

# **Bank of India & Ors. v. Rajendra S/o Parshuram Gainkar & Ors.**

Bank of India & Ors.

**...Appellant**

Rajendra S/o Parshuram Gainkar & Ors.

**...Respondent**

**Case No: Appeal No. 94/2013**

**Date of Judgement: 07/09/2023**

**Judges:**

Mr Justice Ashok Menon, Chairperson

**For Appellant: Mr. O.A. Das along with Ms Pallavi Chari i/b Mr O.A. Das, Advocate.**

**For Respondent: Ms Pradnya Bamne, i/b Mr N. N. Amin & Co., Advocate.**

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**Facts:**

These appeals (No. 94/2013, 95/2013, 96/2013, and 97/2013) concern identical issues regarding agreements to sell and consequent mortgages created over properties that were later sold to different parties, ignoring the earlier registered agreements to sell and mortgages.

The appeals involve different flats in an apartment complex named "Amrit Madhu Residency" situated in Nagpur. The common parties are:

- Bank of India (Appellant)
- M/s Suman Amrut Construction (Builder, a proprietorship represented by Praful Amrutrao Gajbe)
- Kishor Sukhdeorao Barbade (Owner of the land and

developer)

Four members of the same family (Raunaksingh Gurdayalsingh Kande, his wife Sonia Raunaksingh, his sister Sneha Gurdayalsingh, and his brother Yujitsingh Gurdayalsingh Kande) entered into registered agreements to sell with the builder and developer for flats numbered SAM 301, SAM 302, GAM 101, and FAM 201, respectively, on 16/05/2008. The prospective buyers mortgaged the intended flats with the Appellant Bank of India and obtained loans to be handed over to the builder and developer on 22/05/2008 by depositing the agreements to sell as title deeds. The mortgagors defaulted on loan payments, and the Bank initiated measures under the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act). The Applicants in Securitisation Applications (S.As) Nos. 30, 31, 32, and 34/2012 before the Debts Recovery Tribunal, Nagpur (D.R.T.), claim to be bona fide purchasers of the same flats from the builder and developer, having purchased them through registered sale deeds in 2009. They claim to be in actual possession and enjoyment of the flats since 2009. Upon receiving public notices from the Bank regarding the flats they occupied, the Applicants approached the Bank and provided information about their purchases and mortgages with other banks (Union Bank of India and Housing Development Finance Corporation Ltd.). As the Bank was unwilling to stall the SARFAESI measures against the borrowers, the Applicants filed the S.As challenging the measures.

**Arguments by the Parties:**

**Arguments by the Appellant Bank:**

The execution of sale deeds in 2009 regarding the flats agreed to be sold to the borrowers by registered agreements to sell in 2008, and the consequent mortgages created by depositing those registered agreements with the Bank, would render the subsequent sales and mortgages invalid, void, and unlawful. The agreements for sale in favor of the borrowers were not repudiated, rescinded, or canceled, precluding the builder and developer from selling the flats to the Applicants. Mutating the flats in the Applicants' names and paying

revenue/taxes would not constitute a valid title for the Applicants.

**Arguments by the Union Bank of India (Respondent):**

The sale never concluded in favor of the borrowers, as the agreements clearly stated that the sale deed would be executed and registered after full and final settlement of accounts upon receipt of the bank loan or within one month, whichever was earlier. The possession of the property was agreed to be delivered only at the time of executing the sale deed, and the agreement specified that time was the essence of the contract. The borrowers failed to fulfill their obligation to pay the balance amount, get the sale deed registered, and take possession, rendering the agreement invalid. The borrowers, and consequently the Appellants as mortgagees, have no right, title, or interest over the flats.

**Court's Elaborate Opinions:**

The Presiding Officer concluded that apart from the agreement to sell the flats upon completion, no sale deeds were executed in favor of the borrowers, giving them no right, title, interest, or possession over the flats. On the other hand, the Applicants in the S.As., through the registration of sale deeds in their favor, gained possession of the properties in 2009 and were in exclusive enjoyment until filing the S.As. Unless there was a concluded sale in favor of the borrowers, they did not have exclusive rights, title, and interest over the flats to create a valid mortgage. The agreements to sell can be deemed conveyances under the Bombay Stamp Act only if coupled with handing over possession of the property to the purchaser, which did not occur in these cases. The agreements indicated that there was no concluded contract, as the sale deeds were to be executed and possession delivered after full payment and within a specified time, which did not happen. The borrowers did not pay any taxes for the building, indicating that the agreements were never acted upon, and the Bank did not pursue the matter to ensure compliance with the agreements. The agreements suggest that the flats remained with the seller until the sale deeds were executed and possession delivered. No action for specific performance was sought, and it is now time-barred. Collusion

between the borrowers (members of the same family) and the builders/developers to avail the loan cannot be ruled out. The Applicants have been in exclusive possession and enjoyment of the properties since the sale deeds were executed in their favor. The Presiding Officer was justified in passing the order allowing the S.As and quashing the SARFAESI measures initiated by the Appellants.

**Cases Cited:**

S. Arunchalam Asari (died) & Ors vs. Sivan Perumal Asari & Ano. 1969 MLJ 530 (cited by the Appellant regarding the rule of priority under Section 48 of the Transfer of Property Act). State of Maharashtra & Ors vs. Mahavir Lalchand Rathod & Ano. 1992 (2) Bom.C.R.1 (cited regarding the requirement of registration and payment of stamp duty on agreements to sell flats under the Maharashtra Ownership Flats Act and the Bombay Stamp Act). Veena Hasmukh Jain & Ano. vs. State of Maharashtra & Ors. (1999) 5 SCC 725 (cited regarding the requirement of registration and payment of stamp duty on agreements to sell flats).

**Sections and Laws Referred:**

Section 48 of the Transfer of Property Act (regarding the rule of priority in case of multiple transfers of the same immovable property). Section 47 of the Registration Act (regarding the effect of non-registration of documents). Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (regarding the regulation of agreements to sell flats). Bombay Stamp Act, 1958 (regarding the requirement of registration and payment of stamp duty on agreements to sell flats). Explanation I to Article 25 of Schedule I to the Bombay Stamp Act (regarding when an agreement to sell can be deemed a conveyance for stamp duty purposes). Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (SARFAESI Act) (under which the Bank initiated measures against the defaulting borrowers). Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB & FI Act) (under which the Bank filed Original Applications for recovery of debts against the borrowers/guarantors).