

Electrosteel Castings Ltd. Vs. UV Asset Reconstruction Company Ltd. &Ors.

Civil Appeal No. 6669 of 2021
2021-11-26 | M. R. Shah, J.
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Full judgment text

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[Civil Appeal No. 6669 of 2021]

M. R. Shah, J.

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 13.08.2021 passed by the High Court of Judicature at Madras in O.S.A. No.292 of 2019, by which the Division Bench of the High Court has dismissed the said appeal preferred by the original plaintiff rejecting the plaint/suit filed by the appellant herein - original plaintiff on the ground that the suit is barred by Section 34 of the SARFAESI Act, 2002, the original plaintiff has preferred the present appeal.

2. The facts leading to the present appeal in nutshell are as under:

2.1 That original defendant No.3 respondent No.3 herein (hereinafter referred to as original defendant No.3) availed the loan facility vide Rupee Loan Agreement dated 26.07.2011 from defendant No.2 respondent No.2 herein - SREI Infrastructure Finance Limited and availed the financial assistance to the extent of Rs.500 crores. The appellant herein - original plaintiff stood as guarantor. A mortgage was created by the appellant herein - original plaintiff in favour of defendant No.2 - respondent No.2 herein - financial creditor over its factory land at Evalur, Tamil Nadu along with plant and machinery, by way of deposit of title deeds in terms of the declaration to secure the repayment, discharge and redemption by original defendant No.3.

That original defendant No.3 - corporate debtor could not pay the loan amount, therefore the proceedings under the Insolvency Bankruptcy Code, 2016 (IBC) was initiated against the corporate debtor. An application under Section 7 of the IBC was filed by the State Bank of India against original defendant No.3 - corporate debtor. The default amount was INR 923,75,00,000/-. The resolution process was initiated and an interim resolution professional was appointed under the provisions of IBC.

A resolution plan came to be approved by the Committee of Creditors under Section 30(4) of the IBC. The learned Adjudicating Authority vide order dated 17.04.2018 approved the resolution plan. Under the approved resolution plan an amount of INR 241,71,84,839.18 was required to be paid and 67,23,710 equity shares of the corporate debtor were to be allotted. As per the case on behalf of the plaintiff - appellant herein on payment of aforesaid amount and transfer of aforesaid shares No Due Certificate was issued in favour of the corporate debtor - original defendant No.3 on 25.06.2018 and the corporate debtor came to be discharged.

It appears that thereafter an assignment agreement was executed between defendant No.2 - respondent No.2 herein and defendant No.1 - respondent No.1 herein on 30.06.2018, assigning all the rights, titles and interest in all the financial assistance provided by defendant No.2 - financial creditor respondent No.2 herein in terms of agreement dated 26.07.2011 in favour of assignee respondent No.1.

As assignee respondent No.1 herein pursuant to the assignment agreement dated 30.06.2018 had issued letter to all the interested parties, namely, assignor financial creditor, guarantor and corporate debtor informing that assignor - financial creditor respondent No.2 herein had absolutely assigned all the rights, title and interest in all the financial assistance granted by financial creditor respondent No.2 herein from time to time to corporate debtor in favour of assignee respondent No.1 herein vide assignment agreement dated 30.06.2018. The said letter was responded by the plaintiff - appellant herein stating the following:

(i) "Respondent No.2 had duly filed its claim before the Resolution Professional in accordance with the provisions of IBC.

(ii) This claim was crystallised and admitted at INR 577.90 Crores and also formed part of the approved Resolution Plan of Vedanta Limited.

(iii) Pursuant to the approved Resolution Plan, the entire debt of Respondent No.2 has been discharged by way of allotment of shares and payment in cash on 6.06.2018 and 21.06.2018 respectively.

(iv) It was also highlighted that in terms of section 3.2(xi) of the approved Resolution Plan, upon discharge of financial creditors (including Respondent No.2), the financial creditors were required to redeliver and cause to be delivered to Petitioner all documents encumbered with the financial creditors.

(v) Therefore, when no due was outstanding and in fact redelivery of encumbered assets was required, there was no basis under contract or law for assignment of loan/debts/securities.

