BEFORE THE DEBTS RECOVERY APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Appeal No. 104/2015

Between

Bank of Baroda … Appellant/s

V/s.

Vijeta W/o Dinesh Wadhwani & Ors. …Respondent/s

Mr Anant B. Shinde, Advocate for Appellant.

-: Order dated: 28/07/2023:-

Appellant the Bank of Baroda is in appeal aggrieved by the order dated 09.04.2014 in Review Application No. 01 of 2014 in Securitisation Application (S.A.) No. 57 of 2013 on the files of the Debts Recovery Tribunal, Nagpur (D.R.T.), reviewing the order of dismissal of the S.A. dated 31.01.2014 and finding that the mortgage created by the borrower in favour of the Appellant Bank has no legal validity.

2. The facts and brief can be summarised thus:

The 3rd Respondent is the sole proprietor of a proprietorship named M/s Shivaji Traders. He borrowed a sum of ₹6 lakhs from the Appellant Bank as a principal borrower with the 4th Respondent as a guarantor. A demand promissory note, letter of continuing security, an instrument of hypothecation of goods and other documents connected with the loan and PAN card issued by the Income Tax Department were submitted. The 3rd Respondent also created an

equitable mortgage of his residential flat No. 203 admeasuring 520 ft² bearing Corporation House No. 354/84/13 on the 2nd floor of the apartment building Jamuna No. 1, Jamuna Cooperative Housing Society Ltd., Vidhyarthi Layout, C.A. Road, near Dr Ambedkar Chowk, Nagpur 440008 (the secured asset). The original title deeds of the property were deposited with the Bank vide a memorandum of deposit of title deed dated 04.12.2006. The borrower defaulted on repayment which resulted in the loan account being classified as Non-Performing Assets (NPA). Consequent to that, the Appellant initiated measures under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short). A demand notice was issued under section 13(2) of the SARFAESI Act calling upon Respondent Nos. 3 and 4 to repay the debt. There was no response and consequently, symbolic possession of the flat was taken under the provisions of section 13(4) of the SARFAESI Act by affixture of a notice on the outer door of the flat in the presence of the officials of the 5th Respondent society.

3. Respondent Nos. 1 and 2 filed S.A. No. 57 of 2013 before the D.R.T. against the Appellant bank and the rest of the Respondents under section 17 of the SARFAESI Act challenging the measures initiated by the Appellant concerning the secured asset, claiming that they are the exclusive owners of the flat which they had purchased from the 3rd Respondent. It was further contended that they had availed a housing loan from the 6th Respondent, Dewan Housing Finance Corporation by creating a simple mortgage with regard to the

said flat on 28.04.2009. It is pointed out that the alleged sale was subsequent to the mortgage created by the 3rd Respondent in favour of the Appellant Bank on 04.12.2006. The original title deeds and the share certificate issued by the 5th Respondent to the 3rd Respondent as well as the allotment letter were already lying in deposit with the Appellant Bank.

4. The contention raised in the S.A. was that the 3rd Respondent is a Pakistani national and that he could neither have purchased a property in India nor mortgaged it and obtained a loan without the prior permission of the Reserve Bank of India. Per contra, the Appellant Bank contended that the sale deed in favour of the Applicants in the S.A. was neither registered nor was the stamp duty paid. The Ld. Presiding Officer in his judgment and order observed that in case the 3rd Respondent did not have the right to purchase property or mortgage it, he also could not as well have sold the property to the Applicants in the S.A. and therefore, they have no locus-standi to challenge the action of the Respondent Bank. After considering the pleadings, facts and the material on record, the D.R.T. dismissed the S.A. vide judgment and order dated 31.01.2014. No appeal was preferred.

5. The Applicants in the S.A. however, filed a review application reiterating the contention that no mortgage could be created by a Pakistani national and hence the order needs to be reviewed. After hearing the counsel for parties and also the 5th Respondent, the Ld. Presiding Officer allowed the review holding that no valid mortgage could be created in favour of the Bank because a Pakistani national

could neither have purchased properties in India nor mortgaged it without permission of the R.B.I. The Appellant is aggrieved and hence in appeal.

