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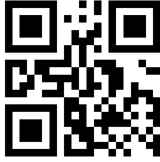

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP/84/2018

ICICI BANK LTD.
A BANKING COMPANY INCORPORATED UNDER THE COMPANIES ACT, 1956, AND A BANKING COMPANY WITHIN THE MEANING OF BANKING REGULATION ACT, 1949 HAVING ITS REGD OFFICE AT NEAR CHAKLI CIRCLE, OLD PADRA ROAD, VADODARA, GUJARAT, PIN- 390007 AND A BRANCH OFFICE AT OHIO COMPLEX, FANCY BAZAR, GUWAHATI- 781001 REP. BY ITS AUTHORISED REP AND ATTORNEY HOLDER MR. FARID AHMED LASKAR

VERSUS

SASWATI DAS @ SASWATI BORO AND ANR
W/O- LATE BASHAV DAS, R/O- H NO. 225, NIZARAPAR, CHANDMARI, GUWAHATI- 03, DIST- KAMRUP(M), ASSAM

2:RAMANI DAS
S/O- LATE BASHAV DAS
R/O- H NO. 225
NIZARAPAR
CHANDMARI
GUWAHATI- 781003
DIST- KAMRUP(M)
ASSAM

BEFORE

HON'BLE MR. JUSTICE DEVASHIS BARUAH

Advocate for the Petitioner : Mr. M Sharma, Advocate

Advocate for Respondents : Mr. T Deuri, Advocate

Date of hearing & Judgment : ***9th December, 2021***.

JUDGMENT & ORDER (ORAL)

Heard Mr. M Sharma, the learned counsel for the petitioner. And Mr. T Deuri, the learned counsel appearing on behalf of the respondent No.1

[2] This is an application under Section 115 of the Code of Civil Procedure challenging the impugned order dated 12.04.2018 passed in Misc. (J) Case No. 208/2018 as well as Misc. (J) Case No. 193/2018 both arising out of Title Suit No. 97/2018 pending before the court of the learned Civil Judge No. 2, Kamrup (Metro) at Guwahati.

[3] Before further proceeding with the instant matter, it would be relevant to point out that the Misc. J Case No. 193/2018 arising out of Title Suit No. 97/2018 is a proceeding under Order XXXIX Rule 1 & 2 filed by plaintiff/the respondent No. 1 in the suit seeking temporary injunction and the trial court vide order dated 12.04.2018 has directed both the parties to the suit to maintain status quo in respect of A schedule land described in the petition till the disposal of Title Suit No. 97/2018. The fate of the said challenge would be dependent upon the outcome of the challenge to the rejection of the application for rejection of the plaint.

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[4] Now coming to the next Misc. (J) Case No. 208/2018, it is relevant to take note that the said application was an application under Order VII Rule 11(d) for rejection of the plaint on the ground that from a perusal of the plaint, it appears that the suit is barred by the Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002 for short "the Act of 2002").

[5] To decide the legality and validity of the said order dated 12.08.2018, it would be relevant to take note of the certain basic facts which I do as herein under:

[6] The respondent No. 1 as plaintiff has instituted a suit being Title Suit No. 97/2018 against her son who is the defendant No. 1 and the petitioner herein who were arrayed as defendant Nos. 1 and 2 in the said suit. It is an admitted fact that the respondent No. 1 is the owner of a plot of land measuring 1 katha 7 lechas covered by Dag No. 1271 of KP Patta No. 92 of village Khargulli under Ulubari mouza in the district of Kamrup, Assam. The said plot of land has been more specifically described in Schedule A to the plaint. The defendant No. 1, who appears to be the younger son of the plaintiff approached the plaintiff to allow him to construct a RCC building over the Schedule A land and the plaintiff allowed the said defendant to construct the RCC building by obtaining necessary permissions from the competent authority and accordingly the defendant No. 1 had obtained NOC from the Guwahati Municipal Corporation for construction of the G+2 RCC building on 06.01.2003 in the name of the defendant No. 1. Pursuant thereto the defendant No. 1 constructed the G+2 RCC building over the Schedule A land. The plaintiff further alleged that on 22.02.2018 some unknown persons came to the residence of the plaintiff and identified