(vi) It was emphasised that assignment agreement dated 30.06.2018 was null, void ab initio and without any basis."

2.2 That thereafter on the basis of the assignment agreement dated 30.06.2018, the assignee - original defendant No.1 - respondent No.1 herein initiated the proceedings against the plaintiff - appellant herein, who stood as guarantor, under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) by issuing a notice dated 27.12.2018, demanding the payment of INR 587,10,08,309 due under the rupee term loan agreement dated 26.07.2011.

Notice dated 27.12.2018 of the SARFAESI Act was responded by the plaintiff - appellant herein vide reply dated 20.02.2019 stating that pursuant to repayment of amount in terms of the approved resolution plan, all the claims of financial creditor respondent No.2 herein stand extinguished and consequently, no claim can be made by the assignee respondent No.1 herein for the same default and that no amount is due and payable to assignee respondent No.1. That thereafter a possession notice dated 19.06.2019 was issued under rule 8 (1) of the Security Interest (Enforcement) Rules, 2002 by the assignee to the plaintiff - appellant herein. Thus a possession notice was published in the newspaper on 22.06.2019.

2.3 That thereafter the plaintiff - appellant herein instituted a Civil Suit being C.S.(D) No.18962 of 2019 on 22.06.2019 before the High Court of Madras and prayed for the following reliefs:

"(i). To declare that the 1st Defendant acquired no rights against the Applicant herein under the Assignment Deed dated 30.06.2018, and consequently, declare that the 1st Defendant is not a secured creditor visavis, the Applicant herein; and (ii). Consequently, to declare Possession Notice dated 19.6.2019 issued by the 1st Defendant herein has null and void and render justice."

2.4 The suit was filed with an application seeking leave to file the suit with the aforesaid prayers. As observed hereinabove, the suit was filed on 22.06.2019. Immediately thereafter appellant herein - plaintiff also filed an application before the Debt Recovery Tribunal (DRT), Chennai under Section 17(1) of SARFAESI Act on 17.07.2019 against the possession notice dated 19.06.2019 praying that the assignee has acquired no rights under the assignment agreement dated 30.06.2018 and consequently, assignee respondent No.1 is not a secured creditor visavis the appellant - plaintiff and also to declare possession notice dated 19.06.2019 as null and void. The registry of DRT returned the application filed under Section 17(1) of SARFAESI Act by observing as under:

" Counsel for the Appellant has represented SA without complying with the defects read out, however with an endorsement that he is a proper and necessary party and that relief prayed for vide Para VII(i) is maintainable. He has reiterated that relief has to be sought in relation to the notice under challenge. May be returned."

2.5 The defendants appeared before the High Court in C.S.(D) No.18962 of 2019, affidavits and counter affidavits were filed by the parties to the suit. By order dated 30.09.2019, the learned Single Judge of the High Court dismissed application No.4322 of 2019 and C.S.(D) No.18962 of 2019 on the ground of jurisdiction observing that the suit is for land and property situated outside the jurisdiction of the court and therefore the suit is not maintainable. It was also observed and held that the civil court's jurisdiction is barred in view of Section 34 of the SARFAESI Act and only DRT had competence to decide the matter.

3. Feeling aggrieved and dissatisfied with the order passed by the learned Single Judge of the High Court dismissing the application as well as the suit vide order dated 30.09.2019, appellant herein - original plaintiff filed an appeal before the Division Bench of the High Court being O.S.A. No.292 of 2019. By the impugned judgment and order the Division Bench of the High Court has dismissed the said appeal in view of the bar under Section 34 of the SARFAESI Act.

4. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the Division Bench of the High Court confirming the judgment and order passed by the learned Single Judge rejecting the plaint/dismissing the suit as not maintainable in view of the bar under Section 34 of the SARFAESI Act, original plaintiff - appellant herein has preferred the present appeal.

5. Dr. A.M. Singhvi, learned Senior Advocate has appeared on behalf of the appellant and Shri Shyam Divan, learned Senior Advocate has appeared with Shri Huzefa Ahmadi, learned Senior Advocate, on behalf of the respondents - defendants.