6. The Respondents were served but none appeared for Respondent Nos. 3 and 4 and hence they were set ex parte. Respondents Nos. 1, 2 and 5 appeared but no replies were filed for them, and they were neither represented nor arguments advanced for them when the appeal was taken up for hearing. The Ld. Counsel appearing for the Appellant Mr Anant B. Shinde was heard and records perused.

7. The important question that arises for consideration in this appeal is whether the Ld. Presiding Officer was justified in undoing his judgment in a review application filed by the Applicants in the S.A. Rule 5-A of the Debts Recovery Tribunal (Procedure) Rules, 1993 ('the Rule', for short) provides for review of an order by the Presiding Officer which read thus prior to the amendment which came into effect on 04.11.2016:

> "**5-A. Review** :- (1) Any party considering itself aggrieved by an order made by the Tribunal on account of some mistake or error apparent on the face of the record desires to obtain a review of the order made against him, may apply for a review of the order to the Tribunal which had made the order.
> (2) No application for review shall be made after the expiry of a period of 60 days from the date of the order and no such application shall be entertained unless it is accompanied by an affidavit verifying the application.
> (3) Where it appears to the Tribunal that there is no sufficient ground for review, it shall reject the application for review or if it should be granted, it shall grant the same;
> PROVIDED THAT no such application shall be granted without previous notice to the opposite party to enable him to appear and to be heard in support of the order, a review of which is applied for."

8. Section 22 (2) (e) of the RDDB & FI Act also provides for powers to the D.R.T. to review its decisions as are vested in a Civil

Court under the Code of Civil Procedure, 1908 while trying a suit.

9. From a reading of the above provisions, it is clear that the Tribunal has been clothed with the power of a Civil Court which the Civil Court enjoys in reviewing its own decisions. The power of review under the CPC is provided under Order 47 Rule 1. It is well settled that the power to review is not an inherent power. It must be conferred by law either specifically or by necessary implication. There is no doubt that the D.R.T. has been conferred with such power to review its decisions. The only question that arises for consideration is whether the power has been exercised properly in the present case. A reading of the provisions would indicate that the power to review is confined to the correcting of some mistake or error apparent on the face of the record. A review does not mean the court sitting on the appeal over own its decision. A rehearing of the matter is not contemplated in a review application. Only errors or mistakes on the face of the record could be corrected by exercising its powers of review. It is only intended for correcting an apparent error that the parties are able to satisfy to be erroneous on the face of it. An order or judgment passed by a court cannot be reconsidered by the court. An erroneous judgment on improper appreciation of the facts and law has to be corrected in an appeal by a superior court. The Hon'ble Supreme Court has in *M/s Jain Studios Ltd vs. Shin Satellite Public Co. Ltd. (2006) 5 SCC 501* held that the power to review cannot be confused with appellate power which enables a superior court to correct all errors committed by a subordinate court. It is not a rehearing of an original matter. A review of old and overruled

arguments is not enough to reopen concluded adjudications. The power of review has to be exercised with extreme care, caution and circumspection only in exceptional cases.

10. There is no doubt that the Tribunal's power to review its order/decision is akin to that of a Civil Court, statutorily enumerated and judicially recognised limitations on the Civil Court's power to review its judgment/decision would also apply to the Tribunal's power under Sec. 22 (2) (e) of the RDB Act read with Rule 5-A of the Rules. A Tribunal established under the Act is entitled to review its order/decision only if either of the grounds enumerated in Order 47 Rule 1 CPC is available. This would necessarily mean that the Tribunal can review its order/decision on the discovery of a new or important matter or evidence that the Applicant could not produce at the time of the initial decision despite the exercise of due diligence, or the same was not within his knowledge or if it is shown that the order sought to be reviewed suffers from some mistake or error apparent on the face of the record or there exists some other reason, which in the opinion of the Tribunal, is sufficient for reviewing the earlier order/decision. (See *State of West Bengal & Ors vs. Kamal Sengupta & Anr. (2008) 8 SCC 612*).