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themselves as officials of the defendant No. 3 and took symbolic possession over the Schedule A property. On enquiry, the plaintiff came to learn that a loan to the tune of Rs. 55 lakhs is shown to have been obtained by the plaintiff against the Schedule A property in the year 2013 by mortgaging the Schedule A property and due to non-payment/default in payment of the loan amount, the defendant Nos. 2 and 3 have proceeded for realisation of the debt under the Act of 2002. The plaintiff on coming to learn about the said aspect of the matter alleges that she along with her elder son went to the Branch office of the defendant No. 3 and met the Manager and could come to learn that the loan amount of Rs. 55 lakhs was sanctioned in the name of the defendant No. 1 and the plaintiff stood as the guarantor of the said loan mortgaging the Schedule A property as secured asset. The plaintiff thereafter made enquiry and could come to learn that some fraud has been committed by forging the signatures of the plaintiff in obtaining a loan shown to have been obtained by the defendant No. 1 with the help and support of some professional agent/bank officials of the defendant No. 3. In that view of that matter, on the allegation that a fraud has been committed by forging the signatures of the plaintiff in obtaining a loan by the defendant No.1 with the help of some professional agent/bank officials of the defendant No. 3, the plaintiff had filed the suit being Title Suit No. 97/2018 seeking the relief for a declaration that:-

(a) the loan and mortgage by and between the defendants in respect of the Schedule A property of the plaintiff is a fraudulent mortgage created by defendant to deceive and defraud the plaintiff and such mortgage is not by the plaintiff and the defendants have no right and authority to enter into and to take possession of the suit property of Schedule A.

(b) the symbolic possession notice dated 22.02.2018 issued by the defendant

Nos. 2 and 3 in respect of Schedule A property is a fraudulent which is illegal, in-operative and not binding upon the plaintiff in respect of Schedule A property.

(c) a decree for permanent injunction restraining the defendant Nos. 2 and 3 and their officers, agents etc from entering into the Schedule A property and from disturbing the plaintiff in peaceful possession over the said property.

[7] At this stage, it is also relevant to take note of that while describing the Schedule A property, the plaintiff has not only included the land where she claims to be the owner but also included the G+2 storied building which admittedly she claims to have been constructed by the defendant No. 1, who she alleges committed the fraud in obtaining the loan. Pursuant to the filing of the suit and the summons having been received, an application was filed under Order VII Rule 11(d) seeking rejection of the plaint on the ground that a perusal of the averment would disclose that the suit is barred by law under Section 34 of the Act of 2002. The said application was registered and numbered as Misc. (J) Case No. 208/2018

[8] The plaintiff filed written objection to the said application objecting to the maintainability as well as on facts. It was the specific case of the plaintiff in her written objection that having alleged fraud the bar under Section 34 of the Act of 2002 cannot be applied to the facts of the instant case. The trial court vide an order dated 12.04.2018 rejected the application filed by the petitioner herein on the ground that the plaintiff has been able to show a prima facie and independent case of fraud which cannot be adjudicated by the Debts Recovery Tribunal and only can be done by the Civil court.

[9] Feeling dissatisfied and aggrieved, the petitioner is before this Court

in exercise of the revisional jurisdiction under Section 15 of the Code of Civil Procedure. To the instant application, an affidavit-in-opposition has been filed by the plaintiff. To the said affidavit-in-opposition, the FIR bearing No. 218 dated 06.03.2018 which happens to be specifically mentioned in para 6 of the plaint and was a part of the plaint was filed. In the said FIR, it has been inter alia mentioned that the plaintiff never executed any agreement with the ICICI bank, neither had put any signature in any document or documents in respect of any loan with the ICICI Bank Limited. It has, however been admitted that a few years ago her son had taken a loan from the ICICI Bank Limited, Fancy Bazar Branch, Guwahati and in respect of which the plaintiff was neither a guarantor nor co-applicant. She further alleged that her son along with some persons of the ICICI Bank had fraudulently put her signature in some loan documents. The basis of this particular FIR happens to be the basis of the suit.