5.1 Dr. Singhvi, learned Senior Advocate appearing on behalf of the plaintiff appellant herein has vehemently submitted that in the facts and circumstances of the case both, learned Single Judge as well as the Division Bench have materially erred in rejecting the plaint and dismissing the suit on the ground that the suit is barred in view of the bar under Section 34 of SARFAESI Act.

5.2 It is submitted that the High Court has not properly appreciated and considered the fact that in the suit plaintiff had pleaded the fraud and it was the case on behalf of the plaintiff - appellant herein that the assignment agreement dated 30.06.2018 is fraudulent and relief was sought to declare the assignment agreement dated 30.06.2018 as null and void by the plaintiff - appellant herein, the said relief cannot be granted by the DRT under the provisions of the SARFAESI Act and therefore the bar under Section 34 of the SARFAESI Act shall not be applicable.

5.3 It is submitted that when the suit is filed alleging 'fraud' the bar under Section 34 of the SARFAESI Act shall not be applicable and the suit for the reliefs sought in the plaint shall be maintainable.

5.4 It is submitted that even otherwise considering the fact that subsequently and before the assignment agreement, the proceedings under the IBC against the corporate debtor with respect to the loan agreement dated 26.07.2011 were initiated and the resolution plan was approved and entire amount due and payable under the approved resolution plan was paid to the successful resolution applicants and even 67,23,710 equity shares of the corporate debtor came to be transferred as per the approved resolution plan and the original loanee - corporate debtor was discharged and NOC was issued, therefore, assignment deed can be said to be 'fraudulent' after the resolution plan under IBC and the amount paid under the resolution plan and on transfer of the shares as per the approved resolution plan and the corporate debtor was discharged. Therefore, there shall not be any dues to be paid by the appellant herein as guarantor.

5.5 It is submitted that as such not only the assignment agreement dated 30.06.2018 is null and void and is 'fraudulent' even the assignee cannot be said to be a secured creditor so far as the appellant is concerned.

5.6 It is further submitted by Dr. Singhvi, learned Senior Advocate appearing on behalf of the appellant that there is no legally enforceable debt by the plaintiff - appellant herein for the reasons stated above and therefore the initiation of the proceedings under the SARFAESI Act are bad in law and not maintainable.

5.7 In the alternative, it is prayed by Dr. Singhvi, learned Senior Advocate appearing on behalf of the appellant that in case this Court is not inclined to entertain the present appeal, confirming the judgment and order passed by the High Court rejecting the plaint/dismissing the suit, in that case the original plaintiff - appellant may be given an opportunity to file the proceedings before the DRT under the SARFAESI Act and all the contentions including that assignment agreement is null and void; that assignee cannot be said to be the secured creditor under the assignment agreement dated 30.06.2018; and that there are no dues so far as the appellant - plaintiff is concerned may be kept open. He has stated that in that case the appellant shall file appropriate proceedings before the DRT within a period of two weeks from today.

6. Present appeal is vehemently opposed by Shri Shyam Divan, learned Senior Advocate and Shri Huzefa Ahmadi, learned Senior Advocate, appearing on behalf of the contesting defendants - original defendants - respondents herein.

6.1 It is vehemently submitted that the suit before the learned Single Judge filed by the appellant is rightly held to be not maintainable in view of the bar under Section 34 of the SARFAESI Act.

6.2 It is vehemently submitted that as such the suit is rightly held to be not maintainable. It is submitted that initiation of the proceedings by the appellant by filing of the suit for the reliefs sought in the plaint is nothing but abuse of process of law and court.

6.3 It is submitted that the allegations of 'fraud' are nothing but a clever drafting only with a view to bring the suit maintainable before the civil court despite the bar under Section 34 of the SARFAESI Act.

6.4 It is vehemently submitted by the learned senior counsel appearing on behalf of the respondents herein - original defendants that except using the word 'fraud'/'fraudulent', there are no other particulars pleaded in support of the allegations of fraud. It is submitted that pleading of 'fraud' is made at two places in the plaint namely para 31 and para 46.

