

BEFORE THE DEBTS RECOVERY
APPELLATE TRIBUNAL, AT: MUMBAI

Present: Mr. Justice Ashok Menon, Chairperson

Appeal No. 172/2014

Between

Bank of Baroda ... Appellant/s
V/s.
Rukunuddin G Sheikh & Ors. ...Respondent/s
Mr. Nilesh Bamne, i/b M/s. A.R. Bamne & Co., Advocate for
Appellant.
Mr. Puneet Gogad, Advocate for Respondent Nos.1 & 2
Mr. Prashant Pandit along with Mr. Jay Pandit, Advocate for
Respondent Nos. 4 (a) to 4 (c).
Mr. Rajesh Nagory, i/b M/s. T.N. Tripathi & Co., Advocate for
Respondent No.6.

AND

Appeal No. 95/2014

Between

Paramjit Sales & Service Pvt. Ltd. ... Appellant/s
V/s.
Rukunuddin G Sheikh & Ors. ...Respondent/s
Mr. Rajesh Nagory, i/b M/s. T.N. Tripathi & Co., Advocate for
Appellant.
Mr. Puneet Gogad, Advocate for Respondent Nos.1 & 2
Mr. Nilesh Bamne, i/b M/s. A.R. Bamne & Co., Advocate for
Respondent No.3
Mr. Prashant Pandit along with Mr. Jay Pandit, Advocate for
Respondent Nos. 5 (a) to 5 (c)

-: Common Order dated: 06/10/2023:-

These appeals impugn the order dated 29/04/2014 in Misc. Application (M.A.) No. 22 of 2012 filed by two persons named Rukunuddin G. Sheikh and Naushad G. Sheikh in Original Application (O.A.) No. 51 of 1997 on the files of the Debts Recovery Tribunal-I, Ahmedabad (D.R.T.) directing the Recovery Certificate No. 683 issued by the D.R.T. to be modified, and sent back to the Recovery Officer for execution in the Recovery Proceedings. Appeal No. 95/2014 was filed by the Certificate Holder, Dena Bank which later merged with the Bank of Baroda. Appeal No. 172/2014 was filed by the auction purchaser who had purchased the secured property as the highest bidder. The Appellants are aggrieved, hence the appeal.

2. Dena Bank had filed the aforesaid O.A. against the late Anilbhai Kantilal Patel and late Kusumben Anilbhai Patel for recovery of various credit facilities availed by the company named Abheeneermay Packaging Pvt. Ltd. They secured the debts of the company by executing various security documents in favour of the bank. By way of further security, on 05/10/1989, Anilbhai created an equitable mortgage in respect of his 1/6 share over the freehold land lying near V.S. Hospital, Ellisbridge forming part of survey Nos. 6 and 7/1 of Mouje, Mandalpur and part of sub-plot Nos. 2 and 3 of final plot No. 543 of Ellisbridge Town Planning Scheme No. III admeasuring 637.50 m² together with the building constructed thereon (mortgaged property). The borrowers/ mortgagors defaulted payment of the debt and the bank filed the aforesaid O.A. on 27/02/1997 for recovery of a sum of ₹14,59,108.95 together with interest to be realised from the

defendants and from out of the mortgaged securities. The O.A. was contested by the defendants and ultimately allowed vide judgment and order dated 07/03/2001. The creation of the equitable mortgage by Anilbhai was upheld and a Recovery Certificate was issued in favour of the bank. The mortgaged property was attached vide order dated 05/08/2003, and Anilbhai was prevented from transferring the property. After completing the procedure as per the Rules, the Ld. Recovery Officer issued orders dated 20.04.2007 for auctioning the subject property for a reserve price of ₹30,30,000/- on 18/07/2007. The sale did not take place on that day as scheduled and was rescheduled to 03/08/2007.

3. The Certified Debtor (CD) Anilbhai's, brothers namely Suresh Kantilal Patel, Mahesh Kantilal Patel, Hemendra Kantilal Patel, Grish Kantilal Patel and Romesh Kantilal Patel filed third-party objection through their Counsel raising a claim over the mortgaged property as co-owners. However, the application was not pursued and pressed for a hearing before the Ld. Recovery Officer and the auction took place as scheduled. Paramjit Sales and Services Pvt. Ltd., the Appellant in Appeal No.95/2014 was declared the highest bidder for having knocked the deal for ₹31 lakhs. The sale was confirmed and a sale certificate was issued on 14/09/2007, symbolic possession of the mortgaged property was taken on 21/10/2008 and the sale certificate was registered with the Sub-Registrar as document No. 7246 on 05/06/2009.

