

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

Present: Mr Justice Ashok Menon, Chairperson

Misc. Appeal No. 83/2009

Between

Manisha Chandrashekar Patil & Ors. ... Appellant/s
V/s.

Bank of Maharashtra & Anr. ... Respondent/s

Ms Drishti Shah, Advocate for Appellants.

Mr N.J. Devashree, Advocate for Respondent No. 1.

AND

Misc. Appeal No. 115/2009

Between

Bank of Maharashtra ... Appellant/s
V/s.

Mr Rajmohan N. Rao & Ors. ... Respondent/s

Mr N.J. Devashree, Advocate for Appellant.

Ms Drishti Shah, Advocate for Respondents No. 3(B), 3(C) & 3(D).

∴ Common Order dated: 26/04/2023∴

These two appeals arise from the same judgment and order in Appeal No. 6 of 2008 dated 13.10.2008 on the files of the Debts Recovery Tribunal-II, Mumbai (D.R.T.). Appeal No. 83 of 2009 is filed by Respondent No. 3 C while Appeal No. 115 of 2009 is filed by the first Respondent Bank of Maharashtra impugning the aforesaid judgment.

2. The Bank of Maharashtra had filed Suit No. 2019 of 1991, for the realisation of money from the borrower late Pandurang Dajiba

More and obtained a decree. Consequent to the implementation of the Recovery of Debts Due to Banks & Financial Institutions Act, 1993 ('RDDB& FI Act', for short) a Recovery Certificate was issued by the DRT against the original borrower who died and is now represented by his legal representatives, Respondent Nos. 3A to 3D. The Recovery Certificate was sought to be executed by the Bank by filing Recovery Proceeding No. 149 of 2004 before the Recovery Officer, DRT-II, Mumbai. The property described as Unit No. 515, 5th Floor, Bharat Industrial Estate, T. J Road, Sewree, Mumbai 400015 (subject property) was attached and proceeded against. The first Respondent herein, namely Rajmohan Narsingh Rao as the legal representative of his deceased mother as the legal representative of his deceased mother Jayalaxmi Rao filed an intervention petition as M.A. No. 456 of 2005 before the Ld. Recovery Officer claiming to be the absolute owner in possession of the subject property. Vide order dated 03.07.2007, the Ld. Recovery Officer, dismissed the aforesaid M.A. Aggrieved by the said order dismissing the claim, the Intervener filed Appeal No. 6 of 2008 before the Ld. Presiding Officer under Section 30 of the RDDB & FI Act. The appeal is allowed vide judgment dated 13/10/2008 and the attachment over the subject property was released.

3. The facts, in brief, are thus:

Mrs Gulab Pandurang More, one of the certified debtors purchased the subject property from the intervener's mother, the late Jayalaxmi Rao by virtue of an agreement to sell dated 10.04.1972,

and was in possession of the printing press that was being conducted in the subject property by virtue of the part performance of the contract. Advance sale consideration of ₹ 75,000/- was also paid on 27.04.1972. The press functioning in the subject property was also assigned to Mrs Gulab Pandurang More for a sale consideration of ₹20,000/-. The balance sale consideration of ₹ 45,000/- was to be paid within 8 days. Mrs Gulab also paid the dues to the society where the property was located. The society had recognised Mrs Gulab as a member and had even issued a lawyer notice claiming arrears of dues from her.

4. Consequent to the demise of Jayalaxmi, the intervener Rajmohan Rao filed a suit before the Bombay High Court as No. 894 of 1975 against Mrs Gulab for handing over possession of the property including the printing press. The suit was however dismissed for default on 19.06.1989. Mrs Gulab and her husband had filed a petition for quashing the criminal proceedings pending against them before the Additional Chief Metropolitan Magistrate on the same was allowed holding that it was a civil dispute and no criminal offence is attracted.

5. The Ld. Recovery Officer observed that though the property was not mortgaged, a negative lien was created by the borrowers undertaking that they would not create any encumbrance over the property. It is relying on that undertaking that the Ld. Recovery Officer dismissed the claim.

