

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

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

**Appeal No. 262/2009**

**Between**

Suchita Sanjay Bodhani  
V/s.

... Appellant/s

State Bank of India & Ors.

... Respondent/s

Mr V. V. Chandavale along with Mr Vishal Tambe, Advocate for Appellant.

**-: Order dated: 28 /04/2023:-**

The Appellant is in appeal impugning the dismissal of the Securitisation Application (S.A.) No. 62/2008 on the files of the Debts Recovery Tribunal, Pune (D.R.T.) vide order dated 28/08/2009.

2. The Appellant is neither the borrower nor the guarantor/mortgagor. He claims to be the owner in possession of flat No. 5 above the 2<sup>nd</sup> stilt floor, Prerana Apartments, near Rashtrabhasha Bhavan constructed on property CTS No. 399, Narayan Peth, Pune (the subject flat).

3. The S.A. was filed under Sec. 17 (1) of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short) the 1<sup>st</sup> Respondent State Bank of India (SBI) the successor of State Bank of Hyderabad is the creditor which had allegedly lend money to Respondent Nos. 6 and 7 on mortgaging the subject flat situated on the 2<sup>nd</sup> floor above stilt floor. The borrowers defaulted on payment, the Bank

initiated measures under the SARFAESI Act for the recovery of debt.

4. The property is situated in CTS No. 399 of Narayan Peth was owned by one Deshmukh family who entrusted the development rights in the property to developers named Prerana Home Private Limited (the 2<sup>nd</sup> Respondent herein represented by the 3<sup>rd</sup> Respondent as its Director), vide agreement dated 23/05/1995. They also executed a Deed of License and a General Power of Attorney in favour of the developer. The existing structure on the property was demolished and the developer prepared a plan for the construction of a new apartment building and submitted it to the Pune Municipal Corporation which was approved and a commencement certificate bearing No. 4757 was issued by the Municipal Corporation on 06/08/2003. The intention of the developer was to construct flats and sell them to the public at large. At the time of entering into the development agreement, the 4<sup>th</sup> Respondent Dattakumar Damodar Kulkarni was a tenant in one of the flats and the developer agreed to allot one flat to him and was accordingly informed. On 26/06/1998 the developer executed an agreement of sale in favour of Respondent Nos. 4 and 5 under section 4 of the Maharashtra Ownership Flats (Regulation of the promotion of the construction, sale, management and transfer) Act ('MOFA', for short). The flat was allegedly delivered to Respondent Nos. 4 and 5. The Appellant approached Respondent Nos. 4 and 5 and entered into an agreement with them to purchase said flat for ₹15 lakhs and the same was registered on 10/07/2008 at the Sub-Registrar's Office, Haveli, Pune. After making payment of the entire

sale consideration to Respondent Nos. 4 and 5, executed a duly notarised possession note on 10/07/2008 in respect of the flat in favour of the Appellant.

5. Since the payment of the debt was defaulted by Respondent Nos. 6 and 7, the officers of the Bank served a notice under Sec. 13 (4) of the SARFAESI Act on 10/09/2008 and took symbolic possession of the subject flat.

6. According to the Appellant, Respondent Nos. 4 and 5 had sold the subject flat exclusively to her and even handed over possession. It is contended that Respondent Nos. 6 and 7 have no right title or interest over the subject flat. The Appellant states that she had, prior to the purchase of the flat issued a public notice through her advocate in the Daily Prabhat newspaper inviting objections from persons claiming any right over the subject flat. No objections were received by her and, therefore, she proceeded with the sale as a bona fide purchaser for value without notice of any charge over the property whatsoever. Since she is aggrieved with the issuance of the notice by the 1<sup>st</sup> Respondent, she approached the D.R.T. with the S.A. seeking to quash the notice under Sec. 13(4).

7. Per contra, the 1<sup>st</sup> Respondent Bank contends that Respondent Nos. 4 and 5 from whom the Appellant had allegedly purchased the subject flat, had no right whatsoever over it. It is contended that Respondent Nos. 4 and 5 had entered into an agreement with the 3<sup>rd</sup> Respondent who is a director of the 2<sup>nd</sup> Respondent company, on 26/06/1998 with regard to a flat situated on the rear side above the stilt 1<sup>st</sup> floor admeasuring 49.70 Sq. ft.

and specific drawings of the said flat form part of the registered agreement. Under the circumstances, it is explicit that Respondent Nos. 4 and 5 did not have any right title or interest over the subject flat which is situated on the rear above the stilt 2<sup>nd</sup> floor admeasuring 55.74 Sq. ft., and has a totally different design in comparison to the flat which was agreed to be sold by the 2<sup>nd</sup> Respondent to Respondent Nos. 4 and 5. The loan was advanced by the 1<sup>st</sup> Respondent to Respondent Nos. 6 and 7 after due diligence, for the purchase of the subject flat. It is pointed out that the Appellant is taking advantage of the flat No. 5 which was assigned to both flats. The public notice referred to by the Appellant is with regard to flat No. 5 on the 1<sup>st</sup> floor above the stilt. The first Respondent would further contend that the Appellant's claim that she has been in possession of the subject flat since 2001 is belied by the fact that the commencement certificate bearing No. 4757 was issued for the building by the Municipal Corporation only on 06/08/2003.