4. Records would reveal that the mortgagor Anilbhai and his five brothers had divided the property among themselves into six equal

shares in July 2006 and after deducting an extent of land measuring 41.70 sq. mtrs acquired by the Ahmedabad Municipal Corporation for road widening from out of the total 637.50 sq. mtrs, the balance area was equally divided into sub-plots of 202.20 sq. mtrs each. The Appellants would contend that such division of the land was done without the consent or sanction of the Ld. Recovery Officer has no legal sanctity and hence, such a division by metes and bounds is not binding on the Appellants. The brothers of the Certified Debtor Anilbhai also executed a registered deed No.12929 on 14/12/2009 before the Sub-Registrar assigning their properties to aforesaid Rukunuddin G. Sheikh and Naushad G. Sheikh who are the Applicants in M.A. No. 22 of 2012 and Respondents Nos. 1 & 2 in both these appeals. A public notice was also published in the newspaper on 21/03/2010 inviting objections regarding the sale from the public. Both the Appellants had raised objections concerning the sale. It is pointed out that Respondents Nos. 1 & 2 had sufficient notice about the claim of the mortgagee bank and the auction purchaser (Appellants) and despite that, proceeded with the sale.

5. The brothers of Anilbhai filed five separate civil suits before the City Civil Court, Ahmedabad seeking an injunction to restrain the auction purchaser from entering the property or alienating the same. The Applicants in the M.A. were also made parties to those civil suits. The bank and the auction purchaser appeared in the civil suits and filed applications for dismissal of the suits under Order VII Rule 11 of the Code of Civil Procedure (CPC). Vide order dated 30/11/2011 the civil suits were rejected by the Court. The plaintiffs in the suits

challenged the rejection of the suits before the Hon'ble High Court of Gujarat by filing first appeals and those appeals were all dismissed on 13/12/2011. The Applicants in the M.A. had through their counsel submitted to the Hon'ble High Court as being bona fide purchasers of a part of the suit properties for value and that there was confusion concerning the demarcation and identification of the properties. It was also submitted that an application was filed before D.R.T., Ahmedabad in O.A. No. 51/1997 for clarification and that the same is pending consideration. Given the rival submission made before the Hon'ble High Court, it was observed that a method was adopted not only to stall the recovery proceeding by the bank but ingenious method of filing suits, though such suits would not be maintainable given the embargo under the RDDB & FI Act. The Hon'ble High Court also observed that even if assuming that there was some kind of confusion or dispute concerning the exact identification and demarcation of the land, it could have been sorted out before the D.R.T. at that time when the auction was held.

6. It is further pointed out that CD Anilbhai had filed a Review Application No. 01 of 2010 before the D.R.T. challenging the judgment and order dated 07/03/2001 raising a contention regarding the mortgage and the area comprised in the mortgage, which was dismissed on 14/10/2011. The brothers of the CD filed appeals before the Presiding Officer, D.R.T. challenging the auction order passed by the Ld. Recovery Officer. The applications for condonation of delay to receive those appeals were dismissed by the Ld. Presiding Officer on 06/12/2012. The auction has thus now become final after

all the challenges made against it were futile.

7. After attempts made by the bothers of the CD failed before the Civil Court, the High Court, the Recovery Officer and the Presiding Officer, Respondents Nos. 1 & 2 filed civil suits before the City Civil Court Ahmedabad seeking declaration and permanent injunction concerning the right of the auction purchaser's claim over the property. The auction purchaser contested those suits by filing applications under Order VII Rule 11 of the CPC and consequently, those suits were also rejected by the Civil Court vide order dated 28/03/2012. No declaration whatsoever challenging the right title and interest of the auction purchaser over the property could, therefore, be obtained by Respondents Nos. 1 & 2 or their predecessors -in - interest.

8. After the attempts by Respondents Nos. 1 & 2 and their assignors failed, M.A. No. 22/2012 filed before the D.R.T. under Sec. 26(2) read with Sec. 19(25) of the RDDB & FI Act by Respondents Nos. 1 and 2 seeking to modify the Recovery Certificate concerning the extent of the property and to give necessary directions to the Ld. Recovery Officer for executing the Certificate. In the aforesaid application, it is contended by the Applicants that the measurements of the mortgaged property were wrongly described in the Recovery Certificate which has come to the notice of the applicants only when the auction purchaser of the alleged mortgaged property attempted to encroach over the property owned by the applicants as well. The co-owners of the larger extent of the property had earlier sold 3042 Sq. yards by registered sale deed to Maharana Pratap Centre Owners