11. The Hon'ble Supreme Court has in *Lily Thomas & Ors vs. Union of India & Ano. (2000) 6 SCC 224* held thus:

> "56. It follows, therefore, that the power of review can be exercised for correction of a mistake but not to substitute a view. Such powers can be exercised within the limits of the statute dealing with the exercise of power. The review cannot be treated like an appeal in disguise. The mere possibility of two views on the subject is not a ground for a review."

12. In *Inderchand Jain (Dead) through LRs vs. Motilal (Dead) through LRs. (2009 14 SCC 663* it is held thus:

> "10. It is beyond any doubt and dispute that the review court does not sit in appeal over its own order. A rehearing of the matter is impermissible in law. It constitutes an exception to the general rule that once a judgment is signed or pronounced, it should not be altered. It is also trite that exercise of inherent jurisdiction is not invoked for reviewing any order."

13. In *Kamlesh Verma vs. Mayawati & Ors (2013) 8 SCC 320* it is held that the review is not a rehearing of an original matter. The power of review cannot be confused with appellate power with enables a superior court to correct all errors committed by a subordinate court. A repetition of old and overruled argument is not enough to reopen concluded adjudications.

14. In the present case, the Ld. Presiding Officer had already overruled the argument that the Applicants in the S.A. holding that they have not succeeded in establishing the Sarfaesi measures initiated by the Bank faulty. It was also observed that in case a Pakistani national is incapable of buying or mortgaging a property without permission of the RBI that would equally affect the Applicant who had admittedly purchased the very same property from the Pakistani national. The Ld. Presiding Officer could not have reviewed his judgment/decision on a further hearing. The only option left to the Applicants, if aggrieved was to prefer an appeal.

15. Coming to the merits of the contention regarding the impropriety of the mortgage or sale, it has to be first found out what the RBI restriction is. The purchase or sale of an immovable property such as a residential flat is a **capital account transaction**. Under Section 6(2) of the Foreign Exchange Management Act, 1999, the RBI in

consultation with the Central Government has the power to specify any class or classes of **capital account transactions** which are permissible. Section 6(3)(i) of this Act further empowers RBI to make regulations to prohibit, restrict or regulate the acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by certain persons. Section 47(2)(a) of this Act gives power to RBI to make Regulations for this purpose. In accordance with these provisions, the RBI has made the Foreign Exchange Management (Acquisition and transfer of immovable property in India) Regulations, 2000. Regulation 7 states as under:

"**7. Prohibition on acquisition or transfer of immovable property in India by citizens of certain countries:-** No person being a citizen of Pakistan, Bangladesh, Sri Lanka, Afghanistan, China, Iran, Nepal or Bhutan without prior permission of the Reserve Bank shall acquire or transfer immovable property in India, other than lease, not exceeding five years."

16. Thus, according to this Regulation which has legal force in India, a citizen of Pakistan cannot purchase an immovable property in India without the prior permission of the RBI. This restriction is applicable to nationals of only a few countries as mentioned above.

17. Even going by the evidence adduced, there is nothing on record to indicate that the third Respondent is a Pakistani national. He has been residing in Nagpur for long and had been conducting business. Unless the Applicants in the S.A. provide evidence regarding the third Respondent being a Pakistani citizen, they cannot succeed. Moreover, the Applicants had filed S.A. under Sec. 17 of the SARFAESI Act challenging the Sarfaesi measures on the ground that they are the real owners of the secured asset by virtue of a sale deed executed in their favour by the third Respondent on 05.08.2013. Apparently, the said

sale was consequent to the mortgage created on 04.12.2006. The sale being consequent to the mortgage would not be binding upon the Bank. Hence, even on merits the Applicants in the S.A. did not stand a chance to succeed.

The impugned order of review dated 09.04.2014 is, therefore unsustainable and is, therefore, set aside.

Resultantly, the appeal is allowed and S.A. No. 57 of 2013 together with R.A. No. 01 of 2014 stand dismissed.

Sd/-
Chairperson

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