8. Respondent Nos. 4 and 5 appeared and filed written statements in which they supported the contention raised by the Appellant. It is also stated that the agreement favouring Respondents Nos. 6 and 7 is illegal.

9. The developers did not appear or offer any explanation. After considering the pleadings and evidence on record, the Ld. Presiding Officer dismissed the S.A. but directed Respondent Nos. 2 and 3 to pay ₹1 lakh each to the Appellant towards exemplary costs. The Appellant is aggrieved with the dismissal and hence in appeal.

10. The important question that arises for consideration in this

appeal is whether the subject flat was sold to the Appellant by Respondent Nos. 4 and 5 as alleged. The title deed pertaining to Respondent Nos. 4 and 5 will have to be examined for this purpose. It is seen that a tripartite agreement was executed between the developer as the first part, Respondent Nos. 4 and 5 as the second part and the owners of the land namely Deshmukhs as the third part. The relevant portion of Clause 2 of the agreement marked as exhibit A-12 reads thus:

“2. The tenant purchaser hereby agrees to purchase from the DEVELOPERS and the DEVELOPERS hereby agrees to sell to the tenant purchaser one residential unit bearing flat No. 5 admeasuring 49.70 sq. mtrs. situate on rear side above stilt 1st floor included passage, landing and staircase as shown in the floor plan thereof hereto annexed and marked ‘D’ (hereinafter referred to as ‘the unit’) for the price of ₹2,55,250/- including staircase and landing of the cost proportionate price of the common areas and facilities appurtenant to the premises the nature, extent and description of the common/limited common areas and facilities/limited common areas and facilities which are more particularly described in the second schedule hereunder written .....”(sic)

11. The public notice which was issued by the Advocate for the Appellant marked as exhibit A-15 also refers to the flat purchase by the Appellant as, “flat No. 5, 1<sup>st</sup> floor (stilt floor)”.

12. The agreement of sale executed on 10/07/2008 in favour of the Appellant by Respondent Nos. 4 and 5 marked as Exhibit A-16 however, describes the property sold as, “ .....flat No. 5, stilt 2<sup>nd</sup> floor, area admeasuring 535 sq. ft. i.e. 49.70 sq. mtrs. in a building constructed on the said property and the said flat more particularly described in Schedule ‘B’ ....). The schedule also describes the property as such.

13. The possession note executed between the Appellant and

Respondent Nos. 4 and 5 also describe the flat similarly.

14. The flat that is sold to Respondent Nos. 6 and 7 bears the same number as flat No. 05 but it is on the stilt 2<sup>nd</sup> floor and admeasures 600 sq. ft. i.e. 55.74 sq. mtrs. as described in the sale agreement executed between Respondent Nos. 2 and 3 on the first part, Respondent Nos. 6 and 7 on the second part and Deshmuks on the third part. The sale deed executed in favour of Respondent Nos. 6 and 7 is on 11/05/2005 whereas the sale deed in favour of the Appellant is executed on 26/06/1998. Although the document in favour of the Appellant is prior in point of time, the description of the property differs. It cannot, therefore, be said that the Appellant is the absolute owner of the subject flat No. 5 situated on the rear side of the 2<sup>nd</sup> stilt floor admeasuring 55.74 sq. mtrs. which is the property mortgaged to the first Respondent Bank.

15. The Ld. Counsel for the Appellant has relied upon the decision *Abdulla Ahmed vs. Animendra Kissen Mitter* AIR 1950 SC 15 to argue for the proposition that extrinsic evidence would determine the effect of an instrument where there remains a doubt as to its true meaning, and on the decision in *The Godhra Electricity Co. Ltd & Ano. vs. The State of Gujarat & Ano.* AIR 1975 SC 32, to argue that in case of an ambiguous document, the acts of the parties to the document are to be considered for deciding what was their intention and that the act done under it is a clue to the intention of the parties. The decision of the Hon'ble Supreme Court in *Raj Kumar Rajindra Singh vs. State of Himachal Pradesh & Ors.* AIR 1990 SC 1833 is also relied upon for the purpose of establishing the case of the Appellant.

There is no dispute regarding the propositions in the decisions cited by the Ld. Counsel. However, none of those would apply to the facts and circumstances of the case at hand. The fact that the Appellant was in possession of the subject flat is no help to her as long as she is not able to prove her title over the property. The flat that was sold to the Appellant is totally different from the one that was a mortgage by Respondent Nos. 6 and 7. Under the circumstances, I find no reason to interfere with the findings of the Ld. Presiding Officer in the impugned order. Resultantly, the appeal has no merits and is dismissed.

Sd/-  
Chairperson

mks-1

DRAFT MUMBAI