Association, leaving each co-owner an individual share, the extent of which comes to 507 Sq. yards of undivided share. Mutation in consequence to the said sale was carried out in the village records vide entry dated 3393 on 11.05.1982. It is pointed out that the entire extent of land mortgaged, measuring 636.50 sq. mtrs is not owned by the original CDs who are Respondent Nos. 2 to 4. The contention is that an extent of 244 sq. mtrs along with the construction standing thereon alone had remained and belonged to the Mortgagors. It is pointed out that the auction purchaser was finding it difficult to identify the exact location of the property purchased in the auction. And on request made by the officers of the bank, a receiver was appointed by the Ld. Recovery Officer to hand over possession of the property to the auction purchaser. However, the receiver also could not succeed in identifying the property. The bank thereafter sought the help of a private agency to identify the mortgaged property which too, was not successful. It is contended that the private agency had, on the contrary, reported that the mortgagor owns only 244.36 sq. mtrs of land.

9. The civil suits filed by the co-owners of the mortgagor resulted in the rejection of the plaint for the reason that it was within the jurisdiction of the D.R.T. to decide the issue. It is in such circumstances that Respondents Nos. 1 and 2 filed the M.A. to rectify the sale deed and the Recovery Certificate. Unless such modification in connection to the measurement of the mortgaged property is made, the Recovery Officer cannot implement the order, state those Respondents.

10. The bank opposed the Misc. Application and filed a detailed reply stating that there is no fault or mistake in the Recovery Certificate issued by the D.R.T. It is also contended that the application is barred by limitation. Further, it is contended that the civil suits filed by the co-owners and the Applicants were all rejected and the appeals filed by the co-owners before the Presiding Officer D.R.T. also proved futile. While disposing of the O.A., the D.R.T. has held that the mortgage was valid and binding upon the mortgagor. It is contended that the brothers of the mortgagor had colluded with him to thwart the action and claims of the bank and the auction purchaser.

11. The auction purchaser had also opposed the Misc. Application and contended that the provisions under section 26 (2) of the RDB Act provide for only the correction of any clerical or arithmetical mistake. There is no such mistake in the Recovery Certificate which needs to be corrected. The property was attached in August 2003 and the sale in favour of the Applicants to the Misc. Application is only consequent to the attachment. The Applicants cannot therefore maintain the Misc. Application under the provisions of section 19 (25) of the RDB Act.

12. The Ld. Presiding Officer found that the Misc. Application was maintainable as the Applicants could not have preferred an appeal challenging the judgment and order in O.A. No. 51 of 1997. On the question of limitation, the Ld. Presiding Officer observed that though the Applicants were aware of the dispute as early as 2010, litigations were pending before the civil court and also the High Court. Only when the auction purchaser attempted to take possession of the

property which was purchased by the Applicants in the M.A. did they have a cause of action to challenge the correctness of the Recovery Certificate under the provisions of section 19 (25) of the RDBB & FI Act. The Ld. Presiding Officer also came to the conclusion that the deceased third Respondent Anilbhai had right only over a property measuring 244.36 sq. mtrs which is one-sixth extent of the total property belonging to him jointly with his brothers. It was observed that the mortgagor could not have mortgaged a property over which he had no right or title. It is observed that the Applicants did not purchase the share of the third Respondent in the property. The brothers of the third Respondent were neither borrowers nor guarantors nor mortgagors. Nothing would, therefore, prevent them from assigning their shares of properties. Since the Recovery Certificate mentions a larger extent of property over which the Certified Debtor does not have exclusive rights, the Recovery Certificate is required to be modified. The auction purchaser and the bank are aggrieved by this order and hence, in appeal.

13. The Ld. Counsel appearing for the Appellant auction purchaser relies upon a catena of decisions in support of his argument. In *Janak Raj vs. Gurdial Singh & Ano.* (1967) 2 SCR 77, it is held that an auction purchaser was entitled to a confirmation of the sale though after the holding of the sale, the decree has been set aside. It is observed that the policy of legislature seems to be that unless a stranger auction purchaser is protected against the vicissitudes of the fortunes of the suit, the sale in execution would not attract customers, and it would not be in the interest of the borrower and creditor alike if sales were

allowed to be impugned merely because the decree was ultimately set aside or modified.

14. In *Jantha Textiles & Ors vs. Tax Recovery Officer & Ano.* (2008) 12 SCC 582, it is held that the established principle of law is that a third-party auction purchaser's interest in the auction property continues to be protected notwithstanding that the underlying decree is subsequently set aside or otherwise.

15. In *Gurjoginder Singh vs. Jaswant Kaur & Ano.* (1994) 2 SCC 368, it was held that the status of a bonafide purchaser in an auction sale in execution of decree to which he was not a party stands on a distinct and different footing since he does not derive his title from either the decree-holder or the judgment debtor and therefore, restitution may not be granted against him.

