

SUPREME COURT OF INDIA

Excel Dealcomm Pvt. Ltd.

Vs.

Asset Reconst. Company (India) Ltd.

C.A.No.3272 of 2015

(M.Y. Eqbal and Pinaki Chandra Ghose JJ.)

01.04.2015

JUDGMENT

PINAKI CHANDRA GHOSE, J.

Leave granted.

This appeal has been preferred against the judgment delivered by the Division Bench of the Calcutta High Court on March 8, 2013 in A.P.O. No.180 of 2012 whereby the High Court while holding that the Calcutta High Court does not have jurisdiction to try civil suit, assumed jurisdiction for non- suing the appellant and also held that the Agreement dated 13.2.2007 is not concluded and thus not enforceable, and dismissed Civil Suit No.299 of 2007 filed by the appellant. The facts of the case necessary to dispose of this appeal are briefly narrated below.

Uniworth Apparel Limited (hereinafter referred to as 'Uniworth'), being Respondent No.3 herein, was a company registered in Maharashtra under the Companies Act, 1956. It had an industrial unit in Thane District of Maharashtra. It availed credit facilities from ICICI Bank. Uniworth could not clear the Bank's dues, as a result the Bank assigned their claim in favour of Asset Reconstruction Company India Limited (hereinafter referred to as 'ARCIL'), being Respondent No.1 herein, a company incorporated under Companies Act, 1956 and registered with the Reserve Bank of India as a Company under Section 3 of the Securitization and Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act'). ARCIL took steps under Section 13 of the SARFAESI Act and took possession of the assets. Allegedly the ARCIL entered into a Private Treaty Agreement dated 13.02.2007 (hereinafter referred to

as 'the Agreement') with the appellant Excel Dealcomm Pvt. Ltd. (herein after referred to as 'Excel'), for sale of the said properties for a consideration of Rs.7.50 Crores. This was to be a sale under SARFAESI Act wherein the sale was to be conducted by execution of sale certificate by the ARCIL in favour of Excel. The Excel alleges that it had even issued a cheque of Rs. 9.5 Crores dated March 1, 2007 to the ARCIL. In reply thereto, Mr. Sanjoy Gupta, Vice President of the ARCIL (Respondent No. 2 herein) had vide letter dated 20-03-2007 informed Excel to collect its cheque since the deal could not be materialised as the management of ARCIL did not approve such a proposal. Thus, the sale could not get through and the present appellant brought out a suit for specific performance of the Agreement against ARCIL, being C.S. No.299 of 2007, in the High Court of Calcutta in December 2007. Initially, there were three Defendants in the said suit, namely, ARCIL, Mr. Sanjoy Gupta (Vice President of ARCIL) and Uniworth. However, later on it was found that ARCIL had sold the suit property to one Webtech Industries Pvt. Ltd. (hereinafter referred to as 'Webtech'), Respondent No.4 herein, on 10.02.2011. So Webtech was impleaded as Defendant No.4 in the said suit after the application for impleadment, being G.A. No.3574 of 2010 was allowed on 06-01-2011. It is to be noted that the suit property was the one mentioned in the Schedule of the Agreement and included both movable and immovable properties as mentioned below:

Mortgage on immovable properties of the Uniworth situate at Plot No. A606, TTC Industrial Area, MIDC, Shil Mahape Road, New Mumbai, Maharashtra. Hypothecation of the whole of movable assets of Uniworth situate at TTC Industrial Area, MIDC, Shil Mahape Road, New Mumbai, Maharashtra including the movable plant and machinery, machinery spare tools and accessories and other movables both present and future (save and except book debts).

ARCIL filed an application, being G.A. No.1225 of 2011, for revocation of leave granted under Clause 12 of Letters Patent by the High Court of Calcutta to the Excel and asking return of the plaint in C.S. No.299 of 2007 to be filed before the Court having jurisdiction to try the same. The said application was based on following grounds:

The suit was effectively a "suit for land" and the immovable property was situate in New Mumbai, Maharashtra. Therefore, as per clause 12 of Letters Patent the suit should be filed in a Court having territorial jurisdiction over the immovable property.

That the alleged Private Treaty Agreement between ARCIL and Excel was entered into pursuant to Section 13(4) of the SARFAESI Act and even the sale was to be conducted by execution of sale certificate as provided in Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules"). Therefore, the jurisdiction of civil court is excluded. That the Private Treaty Agreement provided that Mumbai Court would have exclusive jurisdiction.

