

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr Justice Ashok Menon, Chairperson

Misc. Appeal No. 99/2023

Between

Savitribai Pandurang Patil, wife and legal heir of
deceased Shri Pandurang Hasha Patil & Ors.

... Appellant/s

V/s.

Bank of India & Ors.

...Respondent/s

Ms Aarti Suvarna, Advocate for Appellants.

An advocate for the Appellant is present.

:- Order dated: 11/09/2023:-

On being aggrieved with the order dated 19/05/2023 passed by the Debts Recovery Tribunal-II, Mumbai (D.R.T.) in Interlocutory Application (I.A.) No. 1091/2023 in Securitisation Application (S.A.) No. 87 of 2023 filed by the Appellants under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short), they are in appeal under Sec. 18.

2. The first Respondent Bank of India had lent money to the fifth Respondent on the mortgage of Flat No. 1202 situated on the 12th Floor of 'Elite Towers', Plot Nos. 9B and 9C, sector No. 10, Kharghar, Navi Mumbai (secured asset) purchased by him from the third Respondent who is the sole proprietor of the second Respondent M/s. Dolphin Enterprises for a sale consideration of ₹90 lakhs under a sale agreement dated 13/06/2015. The fifth Respondent borrower

defaulted on repayment of the debt and the BOI classified the account as non-performing assets (NPA) and issued a demand notice under Section 13 (2) of the SARFAESI Act on 31/07/2017. Thereafter, symbolic possession of the secured asset was taken by the BOI on 04/10/2017, and for physical possession, steps under Section 14 of the SARFAESI Act were taken and an order was obtained from the District Magistrate.

3. The Appellants claim to be the legal heirs of late Pandurang Patil, who had allegedly purchased the secured asset flat and was in possession of the flat on his demise. The Appellants as legal heirs inherited the flat and are in actual possession and enjoyment of the apartment. On receipt of notice of taking physical possession in accordance with the order under Section 14 of the SARFAESI Act, the Appellants approached the D.R.T. with the aforesaid S.A. The Appellants would contend that the first Respondent BOI did not conduct due diligence before lending money to the fifth Respondent. Respondents Nos. 2, 3 or 5 have no right, title or interest over the secured asset. The mortgage of the property is, therefore, not valid and pray that the notice to take over physical possession based on the order obtained from the District Magistrate under Section 14 of the SARFAESI Act, may be quashed, and an interim order to stall the measures be passed to protect the possession of the Appellants. The Ld. Presiding Officer was not enthused by the contentions of the Appellants and hence, declined to grant the interlocutory relief in the S.A. The Appellants are aggrieved and hence in appeal.

4. The Appellants contend that the third Respondent had on 06/03/2009, issued an allotment letter in respect of the flat to the late Pandurang Patil and handed over possession of the flat to him. It is further contended that the father of Pandurang Patil late Hasha Ragho Patil was in possession of land and property and the same was acquired by the State Government for the development of the new town of Navi Mumbai and the late Hasha Ragho Patil became entitled to allotment of plot admeasuring 1700 m² under 12.5 % scheme by CIDCO. On the demise of Hasha Ragho Patil, the plot devolved upon all his legal heirs, including the father of the Appellant Pandurang Patil. By a release deed executed on 15/02/2008, and 23/05/2008, all the other legal heirs of Hasha Ragho Patil except one, relinquished their right, title and interest over the plot to Pandurang Patil under two Registered documents. Pandurang Patil became the owner of 1000 m² of land to be allotted under the 12.5% scheme evolved by the CIDCO. According to the Appellants, CIDCO issued two allotment letters, one dated 13/10/ 2008 in favour of the late Pandurang Patil and his nephew Pandit Namdeo Patil allotting plot No. 9B admeasuring 919.58.58 m² and the other of even date in favour of Pandurang Patil concerning plot No. 9C admeasuring 679.85 m². Consequent to the payment of the premium, CIDCO executed a lease agreement on 05/03/2009 in favour of Pandurang Patil agreeing to lease out plot No. 9C to him. Likewise, an agreement of lease was executed in favour of Pandurang Patil and Pandit Namdeo Patil concerning plot No. 9B on 08/04/2009.