16. In *Sadashiv Prasad Singh vs. Harendar Singh & Ors.* (2015) 5 SCC 574, it is held that once the sale is confirmed by the Authority and certain rights have accrued in favour of the auction purchaser, those rights cannot be extinguished except in cases where the said purchaser can be assailed on grounds of fraud or collusion.

17. Concerning the powers of the D.R.T. under Sec. 19(25) of the RDB Act, the Hon'ble Supreme Court has in *Standard Chartered Bank vs. Dharminder Bhoji & Ors.* (2013) 15 SCC 341 held that the provisions under Sec. 19(25) makes it quite clear that the Tribunal has been given powers under the statute to pass such other orders and give such directions to give effect to its orders to prevent abuse of its process or to secure ends of justice. Thus, the Tribunal is required to function within its statutory parameters. The Tribunal does not have any

inherent powers and it is limpid that Sec. 19(25) confers limited powers. The Ld. Counsel appearing for the Appellants would, therefore, submit that the impugned order needs to be set aside.

18. The main contention which needs to be gone into in these appeals is whether the property over which the mortgage was created has been properly identified. It is pertinent to note from the records available that in 1971 a larger extent of property was divided through the partition deed and the mortgagor Anilbhai together with his brothers who had $\frac{1}{3}$ share each, were allotted some property. The mortgagor Anilbhai created a mortgage in favour of the bank regarding the entire property belonging to him and his brothers and on 06/09/1989 a letter was issued confirming the mortgage. On 27/02/1997, the O.A. was filed by the bank against the Defendants therein for recovery of the amount. The O.A. was allowed and a Recovery Certificate was issued. Recovery Proceedings were initiated and the property was supposedly attached on 05/08/2003. The Recovery Officer passed an order on 20/04/2007 for the sale of the property and the auction was conducted on 18.07.2007. Respondents Nos. 1 & 2 who are the Applicants in the M.A. No. 22/2012 raised the claim before the Recovery Officer as assignees of $\frac{5}{6}$ share of the property belonging to the brothers of the mortgagor. That objection was not adjudicated upon and in the auction that was conducted on 03/08/2007, the Appellant in Appeal No. 95 of 2014 came out as the successful bidder. The sale was confirmed and the sale deed was registered. In 2006, the brothers of the mortgagor partitioned the property amongst themselves and the shares allotted to the brothers

were assigned to the Applicants in M.A. No. 22/2012 vide separate assignment deeds. A notice was published regarding the purchase and the auction purchaser raised an objection claiming that he was the absolute owner of the property. The brothers of the mortgagor filed civil suits which were rejected. The appeals filed by the brothers of the mortgagor also went in vain. Thereafter, they challenged the sale with an application for condonation of delay. The delay was not condoned. Respondents Nos. 1 & 2 filed a civil suit which too was rejected holding that D.R.T. has jurisdiction. The Applicants, therefore, did not have any option but to approach the D.R.T. with an application under Sec. 19(25). The application was allowed and the portion belonging to the brothers of the mortgagor was excluded from the charge.

19. The earlier Recovery Certificate pertains to the entire property having an extent of 636.50 sq. mtrs which admittedly belongs to the mortgagor and his five brothers. He could, therefore, have only mortgaged $\frac{1}{6}$ share of the property. The extent shown is prior to the sale of a piece of land having an extent of 3042 sq. yards to Maharana Pratap Centre Owners Association. The said Association has also mutated the property sold to them, in the year 1982. That apart, a portion of land having an extent of 41.70 sq. mtrs was acquired by the Municipality for widening the road. The bank pretends to be ignorant about the registered document executed before the mortgage. The execution of widening of the road was also prior to the mortgage.

20. It is true that there is a mortgage in favour of the bank but it is only $\frac{1}{6}$ of the property which could have been mortgaged. The mortgagor could not have under any circumstances mortgaged a larger

extent of the property belonging to the siblings jointly. It has already come out in evidence that the exact property which has been purchased by the auction purchaser could not be identified. The siblings of the mortgagor are not in any way precluded from entering into a document of partition subsequent to the mortgage for dividing the property as the mortgage is not with their consent. There is also no embargo for them to sell their share to a third party. Even if an auction purchaser purchases a property jointly owned by the mortgagor and others, he can only get an undivided share of the mortgagor in the property and would, therefore, have to seek for partition of the property to get possession.

I am, therefore, of the opinion that there is no infirmity in the impugned order modifying the Recovery Certificate. 244.36 sq. mtrs is the extent of the land to which the mortgagor is entitled and that alone could have been sold in auction. The Appeals are, therefore, dismissed.

Sd/-
Chairperson

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