[10] It is no longer res integra that when a case involves fraud, the bar under the Act of 2002 does not apply. But, the question involved is in respect of the instant proceeding is as to whether the allegation of fraud so made is just an eye wash on account of clever drafting or can be termed to be an allegation of fraud within the meaning of Order VI Rule 4 of the CPC. In para 5 of the plaint, the plaintiff alleges that her signature was forged and the defendant No. 1 obtained a loan with the help and support of some professional agent/bank officials of the defendant No. 3. There is no specific detail as to when the plaintiff had gone to the Branch office of the Bank. There is no allegation as to in which document the signature of the plaintiff has been forged. What has been mentioned is that some professional agent/bank officials along with defendant No. 1 without any specific details. In para 6, the plaintiff mentions

about the FIR dated 06.03.2018. It has been admitted that the petitioner's son had taken loan from the ICICI Bank. In paragraph 7 which is the most pertinent paragraph for the purpose of adjudication as to whether the allegation of fraud is at all made out or not, it has been mentioned that the signatures appearing are forged. But, there is no mention whatsoever as to which are the documents where the signatures appearing have been forged.

[11] What has been done in paragraph 7 that the plaintiff has stated that she has not signed any documents. No specific details have been given. Merely statements have been made that the fraud has been committed on the basis of fraudulent acts of the defendants, the title of the plaintiff has been clouded. The clever drafting on the part of the plaintiff in trying to bring a illusionary cause of action can also be seen from the fact that in paragraph 3 of the plaint it has been mentioned that the construction of the house was made by the defendant No. 1 who had taken the loan from the defendant Nos. 2 and 3. But, the said building i.e., the G+2 property has been brought within the ambit of Schedule A property. This clearly goes to show that the plaintiff in concert and collision with the defendant No. 1 is trying to avert the process under the Act of 2002 by making mere allegation of fraud or documents being fraudulent.

[12] Mr. M Sharma, the learned counsel appearing on behalf of the petitioner placed before me two judgments of the Supreme Court rendered in the case of ***Canara Bank vs. P Selathal*** reported in ***(2020) 13 SCC 143*** as well as the recent judgment of the Supreme Court in the case of ***Electrosteel Castings Limited vs. UV Assets Reconstruction Company Limited***, reported in ***2021 SCC Online SC 1132*** wherein the Supreme Court had clearly observed that mere making allegation of a particular document to be fraud or

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fraudulent do not take away the jurisdiction under Section 34 of the Act of 2002. The allegation of fraud or fraudulent has to be in terms of Order VI Rule 4 whereby specific details and evidence has also to be stated.

[13] Mr. T Deuri, the learned counsel appearing on behalf of the respondent drew my attention to the judgment of this court in the case of ***Bhopal Thapa vs. Girijesh Tiwari***, reported in ***AIR 2015 Gauhati 10*** to submit that when a case of fraud is made out the jurisdiction under Section 34 of the Act of 2002 is ousted.

[14] From the above judgements, one thing is clear that when it is a case of fraud the jurisdiction of the Civil court is not ousted on the basis of Section 34 of the Act of 2002. But, as already stated herein above, the question depends upon whether it is a mere allegation of fraud or fraudulent to avoid the provisions of the Act of 2002. The Code of Civil Procedure, more particularly Order VI deals with pleadings. Order VI Rule 2 stipulates that the pleading shall contain material facts and not evidence. However, Order VI Rule 4 is an exception to the general Rule which stipulates that when it is a case of fraud, misrepresentation, breach of trust, wilful default or undue influence in which particulars may be necessary beyond such as are exemplified in the forms in Appendix A, particular (with dates and items if necessary) shall be stated in the pleadings.

[15] The Supreme Court in the case of ***Canara Bank (supra)*** at paragraph 9 to 12 dealt with the scope and ambit of the powers under Order VII Rule 11 more so in respect to the bar under Section 34 of the Act of 2002 and also as regards the allegations which are necessary to constitute fraud. The said

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paragraph being relevant are quoted herein below:-

"***9. While considering the aforesaid issue/question, few decisions of this Court on exercise of powers under Order 7 Rule 11(d) of the CPC are required to be referred to and considered.***

9.1 In the case of T. Arivandandam (supra), while considering the very same provision i.e. Order 7 Rule 11 of the CPC and the decree of the trial Court in considering such application, this Court in para 5 has observed and held 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 unrepentantly 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."***

9.2. In the case of Church of Christ Charitable Trust and Educational Charitable Society v. Ponniamman Educational Trust (2012) 8 SCC 706, this Court in paras 13 has observed and held as under:

> "***13. While scrutinizing the plaint averments, it is the bounden duty of the trial Court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the Defendant since in the absence of such an act no cause of action can possible accrue."***

9.3. In A.B.C. Laminart Pvt. Ltd. v. A.P. Agencies, Salem (supra), this Court explained the meaning of "cause of action" as follows:

> "***12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against***

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the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which is not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff."