At both these places, the assertion is that consequent to the alleged discharge of the debt of the corporate debtor through the proceedings under the IBC, no assignment of such debt in favour of assignee could have been made and, thus, for this reason, the initiation of proceedings under the SARFAESI Act, is fraudulent. It is submitted that on the aforesaid ground the assignment deed cannot be said to be 'fraudulent'.

6.5 It is further submitted that the word 'fraud'/'fraudulent' are used in the plaint only with a view to bring the suit maintainable before the civil court and to get out of the bar under Section 34 of the SARFAESI Act. It is submitted that after a month of filing of the suit, the appellant filed an application under Section 17(1) of SARFAESI ACT before the DRT, Chennai, assailing the possession notice issued by the assignee under section 13(4) of the SARFAESI Act, however, in the said application, no allegation of any kind of fraud was made against any of the respondents.

6.6 It is submitted that in any case a bare review of the assertions in paras 31 and 46, it can be seen that no material particulars have been pleaded so as to constitute a pleading of 'fraud' as required under Order VI Rule 4 of the Civil Procedure Code, 1908 (CPC). It is submitted that apart from use of adjectives such as 'fraudulent' etc., qua the assignment deed, no actual material particulars have been given with regard to the 'fraud'. It is submitted that the pleadings in para 31 and para 46 do not satisfy the test of 'fraud' under Section 17 of the Indian Contract Act, 1872.

6.7 It is vehemently submitted by the learned Senior Advocates appearing on behalf of the respondents herein that as per the settled preposition of law pleading without any material particulars would not tantamount to a pleading of 'fraud'. Reliance is placed on the decisions of this Court in the cases of Bishundeo Narain & Anr. vs. Seogeni Rai & Jagernath, (1951) SCR 548; Ladli Parshad Jaiswal vs. The Karnal Distillery Co. Ltd., Karnal & Ors., (1964) 1 SCR 270; Canara Bank vs. P. Selathal & Ors., (2020) 13 SCC 143; H.S. Goutham vs. Rama Murthy & Anr., (2021) 5 SCC 241; Ram Singh vs. Gram Panchayat Mehal Kalan & Ors., (1986) 4 SCC 364; and Union of India & Anr. vs. K.C. Sharma & Company & Ors., (2020) 15 SCC 209.

6.8 Making the above submissions and relying upon the decisions of this Court in aforesaid cases, it is prayed to dismiss the present appeal.

7. We have heard the learned senior counsel appearing on behalf of the respective parties at length.

7.1 It is the case on behalf of the plaintiff - appellant herein that in the plaint there are allegations of the 'fraud' with respect to the assignment agreement dated 30.06.2018 and it is the case on behalf of the plaintiff - appellant herein that assignment agreement is 'fraudulent' in as much as after the full payment as per the approved resolution plan under the IBC and the original corporate debtor is discharged, there shall not be any debt by the plaintiff - appellant herein as a guarantor and therefore Assignment deed is fraudulent. Therefore, it is the case on behalf of the plaintiff - appellant herein that the suit in which there are allegations of 'fraud' with respect to the assignment deed shall be maintainable and the bar under Section 34 of SARFAESI Act shall not be applicable.

7.2 However, it is required to be noted that except the words used 'fraud'/'fraudulent' there are no specific particulars pleaded with respect to the 'fraud'. It appears that by a clever drafting and using the words 'fraud'/'fraudulent' without any specific particulars with respect to the 'fraud', the plaintiff - appellant herein intends to get out of the bar under Section 34 of the SARFAESI Act and wants the suit to be maintainable. As per the settled preposition of law mere mentioning and using the word 'fraud'/'fraudulent' is not sufficient to satisfy the test of 'fraud'. As per the settled preposition of law such a pleading/using the word 'fraud'/'fraudulent' without any material particulars would not tantamount to pleading of 'fraud'. In case of Bishundeo Narain and Anr. (Supra) in para 28, it is observed and held as under:

".... Now if there is one rule which is better established than any other, it is that in cases of fraud, undue influence and coercion, the parties pleading it must set forth full particulars and the case can only be decided on the particulars as laid. There can be no departure from them in evidence. General allegations are insufficient even to amount to an averment of fraud of which any court ought to take notice however strong the language in which they are couched may be, and the same applies to undue influence and coercion. See Order 6, Rule 4, Civil Procedure Code."

