$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 7th December, 2021
Pronounced on: 4th January, 2022

\+ CS(OS) 262/2019 & I.A. 7168/2019

TAJUNISSA & ANR. ..... Plaintiffs
Through Mr. Anupam Lal Das, Sr. Advocate with Mr. Abhey Narula, Adv; Mr. Sanjiv Kakra, Sr. Adv. (Amicus Curiae)

Versus

MR. VISHAL SHARMA & ORS. .....Defendants
Through Mr. Ravi Gupta, Sr. Advocate with Mr. Mahip Datta, Ms. Sanya Lamba, Mr. Sachin Jain and Mr. Himansh Yadav, Advs.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

J U D G M E N T

% 04.01.2022

The Background

1. Mr. Ravi Gupta, learned Senior Counsel for Defendant 3, the Kotak Mahindra Bank ("the Bank", hereinafter) vehemently opposed the issuance of summons in this suit and submitted that, even without any pleadings being invited by the Court or being placed on record by his client, he desired to advance submissions, orally, as would persuade this Court to dismiss the suit *in limine* in exercise of the jurisdiction vested in it by Order VII Rule 11 of the Code of Civil Procedure, 1908 ("the CPC").

2. No application under Order VII Rule 11 has been moved by the defendant. No pleadings by the defendant are on record. As Mr. Gupta has chosen to argue *sans* any pleadings, the submissions in the plaint have, for the purposes of this application, to be treated as admitted, at least for the present and for the purpose of consideration of the objections raised by Mr. Gupta. The Court, therefore, proceeds on demurrer.

3. On the principles of law, on which he seeks to base his oral prayer for dismissal of the suit without issuance of summons, Mr. Gupta has placed on record written submissions, along with copies of judgments on which he seeks to place reliance. Mr. Anupam Lal Das, learned Senior Counsel for the plaintiffs, has done likewise.

4. Learned Senior Counsel have been heard at exhaustive length.

5. Mr. Das had initially objected to grant of an audience to Mr. Gupta at this stage, contending that summons had, of necessity, to be issued in any suit validly instituted and that the right of the defendant to an audience would enure only by way of response to the summons. Any objection to the maintainability of the suit, Mr. Das had sought to submit, would have, at that stage, to be raised by the defendant by moving an appropriate application under Order VII Rule 11 of the CPC. Mr. Das had sought to contend that the defendant could not seek to stymie the very issuance of summons, to which every suit, validly instituted, was entitled. He had placed reliance, in this context, on the decision of a Division Bench of this Court in ***Bright Enterprises Pvt***

Ltd v. MJ Bizcraft LLP[1].

6. I had, *vide* my order dated 23rd July, 2021[2], rejected the submission of Mr. Das, relying on ***Bright Enterprises***[1] itself which, in paras 18 and 19, allowed the suit to be disposed of, without issuance of summons, where a successful challenge to the maintainability of the suit was raised under Order VII Rule 10 or under Order VII Rule 11 of the CPC. Success of a challenge laid under the former provision would result in return of the suit, to be instituted before a proper forum, whereas success of a challenge laid under the latter would result in rejection of the suit outright. ***Bright Enterprises***[1], I observed, allowed the suit to be brought to an end *in limine* without issuance of summons in these two select instances; in all other cases, as Mr. Das contended, issuance of summons was a matter of right. As the court to decline to issue summons on the suit, were a case under Order VII Rule 10 or Order VII Rule 11 to be successfully made out, the defendant could not be denied an opportunity of an audience in that regard. The objection of Mr. Das, to the Court entertaining Mr. Gupta at this stage, even before summons were issued in the suit was, therefore, rejected.

7. In choosing, however, to oppose issuance of summons in the suit even without placing pleadings on record, Mr. Gupta has allowed the averments in the suit to, for the purposes of consideration of his challenge, be regarded as correct on the principle of demurrer and has, thereby, taken a calculated risk. As the discussion hereinafter would reveal, this risk has not, in the present case, paid off.

---

[1] **2017 SCC OnLine Del 6394**
[2] **2021 SCC OnLine Del 3803**

8. Before appreciating the challenge laid by Mr. Gupta to the issuance of summons in the suit, a brief understanding of the case set up by the plaintiffs, in the suit, as pleaded, is necessary.

9. Case set up by the plaintiffs in the suit

9.1 Plaintiff 2 is the daughter of Plaintiff 1. The plaintiffs, between themselves, own the basement, ground floor, first floor, and third floor along with terrace rights of the suit property. Defendant 2 is a Company, of which Defendant 1 is the Director.