The learned Single Judge of the Calcutta High Court under Original jurisdiction, vide his judgment and order dated 22.12.2011 dismissed the application for revocation of leave and refused to return the plaint for the following reasons:

The suit was not a suit for land as the Private Treaty Agreement required creation of security or charge of the assets mentioned in the schedule i.e. "mortgage of immovable properties" and "hypothecation of movable properties"; the nature of this security was not mentioned in the agreement and thus, any security could be created on the said mortgage or hypothecation. Therefore, the learned High Court came to the conclusion that the enforcement of terms of agreement would not lead to the decree in suit for land.

With respect to Forum Selection Clause, the High Court held that the ARCIL had waived its right to object to the lack of jurisdiction by participating in application for impleadment of Respondent No.4, wherein orders were passed on 06.01.2011. The learned High Court noted that ARCIL had made no objection to the jurisdiction while the impleadment application was argued.

On the question of the jurisdiction of Civil Court being ousted by the SARFAESI Act, the High Court found that the breach of present agreement would not fall under Section 17 of the SARFAESI Act wherein the Debt Recovery Tribunal is given the jurisdiction to rule only that whether the sale was a correct measure adopted and conducted properly. In the present case, even if it is assumed that ARCIL was the assignee of ICICI and a third party sued for specific performance against such assignee, the case would not fall under Section 17 of the SARFAESI Act.

Aggrieved by the judgment and order dated 22.12.2011 passed by the learned Single Judge of the Calcutta High Court, dismissing the application for revocation of leave granted under Clause 12 of Letters Patent, ARCIL filed an appeal before the Calcutta High Court, being A.P.O. No.180 of 2012. The High Court in this appeal, analysed the judgment of the learned Single Judge in the Original Jurisdiction of the High Court of Calcutta. The High Court came to following

conclusion while allowing the appeal: The Private Treaty Agreement was not to be considered a concluded contract as it was subject to the approval of the Board of Directors of the ARCIL. Since, the approval was not given and even the cheque supplied by Excel was made available for return, the said agreement was at best a term sheet. On the point of suit for land the High Court found the alleged sale of assets was to take place by issuing "sale certificate" in terms of Rule 5(6) of the Rules which pre-supposes the handing over of the possession. In view of above two conclusions, the High Court found it was not necessary to answer the question regarding forum selection clause.

On the basis of these conclusions, the Division Bench of the High Court reversed the order of the learned single Judge holding that the contract could not be specifically enforced as it was not a concluded one and also that it would be a suit for land if, at all, the suit is maintainable. Therefore, the Division Bench revoked the leave granted under Clause 12 of the Letters Patent.

In the above factual backdrop, following questions arise for our consideration:

Whether the suit for specific performance filed by Excel was a "suit for land"?

Whether the Private Treaty Agreement conferred an exclusive jurisdiction on the Court of Mumbai and if so, Whether or not ARCIL waived this clause by participating in impleadment application without protest? Whether the jurisdiction of civil Court is barred in the present case by virtue of Section 17 of SARFAESI Act?

Suit for land Clause 12 of the Letters Patent of the High Court of Calcutta reads: "12. And we do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property, such land or property shall be situated, or, in all other cases, if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part, within the local limits of the ordinary original jurisdiction of the said High Court, or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits; except that the said High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage, or value of the property sued for does not exceed one hundred rupees."

A plain reading of the provision suggests that ordinary original civil jurisdiction of the High Court of Calcutta will extend in following cases: In a suit for land or other immovable property-

where such land or property is wholly situated in the territorial jurisdiction of the High Court of Calcutta;

where such land or property is situated in part only within the said territorial jurisdiction of the Court, if the leave of the Court shall have been first obtained.

in suits other than suit for land if the cause of action has arisen wholly within the said limits; where the cause of action has arisen in part only within the said limits, if the leave of the Court shall have been first obtained;

If the defendant at the time of the commencement of the suit dwells or carries on business or personally works for gain within such limits.

In the present case, a suit was filed for the specific performance of the Agreement which contemplated the sale of property, as has been described in para 1 under Section 13 of SARFAESI Act in terms of the Rules. The question with respect to Clause 12 of Letters Patent in the present case is that whether the present suit is suit for land.

