

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

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

**Appeal No. 94/2013**

**Between**

Bank of India & Ors.

... Appellant/s

V/s.

Rajendra S/o Parshuram Gainkar & Ors.

... Respondent/s

Mr. O.A. Das along with Ms Pallavi Chari, i/b Mr O.A. Das, Advocate for Appellants.

**AND**

**Appeal No. 95/2013**

**Between**

Bank of India & Anr

... Appellant/s

V/s.

Netram Namdeorao Dhobale & Ors.

... Respondent/s

Mr. O.A. Das along with Ms Pallavi Chari, i/b Mr O.A. Das, Advocate for Appellants.

Ms Pradnya Bamne, i/b Mr N. N. Amin & Co., Advocate for Respondent No.6 (Union Bank of India)

**AND**

**Appeal No. 96/2013**

**Between**

Bank of India & Anr

... Appellant/s

V/s.

Ashrf Husain Mian & Ors.

... Respondent/s

Mr. O.A. Das along with Ms Pallavi Chari i/b Mr O.A. Das, Advocate for Appellants.

**AND**

**Appeal No. 97/2013**

**Between**

Bank of India & Anr

... Appellant/s

V/s.

Mahesh S/o Shrikant Joshi

...Respondent/s

Mr. O.A. Das along with Ms Pallavi Chari i/b Mr O.A. Das, Advocate for Appellants.

Ms Pradnya Bamne,i/b Mr N. N. Amin & Co., Advocate for Respondent No.7.

**:- Common Order dated: 07/09/2023:-**

The question that arises for consideration in these appeals are identical and concerns the right with regard to the agreements to sell and consequent mortgages created over the properties which has been later sold to different parties ignoring the earlier registered agreement to sell and the mortgage created. The appeals are, therefore, disposed of by a common order. Some of the parties to this appeal are common and the transactions concern different flats in an apartment complex named, "Amrit Madhu Residency" situated in plot No. 40 Neelkamal Housing Society, Hingna Road, Nagpur. The Bank of India represented by its manager is the Appellant in all the appeals. The builder of the apartment complex namely M/s Suman Amrut Construction, a proprietorship represented by Praful Amrutrao Gajbe, and the owner of the land on which the complex is constructed, namely, Kishor Sukhdeorao Barbade, the developer, are also common Respondents in all these appeals. Some other Respondents are also common and would be referred to in the order at a later stage.

2. On the land belonging to Kishor, the builder Praful in the name of his proprietorship intended to develop and construct an apartment

complex consisting of various residential flats. A plan was approved and the builder and developer started developing the property. They were on the lookout for prospective purchasers and found four persons belonging to the same family namely, Raunaksingh Gurdayalsingh Kande, his wife Sonia Raunaksingh, his sister Sneha Gurdayalsingh and his brother Yujitsingh Gurdayalsingh Kande as prospective purchasers for the flats respectively numbered as SAM 301, SAM 302, GAM 101 and FAM 201. On the basis of the agreement to sell executed by the builder and developer on 16/05/2008 and the prospective buyers, deeds of agreement to sell were prepared and registered with the Sub-Registrar under the provisions of the Registration Act. All the prospective buyers are Respondents in the appeals. On execution of the agreements to sell, the prospective buyers mortgaged the flats intended to be purchased by them with the Appellant Bank of India and obtained loans to be handed over to the builder and developer. The equitable mortgages were created on 22/05/2008 by deposit of the agreements to sell, which were the only title deeds available at that point in time. The father of the above-mentioned Raunaksingh, namely Gurdayalsingh stood as guarantor in all the four mortgage transactions. The said Gurdayalsingh is also a common Respondent in all the appeals. The aforesaid mortgagors defaulted payment of the debt and measures were initiated under the provisions of the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act', for short).

3. The Applicants in Securitisation Applications (S.As) Nos. 30, 31,

32 & 34 /2012 on the files of the Debts Recovery Tribunal, Nagpur (D.R.T.) claim to be bona fide purchasers of the above-mentioned flats from the builder and developer purchased as per registered sale deeds executed in their favour in the year 2009. They all claim to be in actual possession and enjoyment of the flats since 2009. Consequent to public notices in 2012 with regard to the flats occupied by them published by the Appellants in consequence of the Sarfaesi measures being initiated against the borrowers, they approached the Appellants and got information regarding the purported agreements for sale and the mortgage by the deposit of title deeds by the borrowers. The Applicants explained regarding the purchase of the flats by them and also regarding the availing of the loan by way of mortgages. The Applicants in S.As Nos. 30 & 31 of 2012 had created mortgages in favour of the Union Bank of India while the Applicant in S.A. No. 32 of 2012 had created a mortgage with the Housing Development Finance Corporation Ltd. The mortgagees are also made Respondents in the proceedings.