7.3 Similar view has been expressed in the case of *Ladli Parshad Jaiswal (Supra)* and after considering the decision of the Privy Council in *Bharat Dharma Syndicate vs. Harish Chandra* (64 IA 146), it is held that a litigant who prefers allegation of fraud or other improper conduct must place on record precise and specific details of these charges. Even as per Order VI Rule 4 in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, particulars shall be stated in the pleading.

Similarly in the case of *K.C Sharma & Company (Supra)* it is held that 'fraud' has to be pleaded with necessary particulars. In the case of *Ram Singh and Ors. (Supra)*, it is observed and held by this Court that when the suit is barred by any law, the plaintiff cannot be allowed to circumvent that provision by means of clever drafting so as to avoid mention of those circumstances by which the suit is barred by law of limitation.

7.4 In the case of *T. Arivandandam vs. T.V. Satyapal & Anr. (1977) 4 SCC 467*, it is observed and held in para 5 as under:

" 5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful - not formal - reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits."

7.5 A similar view has been expressed by this court in the recent decision in the case of *P. Selathal & Ors. (Supra)*.

8. Having considered the pleadings and averments in the suit more particularly the use of word 'fraud' even considering the case on behalf of the plaintiff, we find that the allegations of 'fraud' are made without any particulars and only with a view to get out of the bar under Section 34 of the SARFAESI Act and by such a clever drafting the plaintiff intends to bring the suit maintainable despite the bar under Section 34 of the SARFAESI Act, which is not permissible at all and which cannot be approved.

Even otherwise it is required to be noted that it is the case on behalf of the plaintiff - appellant herein that in view of the approved resolution plan under IBC and thereafter the original corporate debtor being discharged there shall not be any debt so far as the plaintiff - appellant herein is concerned and therefore the assignment deed can be said to be 'fraudulent'. The aforesaid cannot be accepted. By that itself the assignment deed cannot be said to be 'fraudulent'.

In any case, whether there shall be legally enforceable debt so far as the plaintiff - appellant herein is concerned even after the approved resolution plan against the corporate debtor still there shall be the liability of the plaintiff and/or the assignee can be said to be secured creditor and/or whether any amount is due and payable by the plaintiff, are all questions which are required to be dealt with and considered by the DRT in the proceedings initiated under the SARFAESI Act.

It is required to be noted that as such in the present case the assignee has already initiated the proceedings under Section 13 which can be challenged by the plaintiff - appellant herein by way of application under Section 17 of the SARFAESI Act before the DRT on whatever the legally available defences which may be available to it. We are of the firm opinion that the suit filed by the plaintiff - appellant herein was absolutely not maintainable in view of the bar contained under Section 34 of the SARFAESI Act. Therefore, as such the courts below have not committed any error in rejecting the plaint/dismissing the suit in view of the bar under Section 34 of the SARFAESI Act.

9. In view of the above and for the reasons stated above, the present appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, it will be open for the appellant herein to initiate appropriate proceedings before the DRT under Section 17 of the SARFAESI Act against the initiation of the proceedings by the assignee - respondent No.1 herein under Section 13 of the SARFAESI Act inter alia on the ground:(1) that the assignee cannot be said to be secured creditor so far as the appellant is concerned; (2) that there is no amount due and payable by the plaintiff - appellant herein on the ground that in view of

the proceedings under IBC against the corporate debtor and the corporate debtor being discharged after the approved resolution plan, there shall not be any enforceable debt against the appellant.

If such an application is filed within a period of two weeks from today the same be considered in accordance with law and on merits after complying with all other requirements which may be required while filing the application under Section 17 of the SARFAESI Act. However, it is made clear that we have not expressed anything on merits in favour of either of the parties on the aforesaid two issues. Present appeal is accordingly dismissed, however, in the facts and circumstances of the case there shall be no order as to costs

Source disclosure: Complete sanitized public judgment text retained for research. Official-primary replacement and later-history closure remain pending.

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