The suit for land is a suit in which the relief claimed relates to the title or delivery of possession of land or immovable property, [See: Adcon Electronics Pvt. Ltd. vs. Daulat and Anr., (2001) 7 SCC 698]. Further it is an established rule that to determine whether it is a suit for land, the Court will look into barely the Plaint and no other evidence, [Indian Mineral & Chemicals Co. and Others vs. Deutsche Bank, (2004) 12 SCC 376]. If by the averments in the plaint and prayers therein, it appears that the suit is one for land, it shall be so held and if it does not so appear, then the suit shall continue under leave granted under clause 12. In the present case, the prayer in the plaint was couched in following words:

"A decree for specific performance of the agreement for sale recorded in the document dated February 13, 2007 being Annexure "A" hereto by directing the Defendant no. 1 and 2 to issue in favour of the plaintiff Sale Certificate in respect of assets mentioned in Schedule 1 to Annexure A hereto and on as is where is basis in terms of the said agreement"

The learned counsel for the Respondent has very emphatically argued that this prayer is in effect a prayer for possession of the said properties since the procedure under the Rules for execution of the sale certificate, the transfer of possession is pre-requisite. Therefore, he has submitted that although, the possession is not asked for in direct words but that would be the obvious corollary to granting of the prayer. Further, another point which has been emphasized on behalf of respondent is that the prayer requires sale to be effected in terms of the Agreement, and therefore, the entire agreement may be read as a part of the prayer.

On the question of suit for specific performance of an agreement to sell being a suit for land, this Court has laid down a clear principle in *Adcon Electronics Pvt. Ltd. vs. Daulat Ram and Anr.*, (2001) 7 SCC 698, that a suit for specific performance simplicitor without a prayer for delivery of possession is not a suit for land as Section 22 of the Specific Relief Act, 1963 categorically bars any Court to grant such relief of possession in a suit for specific performance unless specifically sought. In view of this judgment, in the present case, the only question for our determination in the plaint is whether a prayer for delivery of possession is sought or not ? The prayer sought is issuance of sale certificate which is provided in Appendix V to the Rules under SARFAESI Act. The sale certificate reads as follows:

"Whereas the undersigned being the authorised officer of the (name of the institution) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of the powers conferred under Section 13 read with Rule 12 of the Security Interest Enforcement Rules, 2002 sold on behalf of the (name of the secured creditor/institution) in favour of the (purchaser), the immoveable property shown in the schedule below secured in favour of the (name of the secured creditor) by (the names of the borrowers) towards the financial facility (description) offered by (secured creditor). The undersigned acknowledge the receipt of the sale price in full and handed over the delivery and possession of the scheduled property. The sale of the scheduled property was made free from all encumbrances known to the secured creditor listed below on deposit of the money demanded by the undersigned."

It may be noted that the sale certificate sought under the prayer requires the delivery of possession of the suit property. Thus, we find that the prayer for delivery of possession was an implicit one in the present case. The prayer as sought

in the plaint could not have been granted without the delivery of possession of the suit property as the sale certificate itself contemplates the delivery of the immovable property. Thus, in view of this we find that the Adcon Electronics would not apply as there was a prayer for delivery of possession in the present case. Therefore, we hold that the present suit was indeed a suit for land.

Exclusive jurisdiction Now, we shall consider as to which court has the jurisdiction to entertain and try the suit. Clause 5 of the Agreement entered into between the parties reads as under:

"The payment/cheque shall be drawn and made payable in Mumbai. The jurisdiction shall be Courts of Mumbai."

Clause 9(e)(viii) of the Agreements further reads as follows:

"Disputes, if any, shall be subject to the jurisdiction of Mumbai Court/Tribunals only"

It is clear from these two clauses that the intention of the parties to the Agreement was to restrict limitation to the forums/courts of Mumbai only. This Court in *Swastik Gases P. Ltd. vs. Indian Oil Corporation Ltd.*, (2013) 9 SCC 32, has held as under:

"The very existence of a jurisdiction clause in an agreement makes the intention of the parties to an agreement quite clear and it is not advisable to read such a clause in the agreement like a statute. In the present case, only the Courts in Kolkata had jurisdiction to entertain the disputes between the parties."

Therefore, we are of the opinion that the Courts of Mumbai were granted exclusive jurisdiction as per the Agreement and we find no reason to create any exception to the intention of the parties.

In view of the above-mentioned two findings that the present suit is a suit for land, and that the parties had granted exclusive jurisdiction to the Court of Mumbai, the jurisdiction of the Court at Calcutta is clearly ousted as per law. Thus, from the above conclusion it appears that the plaint will have to be returned by the Calcutta High Court as it does not have the jurisdiction. Therefore, we are of the view that the question of jurisdiction of the Debt Recovery Tribunal need not be answered. Consequently, this appeal is dismissed. The parties may proceed to take any

appropriate measure in an appropriate forum as provided in law to enforce their rights.