9.4. In the case of Sopan Sukhdeo Sable (supra) in paras 11 and 12, this Court has observed as under:

"***11. In I.T.C. Ltd. v. Debts Recovery Appellate Tribunal [(1998) 2 SCC 70] it was held that the basic question to be decided while dealing with an application filed under Order 7 Rule 11 of the Code is whether a real cause of action has been set out in the plaint or something purely illusory has been stated with a view to get out of Order 7 Rule 11 of the Code.***

12. The trial Court must remember that if on a meaningful and not formal reading of the plaint it is manifestly vexatious and meritless in the sense of not disclosing a clear right to sue, it should exercise the power under Order 7 Rule 11 of the Code taking care to see that the ground mentioned therein is fulfilled. If clever drafting has created the illusion of a cause of action, it has to be nipped in the bud at the first hearing by examining the party searchingly under Order 10 of the Code. (See T. Arivandandam (supra)."

9.5 In the case of Madanuri Sri Rama Chandra Murthy (supra), this Court has observed and held as under:

"***7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the suit is barred***

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> ***by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."***

9.6. In the case of Ram Singh v. Gram Panchayat Mehal Kalan (1986) 4 SCC 364, this Court has observed and held 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.

10. Applying the law laid down by this Court in the aforesaid decisions on exercise of powers under Order 7 Rule 11 of the CPC to the facts of the case on hand and the averments in the plaints, we are of the opinion that both the courts below have materially erred in not rejecting the plaints in exercise of powers under Order 7 Rule 11 of the CPC. As observed hereinabove, the main prayer in the suits is challenging the decree passed by the DRT. The decree passed by the learned DRT and even the order passed by the Recovery Officer are appealable under Section 20 of the RDDBFI Act. In the case of O.C. Krishnan and others (supra), this Court has observed and held that in view of the alternate remedy of preferring the appeal before the DRAT, the petition under Article 227 challenging the order passed by the DRT shall not be maintainable, without exhaustion of such remedy. In the case of O.C. Krishnan and others (supra), decree passed by the DRT was challenged in a petition under Article 227 of the Constitution of India. The High Court allowed the petition. While allowing the appeal of the bank – Punjab National Bank, this Court has observed that without exhaustion of the remedies under the RDDBFI Act, the High Court ought not to have exercised its jurisdiction under Article 227. While holding so, in paragraph 6, this Court has observed and held as under:

> "***6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this fasttrack procedure cannot be allowed to be derailed***

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either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

11. Relying upon and following the decision of this Court in the case of O.C. Krishnan and others (supra), thereafter the Division Bench of the Madras High Court in the case of M/s Cambridge Solutions Limited (supra), has rejected the plaint in which the order passed by the DRT was challenged, in exercise of powers under Order 7 Rule 11 (d) of the CPC. It is required to be noted that in the said case also there were allegations of fraud in the plaint and considering the averments in the plaint, it was found that the allegations of fraud are illusory. It is observed by the Division Bench in the said decision that specific instances and acts of fraud with evidence have to be pleaded in the plaint. It is further observed that mere statements are not enough. It is further observed that it is not sufficient if just fraud is pleaded and there must be material to show that the fraud is committed.