4. Since the Appellants were not willing to stall the Sarfaesi measures initiated by them against the borrowers and guarantor, the Applicants filed the abovementioned S.As. challenging the Sarfaesi measures under the provisions of the SARFAESI Act.

5. The Appellants appeared and opposed the maintainability of the claims raised by the Applicants in the S.As. It was contended by the Appellants that the execution of the sale deeds in 2009 with regard to the flats agreed to be sold to the borrowers by virtue of registered

agreements to sell and consequent mortgages created by deposit of those registered agreements with the Appellant Bank in the year 2008 would render the subsequent sales and mortgages invalid, void and bad in law. It was contended that the agreements for sale in favour of the borrowers were not repudiated, rescinded or cancelled. Hence, it precluded the builder and developer from selling the flats to the Applicants in S.As. It was also contended that mutating the flats in the name of the Applicants and the payment of revenue/taxes would not by itself constitute a valid title in favour of the Applicants. The Appellants have also filed Original Applications (O.As) before the D.R.T. under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ('RDDB & FI Act', for short) for recovery of the debts against the borrowers/guarantor by realising the same from out of the charge created by mortgaging the flats.

6. The Union Bank of India which had financed the purchase of Flat No. SAM 301 and Flat No. SAM 302 in favour of the Applicants in S.As Nos. 31 & 30/ 2012 had appeared in those S.As. and contended that they had conducted all due diligence with regards to the flats before sanctioning the housing loans to the Applicants.

7. None of the borrowers or guarantors appeared to contest the S.As.

8. On considering the rival contentions and the records, the Ld. Presiding Officer concluded that apart from the agreement to sell the flats on its completion, no sale deeds were executed in favour of the borrowers. Hence, none of the borrowers had any right, title, interest

or possession over the flats. On the other hand, the Applicants in the S.As. had in consequence to the registration of sale deeds in their favour, got possession of the property in the year 2009 and were inclusive enjoyment of the flats till the date of filing of the S.As. It was held that unless there was a concluded sale in favour of the borrowers, they did not have exclusive rights, title and interest over the flats so as to create a valid mortgage. Under the circumstances, all the S.As. were allowed and the Sarfaesi measures initiated by the Appellants were quashed.

9. Aggrieved by the allowing of the S.As. and quashing the Sarfaesi measures initiated against the flats, the Appellants have preferred these appeals.

10. Heard the Ld. Counsel appearing for the Appellants and the Ld. Counsel appearing for the Respondents. Records perused.

11. The Ld. Counsel appearing for the Appellants would contend that Sec. 48 of the Transfer of the Property Act embodies the well-established rule of priority founded on law and justice that if a person purports to create by transfer at different times, rights over the same immovable property, such rights cannot co-exist or be exercised to their full extent together and that the later created transfer shall be subject to the previously created rights. The Ld. Counsel submits that the borrowers who are the prior transferees will get priority the moment the agreements of sale are registered and that this right of priority is a direct consequence of Sec. 47 of the Registration Act and Sec. 48 of the Transfer of the Property Act. It is argued that the fact

that a subsequent transferee is a bona fide transferee is not grounds by itself for postponing the rights of a prior transferee. In support of his arguments, the Ld. Counsel relies on a decision of the High Court of Judicature at Madras reported in *S. Arunchalam Asari (died) & Ors vs. Sivan Perumal Asari & Ano.* 1969 MLJ 530. The Ld. Counsel also points out that an agreement under the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 read with the provisions of the Bombay Stamp Act, 1958 makes it mandatory for agreement to sell to be registered and full stamp duty to be paid on the basis of the market value. The Ld. Counsel has relied upon the decisions in *State of Maharashtra & Ors vs. Mahavir Lalchand Rathod & Ano.* 1992 (2) Bom.C.R.1 and in *Veena Hasmukh Jain & Ano. vs. State of Maharashtra & Ors.* (1999) 5 SCC 725 to argue that when there is an agreement to sell a flat, there is a deemed conveyance under the provisions of the Bombay Stamp Act which requires stamp duty to be paid. In the instant case, the agreements to sell were all registered and full stamp duty paid by the borrowers which would be tantamount to a deemed conveyance in their favour and cannot be upset by a subsequent registered sale deed in favour of a third party. Hence, it is pointed out that the Ld. Presiding Officer has committed an error in allowing the S.As. The impugned judgments and orders may, therefore, be set aside and the appeals allowed, submit the Ld. Counsel for the Appellant.

