffs will have the liberty to approach the Debts Recovery Tribunal and obtain appropriate orders on the basis of the observations

made above. Needless to mention, the Debts Recovery Tribunal will take any factual findings as prima facie, as they are made in an interlocutory

application in a suit.

(c) If the plaintiffs are unable to obtain any substantive orders from the tribunal after expiration of the period of six weeks the second defendant will

have liberty to proceed in accordance with law.

All parties are to act on a signed photocopy of this order on the usual undertakings.