5. Respondent Nos. 3 and 4 claiming to be partners of the second Respondent approached Pandurang Patil and offered to develop the aforesaid plot Nos. 9B and 9C. Development rights were thus handed over to them by the late Pandurang Patil. An agreement of development was executed on 05/03/2009 between them concerning the development of the land. As per that agreement, it was agreed that late Pandurang Patil would be handed over 17,500 ft² from out of 23,100 ft² total constructed area free of cost, and the remaining 6000 ft² of constructed area would belong to the third respondent. Accordingly, 16 apartments bearing flat Nos. 201 to 203 on the second floor, flat Nos. 301 to 303 on the third floor, flat No. 403 on the fourth floor, flat Nos. 1101 to 1103 on the 11th floor, flat Nos., 1201 to 1203 on the 12th floor and flat Nos. 1301 two 1303 on the 13th floor, apart from shop Nos. 5 to 9 were agreed to be handed over to late Pandurang Patil. ₹8 lakhs as a security deposit and ₹32 lakhs as an additional premium given for acquiring the development rights to plot No. 9C was paid by the second Respondent to late Pandurang Patil in accordance with the agreement. Yet another development agreement was executed on 31/03/2009 in respect of plot No. 9C between late Panduran Patil and the second Respondent agreeing to grant 500 m² of constructed area of the plot late Pandurang Patil and 169.85 m² was to be retained by the second Respondent. The construction was agreed to be completed within 22 months and the flats and shops were to be handed over within that time to late Pandurang Patil. On the very same date the owners of the property, namely late Pandurang Patil and his nephew Pandit Namdeo Patil of the first part, Respondent No.

2, represented by Respondent Nos. 3 and 4 of the second part and CIDCO on the third part entered into a tripartite agreement concerning plot No. 9C and got the same registered. However, Respondents Nos. 3 and 4, did not execute a similar development agreement concerning plot No. 9B and get it registered. Development permission was issued by CIDCO concerning building a 12-floor apartment complex on plot Nos. 9B and 9C.

6. The 2nd Respondent completed construction of the complex and handed over, physical possession of 9 flats and 5 shop rooms including the subject flat No.1202 to late Pandurang Patil in April 2014. A specific allotment letter concerning the subject flat No. 1202, was also issued by the 2nd Respondent in favour of the late Pandurang Patil. The said flat was in exclusive possession and enjoyment of late Pandurang Patil till his death and the apartment was also leased out to several persons. Presently, one Mr Nazeem Pavar is in actual possession of the flat as a consequence of a leave and licence agreement executed on 20/11/2018.

7. On 29/02/2020 the officers of the 1st Respondent Bank delivered notice at the subject flat, which was handed over to the 2nd Appellant by the licensee. On making enquiries it was revealed that the 5th Respondent had purportedly purchased the flat from the 3rd Respondent based on a sale agreement dated 13/06/2015. The said agreement has no legal sanctity given the handing over of possession and allotment of the subject flat to late Pandurang Patil in 2014.

8. Pandurang Patil died on 09/01/2017 and the property devolved upon the Appellants as his legal heirs. They filed a criminal complaint

against Respondent No. 3 for offences punishable under sections 420, 464, 465, 466 and 467 read with Section 34 of the Indian Penal Code. The said complaint is still pending consideration before the Magistrate's Court.

9. In March 2020 the 2nd Appellant filed S.A. No. 62/2020 challenging the notice to take possession of the subject flat on 06/03/2020. In the meanwhile, yet another notice dated 13/02/2023 was received for taking forcible possession of the subject flat. Given the subsequent notice, S.A. No. 62/2020, filed by the 2nd Appellant was withdrawn on 26/05/2023. Different S.A.s were filed by Appellant Nos. 2 and 6 concerning the other flats delivered by the 2nd Respondent. The Appellants had earlier filed I. A. No. 424/2023 in the present S.A., seeking a stay to the taking over of possession of the subject flat. The 1st Respondent Bank filed a reply stating that the physical possession was not being taken based on the notice already issued and hence a year 424/2023, was disposed of by the Ld. Presiding Officer on 02/03/2003.

