

**BEFORE THE DEBTS RECOVERY**  
**APPELLATE TRIBUNAL, AT: MUMBAI**

**Present: Mr Justice Ashok Menon, Chairperson**

**Appeal No. 69/2013**

**Between**

Bank of Baroda ... Appellant/s  
V/s.  
Shri Siddhi Vinayak Trading Co. & Ors. ... Respondent/s  
Mr Jayesh R. Patel, Advocate for Appellant.  
Mr Sohail E Kazi, Advocate for Respondents Nos. 4 & 5.

**-: Order dated: 13/06/2023:-**

This is an appeal filed by Bank of Baroda impugning the judgment and order dated 11.07.2012 in Original Application (O.A.) No. 170 of 2010 on the files of the Debts Recovery Tribunal No. -II, Mumbai (D.R.T.).

2. The aforesaid O.A. was filed under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDDB & FI" Act for short) seeking to recover a sum of ₹13,16,462/- due under a Packing Credit Facility and ₹4,01,177.35 under a TOD Facility together with interest at the rate of 13.5% per annum from the Defendants personally and from out of the mortgaged property. The first Defendant namely Shri Siddhi Vinayak Trading Co. is the sole proprietorship of the second Defendant. The third Defendant is the wife of the second Defendant who is also a guarantor. The fourth Defendant is the purchaser of the property agreed to be mortgaged to the Bank and

the fifth Defendant is the Pantnagar Shree Ome CHS Ltd a cooperative society constituting the apartment complex where the mortgaged flat is situated.

3. During the month of March 2003, the loan account turns to be a non-performing asset (NPA). On 19.02.2004, the borrower executed a demand promissory note in favour of the Bank for the then outstanding amount. The third Defendant executed a letter of guarantee and both Defendants Nos. 2 & 3 executed acknowledgements of debt on 24.12.2006 and again on 23.03.2009. The second and third Defendant had also given an undertaking to create a mortgage but did not do so. On 20.01.2006 an officer of the Bank noticed that the flat agreed to be mortgaged was being occupied by the fourth Defendant. The secretary of the fifth Defendant society was asked not to transfer the flat without a 'no objection' from the Bank. However, the society did not abide by the request made by the Bank. There was no other option left to the Bank but to issue a recall notice on 22.04.2010. There was no response to that notice and hence, the O.A. was filed for recovery of the amount.

4. In their written statement, Defendants Nos. 1 to 3 denied having signed any documents or receiving any money from the Bank. The fourth Defendant in his written statement contended that he had purchased the property by means of a registered sale deed executed on 18.08.2005 for valid consideration from Defendants Nos. 2 & 3 after obtaining a no objection certificate from the fifth Defendant. He has also lodged a criminal complaint consequent to his knowledge of the debt. The fifth Defendant has

also contested the O.A. and denied having given any undertaking to the Bank with respect to the flat belonging to Defendants Nos. 2 & 3.

5. On appraisal of the evidence placed before him, the Ld. Presiding Officer, vide the impugned judgment upheld the claim of the Bank with regard to the debt and the documents evidencing the debt which persuaded him to grant the monetary relief sought. However, the purported undertaking given by the second and third Defendants regarding the mortgage was disbelieved by the Ld. Presiding Officer. Accordingly, the O.A. was allowed with cost against Defendants Nos. 1 to 3 without any charge over the mortgaged property. The Bank is aggrieved and hence, in Appeal.

6. Heard the Ld. Counsel appearing for the parties.

7. The main question that arises for consideration in this appeal is whether the mortgage of the property created by Defendants Nos. 2 & 3 would be valid or not. It is the case of the Appellant that an equitable mortgage was created in favour of the Bank with regard to Flat No. 879 in Building No. 30, Pantnagar, Shree Ome CHS, Ghatkopar (East), Mumbai while providing a housing loan by the Appellant on 18.10.2000 and the memorandum of deposit of title deeds is also executed. The original agreement of sale, the original registration receipt, the basic title deed of the persons who had sold the property to the Defendants Nos. 2 & 3, the original share certificate, valuation report, and NOC issued by the society were all produced before the Bank and deposited with the intention to create a mortgage. On 29.03.2003, the third Respondent had agreed to extend the equitable mortgage with regard to the said flat to cover

the outstanding dues. It is not a creation of a fresh mortgage but only an undertaking to extend the already created mortgage as security for the subsequent financial transaction. The undertaking was given by the third Defendant alone but the second Defendant has subsequently made an endorsement on that letter of undertaking agreeing to extend the mortgage. The said endorsement written in his own handwriting by the second Defendant is made on 28.04.2003. That apart, the letter of acknowledgement executed on 01.09.2003 further mentioned the equitable mortgage. The letter of acknowledgement dated 24.06.2006 also includes the undertaking to extend the equitable mortgage. There is yet another letter of acknowledgement executed on 23.03.2009 with regard to the outstanding debt and the mortgage. It is also pertinent to note that on 21.01.2006 the Appellant Bank had requested the fifth Defendant society about the lien over the property and not to agree to an assignment without the concurrence of the Bank. The O.A. was filed on 23.07.2010.

8. It is contended that the impugned judgment has not considered the implication of the undertaking and the acknowledgement. It is further submitted that it is also pertinent to note that Defendants Nos. 2 & 3 had sold the property to the fourth Defendant without informing him about the mortgage. The original title deeds were also not handed over to him and he was made to believe that the documents were lost in the flood. He was cheated and aggrieved by that, he had even filed a criminal complaint against Defendants Nos. 2 & 3.

9. Under Sec. 58 of the Transfer of the Property Act, 1882 a

mortgage may be created for securing the payment of money already advanced or to be advanced by way of a loan, or for an existing or future debt. A mortgage by deposit of title deed as defined under Sec. 58 (f) of the TP Act states that delivery of documents of title to the immovable property to the creditor or its agent with intent to create a security thereon is sufficient to create a mortgage by deposit of title deeds. (emphasis supplied) In the instant case, the equitable mortgage was created by the deposit of the title deed as early as on 18.10.2000 and subsequently, Defendants Nos. 2 & 3 agreed to extend that mortgage to subsequent debt as well. That is sufficient to express their intention to create an equitable mortgage. It is also pertinent to note that the mortgagor did not redeem the title deeds consequent to the closure of the housing loan. This would further fortify the case of the Appellant that Defendants Nos. 1 to 3 intended to create an equitable mortgage. The fact that Defendants Nos. 2 & 3 had misled the fourth Defendant to believe that the original documents were lost would also substantiate the case of the Appellant that the borrowers were deliberately concealing the existence of the mortgage.

The Ld. Presiding Officer was, therefore, not justified in declining to grant a charge over the property while decreeing the O.A. The impugned order, therefore, requires interference in appeal.

Resultantly, the appeal is allowed and the impugned judgment and order of the Ld. Presiding Officer dated 11.07.2012 in O.A. No. 170 of 2010 on the files of the Debts Recovery Tribunal No. II, Mumbai is modified to the extent that the amount decreed shall be realisable

from out of the mortgaged property namely Flat No. 879 in Building No. 30, Pantnagar, Shree Ome CHS, Ghatkopar (East), Mumbai. A fresh Recovery Certificate incorporating the mortgage charge shall be issued by the D.R.T. in accordance with the above order.

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Sd/-  
Chairperson

DRAFT MUMBAI