12. Having considered the pleadings and the averments in the suits, more particularly the allegations of fraud, we find that the allegations of fraud are with respect to the partnership deed and there are no allegations at all with respect to mortgage created by the Guarantor – Shri Kallikutty and that too with respect to the deed of guarantee executed by the Guarantor. Much reliance is placed upon the judgment and order passed by the learned Magistrate holding the partners of the firm guilty. However, it is required to be noted that even in the said judgment passed by the learned Magistrate there is no reference to the deed of guarantee and/or the mortgage created by the Guarantor. Even the bank is not a party to the said proceedings. It is reported that against the judgment and order passed by the learned Magistrate, further appeal is pending. Be that as it may, considering the pleadings/averments in the suits and the allegations of fraud, we are of the opinion that the allegations of fraud are illusory and only with a view to get out of the judgment and decree passed by the DRT. We are of the opinion that therefore the suits are vexatious and are filed with a mala fide intention to get out of the judgment and decree passed by the DRT."

[16] In a recent judgment of the Supreme Court rendered in the case of ***Electrosteel (supra)*** which is also a case where an application under Order

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VII Rule 11 was filed in view of the bar under Section 34 of the Act of 2002, the Supreme Court at para Nos. 28 to 33 held that when allegations of fraud is being made there has to be specific pleadings to that effect with necessary particulars and when a suit which is barred by law, the plaintiff cannot be allowed to circumvent the provisions by means of clever drafting so as to avoid to mention of those circumstances by which the suit is barred by law. The said paragraphs being relevant is quoted herein below:

"***28. 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 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.***

29. 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 Bishnudeo Narain (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 depar- ture from them in evidence. General allegations are insuf- ficient 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."***

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30. Similar view has been expressed in the case of Ladli Parshad Jasiwal (supra) and after considering the decision of the Privy Council in Bharat Dharma Syndicate v. Harish Chandra ((1936-37) 64 IA 143), 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 nay 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 (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.

31. In the case of T. Arivadandam v. T.V. Satyapal (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 unrepentantly 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, be should exercise his power under Or. VII r. 1 1 C.P.C. 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 X C.P.C. An activist Judge is the answer to irresponsible law suits."***

32. A similar view has been expressed by this court in the recent decision in the case of P. Selathal (supra).

33. 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 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."

[17] In the instant case as already aforementioned, the allegations which have been made as regards the documents being fraud or fraudulent that the signatures are not the signatures of the plaintiff are vague allegation without any particulars or details. There is no mention in which documents the signatures appearing is not the signatures of the plaintiff. A vague allegation has been made that the loan documents, the signatures are forged. The clever drafting can also be seen from another aspect. It being an admitted fact that the defendant No. 1 had taken the loan who is the son of the plaintiff and after taking the loan from the petitioner Bank the construction was made by the defendant No. 1 in respect of the land belonging to the plaintiff which is the G+2 RCC building and to include the G+2 RCC building within the ambit of Schedule A property would show the clever drafting thereby to create an illusionary cause of action as regards the fraud. This aspect of the matter was not taken in consideration by the learned court below while passing the

impugned judgment and order dated 12.04.2018.

[18] Accordingly, from a perusal of the plaint the suit appears to be barred under the provisions of Section 34 of the Act of 2002 for which the plaint stands rejected.

[19] Taking into account that the plaint has been rejected and there being a remedy being available under Section 17 of the Act of 2002, the plaintiff would be at liberty to approach the learned Debts Recovery Tribunal, Guwahati under Section 17 and the period from the date of filing of the suit till today shall be excluded in calculating the period of limitation for the purpose of filing the application under Section 17 of the Act of 2002. The said liberty is being given taking into consideration the specific submission made by Mr. M Sharma, the learned counsel appearing on behalf of the petitioner that under Section 17 the plaintiff has a remedy for which the plaint ought to be rejected further with an undertaking that the petitioner herein shall not object on the question of limitation before the said Tribunal competent to adjudicate proceedings under 17 of the Act of 2002.

[20] In view of the above findings that the plaint is rejected, the injunction order dated 12.04.2018, passed in Misc.(J) Case No. 193/2018 cannot be sustained in law. However taking into consideration that liberty is granted to the respondent No. 1 to approach the Debt Recovery Tribunal, Guwahati under Section 17 of the Act of 2002, the parties are directed to maintain status quo in respect to the Schedule A property as described in the plaint of Title Suit No. 97/2018 for a period of 30 days from today and thereafter it shall be within the jurisdiction of said Debt Recovery Tribunal to grant or not grant interim

protection.

[21] With the above observations, the petition stands allowed.

JUDGE

Comparing Assistant

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