10. Thereafter, when the Appellants received yet another notice dated 27/04/2023 on 04/05/2023, the Appellants filed I.A.No. 1090/2023 for amendment and I. A. No. 1091/2023, for a stay. The learned Presiding Officer has dismissed I.A. 1091/2023 erroneously and hence, the Appellants are in appeal.

11. The Appellants have also filed a Special Civil Suit No. 11 of 2023 in the Court of the Senior Civil Judge, seeking specific performance of the contract, termination of the agreement with the 5th Respondent and also a permanent injunction against Respondent Nos. 1 to 5. The

said suit is pending adjudication.

12. The Appellants would contend that irreparable injury would be caused to them in case they are dispossessed of the subject flat and hence seek the indulgence of this Tribunal to set aside the impugned order and to grant a stay of the Sarfaesi measures concerning taking over of physical possession of the subject flat under the provisions of Section 14 of the SARFAESI Act.

13. Per contra, the learned counsel appearing for the 1st Respondent Bank would contend that there is no registered document concerning the subject flat executed in favour of the Appellants or their predecessor in interest. Hence, they are not entitled to any relief to get the Sarfaesi measures concerning the subject flat stalled, which is proven to have been sold to the 5th Respondent in the year 2015 through a registered sale deed. The property has been mortgaged in favour of the bank to get a loan. On default of payment, the bank is within its right to proceed against the secured asset under the provisions of the SARFAESI Act. It is also pointed out that although the Appellants have already approached a Civil Court for relief against the Respondents, no favourable order whatsoever has been obtained by them. It is submitted that there is no error in the impugned order, and no interference whatsoever is called for from this Tribunal in appeal.

14. The learned counsel appearing for the Respondent Bank has relied upon several precedents in support of his argument. The Hon'ble High Court of Madras has in *Deenadayalan vs. N.Satheesh Kumar and Ors. MANU/TN/6826/2021* held that when the applicant is

neither a borrower nor a guarantor, the civil rights can be decided by the Civil Court, when it is prima facie apparent from the face of the record that the relief claimed is incapable of being decided by the D.R.T, under Section 17 of the SARFAESI Act. In *Arjun Sitaram Nitinwar vs. Rama Sakbaram Prasad & Ors.* MANU/MH/2151/2013 The Hon'ble High Court of Bombay has held that when the development agreement is eloquent of substantial rights created in favour of the applicant, the said document was compulsorily registrable under Section 17 of the Registration Act. In view of that it was held that the order of the trial Court that an unregistered development agreement creating substantial right is inadmissible in evidence, cannot be faulted with. The Hon'ble High Court of Bombay (Nagpur Bench) has in *Bank of Baroda & Ors. Vs. Gopal Shriram Panda & Ors.* MANU/MH/0987/2021 held that where the civil rights of persons other than that of the borrower or guarantor are involved, the Civil Court would have jurisdiction, that too, when a prima facie apparent from the face of the record that the relief claimed, is incapable of being decided by the D.R.T., under Section 17 of the DRT Act, 1993 read with Section 13 and 17 of the SARFAESI Act.

15. In the instant case, the 2nd Appellant had earlier approached the D.R.T. with a similar prayer in S.A. No. 62/2020 and suffered an adverse order on 05/03/2020, with regard to a stay of the Sarfaesi measures. In the light of the material placed before the D.R.T., the Ld. Presiding Officer has in the impugned order observed that the Appellants base their title under an unregistered development agreement and hence no prima facie case has been made out by the

Appellants to get an interlocutory order against the Sarfaesi measures initiated by the Respondent Bank.

The material placed and the rival submissions based on the precedents relied upon by the Ld. Counsel appearing for the bank, I find no infirmity, whatsoever with the order of the Ld. Presiding Officer.

The Misc. Appeal is, therefore, without any merits and requires to be dismissed.

Resultantly, the Misc. Appeal is dismissed.

Sd/-
Chairperson

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DRAFT MUMBAI