12. Per contra, the Ld. Counsel appearing for the Union Bank of India has vehemently opposed the appeal by pointing out that the sale never concluded in favour of the borrowers and that the borrowers

had entered into an agreement with the builder and developer much prior to the commencement of the construction of the apartment complex and the agreement clearly states that the sale deed is agreed to be executed and registered after full and final settlement of the accounts upon receipt of the bank loan by the borrowers or within one month of the date of agreement whichever is earlier. The possession of the property was agreed to be delivered only at the time of the execution of the sale deed. The agreement also specified that the time is the essence of the contract. The borrower had also agreed to pay the corporation taxes or any other government/semi-government dues with respect to the apartment. Failure on the part of the borrowers to fulfil their obligation to pay the balance amount and get the sale deed registered and possession delivered would result in the agreement becoming invalid. The borrowers, therefore, have no right title or interest over the flats. Consequently, the Appellants also will not have any right as mortgagees over the flats.

13. The argument of the Ld. Counsel for the Appellant is not acceptable for the reason that only an agreement for the sale of the property with delivery of possession can be construed as a convenience under section 2G of the Bombay Stamp Act. Explanation I to Article 25 of Schedule I to the Bombay Stamp Act reads thus:

*“Explanation I.--For the purpose of this article, where in the case of an agreement to sell an immovable property, the possession of any immovable property is transferred to the purchaser before the execution, or at the time of execution, or after execution of such agreement without executing the conveyance in respect thereof, then such agreement to sell shall be deemed to be a conveyance and stamp duty thereon shall be leviable accordingly;”*

14. It is, therefore, clear that an agreement to sell can be deemed to



be a conveyance only if such an agreement to sell immovable property is coupled with handing over possession of the property to the purchaser. Hence, the fact that stamp duty was paid on the agreement to sell in favour of the borrowers will not give any right to the borrowers and it ended it cannot be construed as a conveyance unless it is coupled with handing over of possession. The agreements to sell in these cases would further indicate that there is no concluded contract. Paragraphs 4 and 5 of the agreements read thus:

“4. The sale deed is agreed to be executed and registered after full and final settlement of accounts upon receipt of a bank loan by the Party No. 2 with Party No. 1 or within one month from the date of this agreement whichever is earlier.

5. The possession of the property agreed to be delivered at the time of execution of sale deed.”

15. There is no such compliance by the parties to the agreements.

Moreover, identical paragraph 13 in the agreements reads as follows:

“13. The Party No. 2 Agrees to pay the corporation taxes, cases of any other Govt. or Semi-Govt. dues with respect to her/his apartment either jointly or individually as the case may be.”

16. The agreements would also make it clear that time is the essence of the contract. Admittedly, the borrowers did not get possession of the flats within the time stipulated although the debt was sanctioned and received from the bank. The borrowers have also not paid any tax for the building. This would indicate that the agreements were never acted upon and it is interesting to note that despite these agreements being produced before the bank deposited them as title deeds, the bank did not pursue the matter to see if the possession was handed over and the sale deeds were executed and registered in accordance with the agreement. A reading of the agreements would indicate that

the flats remain with the seller until the sale deed is executed and possession delivered. No action for specific performance of the contract has been sought and it is also time-barred by limitation. It is also pertinent to note that the borrowers were all members of the same family and it appears that the agreements were executed in their favour with the specific intention of availing the loan. The collusion between the borrowers and the builders/developers cannot also be ruled out. No action whatsoever was taken when the flats were sold to the Applicants. They have been in exclusive possession and enjoyment of the property ever since the sale deeds were executed in their favour. The Ld. Presiding Officer was therefore justified in passing the order that he made. I find no reason to interfere. The appeals are, therefore, to be dismissed and I do so.

Resultantly the impugned judgments and orders are upheld and confirmed. The appeals are dismissed.

Sd/-  
Chairperson

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