6. In the impugned judgment, the Ld. Presiding Officer admitted that the certified debtors are in possession of the property

by virtue of part performance as contemplated under Section 53 A of the Transfer of Property Act, but he observed that at the time of attachment, the Intervener was in possession, and therefore, the subject property could not have been proceeded against. It is an admitted case that the Intervener was not in possession of the property and had even approached the Hon'ble High Court of Bombay seeking possession of the property. However, at the beginning of the year 2001, the Intervener somehow wrested possession of the property. The society states that the Intervener had taken forcible possession of the property sometime before 02.01.2002 by breaking open the lock of the premises.

7. The Ld. Presiding Officer relying on Rule 11 of the second schedule to the Income Tax Act observed that when on the date of attachment, the claimant succeeds in establishing that he was in possession of the property and had some interest over it, the Recovery Officer should have made an order releasing the property.

8. Admittedly, the Intervener and his mother had agreed to sell the property to Mrs Gulab More. It is contended that the purchaser failed in paying the balance sale consideration, and therefore the amount paid earlier stood forfeited. It is further contended that the Intervener had, in consequence of the demise of his mother, filed Letters of Administration Petition No. 186 of 2001, and obtained an order to administer the property belonging to his mother.

9. The argument of the Ld. Counsel appearing for the Respondent pertaining to obtaining Letters of Administration with regard to the management of the subject property is inconsequential

in view of the decision in *Ochavaram Nanabhai vs. Dolatram Jamietram* (1904) I.L.R. 28 Bom 644 which was followed in a later decision of the Hon'ble Bombay High Court in *Bai Parvatibai vs. Raghunath Lakshman Bom. L. R. 1063*, where, at the hearing of a petition for Letters of Administration to estate of a deceased person, it was held that it is not the province of the court to go into the title of the property to which the Letters of Administration referred. It was further held that it is no part of the duty of the Testamentary Judge to consider the question of the title to property.

10. The contention that Mrs Gulab was in possession of the subject property only by way of part performance of the contract in that by defaulting payment of the balance sale consideration, she loses her right over the property is also not acceptable. The contention that the agreement to sell was not registered is also of no consequence. A transferee in possession of the property in part performance of the contract is entitled to remain in possession and can defend his possession. A trespasser displacing a person in possession of such property cannot obviously succeed under Order XXI Rule 63 of the Code of Civil Procedure against attaching decree holder on the sole ground that the judgment debtor has only possessory title (*see Nathulal vs. Phoolchand AIR 1970 SC 546*). It is also settled law that under the aforesaid provisions of C.P.C., the possessory title of judgment debtor can be attached by the decree holder (*see Uppala Kanakaiah vs. Mohaboob Singh & Ors AIR 1961 AP 497*).

11. The Intervener Rajmohan Rao was admittedly not in

possession of the subject property in consequence of the sale. He had even approached the High Court seeking possession of the property from Mrs Gulab, by filing Suit No. 894 of 1975 which was dismissed for default on 19.06.1989. He has no case that the legal representatives of Pandurang More or Gulab More had voluntarily handed over the subject property to him. how how he regained possession is not explained. The observation and finding of the Ld. Presiding Officer that at the time of attachment, Rajmohan Rao was in possession and therefore, the attachment is not proper, is not acceptable. The trespasser of a property cannot defend his right over the property in any manner because the possessory right of a trespasser is not legally sustainable. The Ld. Presiding Officer has heavily relied upon the provisions of the I.T. Act. Section 29 of the RDDB & FI Act, in the clearest terms, states that provisions of second and third Schedule of Income Tax Act and 1962 Rules, as in force from time to time, shall as far as possible, apply with necessary modifications as if, the said provisions and Rules refer to the amount of debt due under the RDDB & FI Act instead of the Income Tax Act. Whenever Legislature uses words such as “as far as possible” “as far as practicable” etc; the intent is not to apply the provisions in their entirety. (*Keshrimal Jivji Shah & Ano. vs. Bank of Maharashtra & Ors. 2004 (3) Mh.L.J. 893* relied upon). Hence, there was no justification for the impugned order upsetting the orders of the Ld. Recovery Officer dismissing the claim put forth by the Intervener.

In the result, both the appeals are allowed and the impugned

judgment and order of the D.R.T. in Appeal No. 06 of 2008 dated 13.10.2008 is set aside and the order of the Ld. Recovery Officer dismissing Misc. Application No. 456 of 2006 in R.P. No. 149 of 2004 dated 03.07.2007 is confirmed.

Sd/-
Chairperson

mks-1 & 2

DRAFT MUMBAI