9.2 By a lease deed dated 24th July, 2015, Plaintiff 1 leased the basement of the suit property to Defendant 2, through Defendant 1. The plaintiffs alleges that, thereafter, Defendant 1 misled the plaintiffs into believing that he was financially secure and that the affairs of Defendant 2 were sound and, thereby, coaxed the plaintiffs into reposing trust in him. Misusing the trust thus reposed by the plaintiffs, the plaint alleges that Defendant 1 convinced the plaintiffs to part with possession of the title deeds of the suit property and to sign certain documents, the contents of which were not disclosed to the plaintiffs, and of which they remained unaware, though they were informed that the documents would be needed to secure a loan from the Bank (Defendant 3). Defendant 1, it is alleged, fraudulently used the documents signed by the plaintiffs, and the title deeds of the suit property handed over by the plaintiffs, to mortgage the suit property with the Bank (Defendant 3), on the basis of which loan was availed

by Defendant 2. Against the advancing of loan to Defendant 2, the plaintiffs (through the documents allegedly surreptitiously got signed from them by Defendant 1), Defendant 1 and certain other entities stood guarantors.

9.2 Defendant 2 subsequently went into liquidation. The loan advanced to Defendant 2 went into default, and the account of Defendant 2 became a Non-Performing Asset (NPA), resulting in the Bank proceeding against Defendant 2, the guarantors (including the plaintiffs) as well as the mortgaged suit property, by instituting proceedings under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) before the National Company Law Tribunal (NCLT). The NCLT initiated a Corporate Insolvency Resolution Process (CIRP) against Defendant 2.

9.3 Thereafter, the Bank proceeded against the plaintiffs and the defendants under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the SARFAESI Act"). The outstanding unpaid loan amount was ₹ 25,51,09,036.77. Statutory Demand Notice, under Section 13(2) of the SARFAESI Act was issued by the Bank to the plaintiffs and Defendant 1 on 13th August, 2019. On the plaintiffs and Defendant 1 failing to respond within the period stipulated under Section 13 of the SARFAESI Act[3], the Bank, on 24th and 27th November, 2020,

[3] "**13. Enforcement of security interest**. –

(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

proceeded to take possession of the mortgaged suit property, under Section 13(4).

9.4 Subsequently, on 27th November, 2020, the Bank also filed an Original Application before the learned Debt Recovery Tribunal (DRT) under Section 19 of the Recovery of Debts Due to Banks and

---

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4):

Provided that –

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:—

(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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower."

Financial Institutions Act, 1993 ("the 1993 Act").

10. According to the plaintiffs, Defendant 1 informed the plaintiffs of the documents, signed by the plaintiffs, and the title deeds of the suit property, handed over by the plaintiffs to Defendant 1, having been used by him to obtain a loan from the Bank by mortgaging the suit property, only in 2019. The plaintiffs, in the circumstances, filed a Police Complaint, and also addressed a letter to the Chief Manager of the Bank. Averments to this effect are contained in paras 26 and 27 of the plaint, which read thus:

> "26. In view of this act of blatant fraud played upon them by the Defendant No. 1, the Plaintiffs filed a Police Complaint which PS Safdarjung Enclave on 19.12.2018 vide DD No.39B. A copy of the Police Complaint is filed along with the present Suit.
>
> 27. In addition to the said Police Complaint, the Plaintiffs also wrote a detailed letter to the Chief Manager of Defendant No. 3 stating inter alia that they had been defrauded by the Defendant No. 1 *with the collusion of some Bank officials of Defendant No. 3*. A Copy of the Letter dated 23.1.2019 is filed along with the present Suit."
>
> (Emphasis supplied)

11. The "Subject" in the Police Complaint lodged by the plaintiffs on 19th December, 2018, reads "Complaint against Accused Persons, namely (1) Mr. Vinay Vishal Sharma, Director of M/s Affinity Beauty Salon Pvt Ltd, (2) M/s. Affinity Beauty Salon Pvt Ltd, a Company having registered office at C-25 Green Park Ext. New Delhi, 110016, *and other unknown accused persons in the employment of Kotak Mahindra Bank Ltd, Nehru Place Branch for committing the offences*

of conspiracy, cheating and breach of trust punishable under Sections 420/406/120B of the Indian Penal Code, 1860". Para 9 of the Police Complaint specifically alleges that Plaintiff 2 was made to sign papers, without disclosing their parentage, by Defendant 1 "along with a couple of representatives stating to be from the Bank". The concluding para 18 of the Complaint also alleges, specifically, that the plaintiffs had "been cheated out of their property by the Accused Persons *and the other unknown Bank Officials who are hand in glove with the Accused Persons*".

12. The attempts of the Bank to proceed against the suit property, it is claimed, fuelled the filing of the present plaint. Essentially predicated on the above allegations, the plaintiffs seek, in the suit, (i) declaration that the documents executed by the plaintiffs in favour of the Bank are null and void, (ii) cancellation of the mortgage of the suit property, (iii) a direction to the Bank to return the title deeds of the suit property and (iv) a restraint against the Bank from interfering with the plaintiffs' possession of the suit property.

Rival Contentions

13. Mr. Gupta's contention is that the suit is barred by Section 34 of the SARFAESI Act, which reads thus:

> "**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 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)."

Section 34, in the submission of Mr. Ravi Gupta, embodies a clear proscription against entertainment, and, consequently, issuance of summons, in a case such as this. He relies, for this purpose, on the judgment of the Supreme Court in ***Mardia Chemicals Ltd v. U.O.I.***[4] A suit would lie, in his submission, only where the plaintiffs allege fraud against the Bank. No such allegation – as Mr. Gupta would submit – is contained in the plaint and, accordingly, the suit is not maintainable. This submission has also been reduced into writing, in the following passage, contained in written submissions filed by the Bank under an index dated 3rd May, 2021:

> "That in case of Mardia Chemicals Ltd. vs. Union of India (AIR 2004 SC 2371) the Hon'ble Apex Court while holding the validity of SARFAESI Act held that the jurisdiction of the Civil court can be invoked only to a very limited extent *where 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. It is submitted that *in the present case the Plaintiffs have alleged the plea of fraud against the other Directors/Guarantors of Principal borrower being Defendant No. 2 and no allegations have been made against the Defendant No. 3 Bank, therefore, the exception which has been mentioned in the judgement passed by the Hon'ble Supreme Court does not apply in the present case* and the present suit is liable to be dismissed."
>
> (Emphasis supplied)

In a similar vein, it is contended, in the written submissions tendered by the Bank on 7th December, 2021, after orders were reserved, that "there is *no plea of fraud much less legal and valid plea of fraud against the Defendant No. 3 Bank*, as has been raised in the plaint".

14. Where the secured creditor has initiated proceedings under Section 13 of the SARFAESI Act, resort to the civil court, submits Mr. Gupta, stands completely foreclosed by virtue of Section 34 thereof, except where fraud is pleaded against the secured creditor. In the present case, Mr. Gupta submits that the plaintiffs have pleaded fraud only against Defendants 1 and 2 and not against the Defendant 3-Bank. The suit is, therefore, not maintainable.

Discussion and Findings

15. No detailed analysis is, in my opinion, necessary, as the submission of Mr. Gupta is obviously contrary to the record, as well as the pleadings in the plaint.

16. The position in law, as Mr Gupta correctly submits, stands settled by the decision in ***Mardia Chemicals***[4].

17. ***Mardia Chemicals***[4] involved a challenge, wholesale, to the SARFAESI Act, with particular emphasis on Section 13. It was sought to be contended, before the Supreme Court, that Section 13 of the SARFAESI Act allowed a secured creditor to proceed against the property of the borrower merely on the borrower defaulting in payment within the stipulated period, consequent on notice under Section 13(2) being issued by the secured creditor. The burden of the challengers' song was that the statute did not provide for any

[4] **(2004) 4 SCC 311**

dispassionate adjudicatory mechanism, which would factor in the concerns and interests of the borrower, and the legitimate defences that the borrower may have had against the claim of the creditor.

18. The Supreme Court negatived the challenge. For the purposes of the present dispute, it is not necessary to enter further into that aspect.

19. One of the issues which was discussed in the judgment, and with which alone we are concerned in the present case, was whether the borrower could seek recourse to a civil court, once Section 13 was invoked by the secured creditor. *Inter alia*, it was sought to be contended before the Supreme Court that, perhaps, recourse to the civil court was permissible *before* the secured creditor took possession of the properties of the borrowers/guarantors under Section 13(4), but not *after* action under Section 13(4) had been taken. The Supreme Court, however, negatived the contention, holding that, once Section 13 stood invoked by the secured creditor, recourse to the civil court stood statutorily barred, even before the matter proceeded to the Section 13(4) stage. Mr. Gupta places especial reliance on the observations of the Supreme Court in that regard, which are to be found in para 50 of the report:

> "**50.** It has also been submitted that an appeal is entertainable before the Debts 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 Debts 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

> the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that 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 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."

20. Mr. Gupta also places reliance on the succeeding para 51 of the report which, however, completely defeats his case. The paragraph reads thus:

> "**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 his 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, AIR 1955 Mad 135***, AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22 : (AIR p. 143)
>
> > "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 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 Ghose, Rashbehary : Law of Mortgages, Vol. II, 4th Edn., p. 784.)"
>
> (Emphasis supplied)

21. To the statutory proscription engrafted in Section 34 of the SARFAESI Act, therefore, the Supreme Court has, in the afore-extracted passage from ***Mardia Chemicals***[4], chiseled out an exception, in a case in which "for example, 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".

22. The words used by the Supreme Court indicate that the exception to availability of the ordinary civil remedy, by the borrower, where the secured creditor has proceeded to take action under Section 13 of the SARFAESI Act, is not couched in exhaustive terms. The Supreme Court starts by using the expression "for example". This, even by itself, indicates that the categories of cases envisaged in the succeeding part of the sentence merely *exemplify* those cases in which

recourse to the civil court is permissible, and are not *exhaustive* in that regard.

23. The first category of such cases, as envisaged by the Supreme Court, is "where the action of the secured creditor is *alleged to be* fraudulent". All that is required is, therefore, an *allegation*. Once there is, in the pleadings of the plaintiff before the civil court, an allegation that the act of the secured creditor is fraudulent, the proscription against recourse to the ordinary civil remedy, in Section 13, ceases to apply.

24. The expression "fraud", of which "fraudulent" is merely a derivative, is of wide amplitude, and one need search no farther, to appreciate its scope, than the following definition in Kerr on Fraud and Mistake, 78 Edition, cited with approval by the Supreme Court in ***Venture Global Engineering v. Satyam Computer Service Ltd***[5]:

> "Fraud in the contemplation of a civil court of justice, may be said to include properly all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another, or by which an undue or an unconscientious advantage is taken of another."

That the duty of a Bank, to its customers and clients, involves, fundamentally, an element of trust and confidence, "justly reposed" by the client in the Bank and its employees, is merely stating the obvious. Where, therefore, the plaintiffs allege that the Bank has, *in collusion with other defendants*, used documents, got fraudulently executed or

[5] **(2010) 8 SCC 660**

signed by the plaintiffs, to mortgage the plaintiffs' property with the Bank, fraud, quite plainly, is alleged. The particular use of the word "fraud", *mantra*-like, is hardly required, where the elements of fraud are pleaded, as in the present case.

25. The plaintiffs have specifically alleged collusion against the officials of the Bank. Collusion, as a tort, partakes fundamentally of the character of fraud. The Supreme Court, in ***State of Goa v. Colfax Laboratories Ltd***[6], defined "collusion" thus:

> " 'Collusion' means a secret agreement *for a fraudulent purpose or a secret or dishonest arrangement in fraud of the rights of another*. It is a deceitful arrangement between two or more persons for some evil purpose, *such as to defraud a third person of his rights*."
>
> (Emphasis supplied)

Collusion, if alleged, therefore, partakes, in its essence, of the character of fraud. Particularly in the case of a Bank, which enjoys a fiduciary relationship with the public, an expansive interpretation to the expression "fraud" has to be accorded. Whether the allegation is right or wrong, substantial or merely chimerical, or merely a puff in the air, is not relevant while examining the applicability of para 51 of the report in ***Mardia Chemicals***[4]. Once the allegation exists, it exists, for better or for worse. Once fraud, on the part of the secured creditor, is alleged, recourse to ordinary civil remedies cannot be denied to the plaintiffs.

26. Indeed, Mr. Ravi Gupta, quite fairly, did not seek to contend

[6] **(2004) 9 SCC 83**

otherwise. As the paragraph extracted from the defendant in the written submissions, in para 13 *supra* reveals, the submission of Mr. Ravi Gupta has proceeded, all throughout, on the premise that the plaintiffs have not alleged fraud on the part of the Defendant 3-Bank. This, as it is clear, is not the case.

27. Fraud and collusion, on the part of the Bank have been specifically pleaded by the plaintiffs, I am unable to concur with Mr. Ravi Gupta that the plaintiff is disentitled to issuance of summons in the suit. ***Mardia Chemicals***[4] holds otherwise.

28. The objection of Mr. Gupta is, therefore, rejected.

29. Orders in the suit and in the pending applications would be pronounced separately.

C.HARI SHANKAR, J

JANUARY 4, 2022