

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

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

**Misc. Appeal No. 33/2010**

**Between**

Tejal Chetan Rathod  
V/s.

... Appellant/s

Central Bank of India & Ors.

... Respondent/s

Tejal Rajmani Verma along with Ms Kinjal Jain, i/b M/s. Navdeep Vora & Associates, Advocate for Appellants.

Mr T. N Tripathi, i/b M/s T. N. Tripathi & Co., Advocate for Respondent No. 1.

Mr Bhavik Jain, i/b K. R. Shekhawat, Advocate for Respondent No. 6.

**-: Order dated: 09/10/2023:-**

The Appellant impugns the judgment and order dated 21/01/2010 in Miscellaneous Application (M.A.) No. 62 of 2009 on the files of the Debts Recovery Tribunal-II, Mumbai (D.R.T.) whereby the application filed by the Appellant under Section 19(25) of the Recovery of Debts Due to Banks & Financial Institutions Act ('RDDB & FI Act', for short) was dismissed.

2. The facts and brief are this:

Flat No. 201, 2<sup>nd</sup> floor, C-Wing, Building No. 2 Amazon Park, village Eksar, Taluka Borivali (East) Mumbai 400092, (subject flat) was allegedly agreed to be sold by the 6<sup>th</sup> Respondent builder namely M/s R J Constructions, a firm, to the 4<sup>th</sup> Respondent through an unregistered agreement for sale executed on 06/01/1999 for a total sale consideration of ₹2,675,000/-, and ₹ 26,750/- was paid as advance

sale consideration. Payment of the balance amount was defaulted as a result of which the 6<sup>th</sup> Respondent terminated the agreement and issued a lawyer notice on 29/11/2007 informing the 4<sup>th</sup> Respondent about such termination. Respondents Nos. 2 to 5 had availed loan from the 1<sup>st</sup> Respondent bank on 28/11/2000 and the 4<sup>th</sup> Respondent allegedly created an equitable mortgage by depositing the agreement for sale that was executed in his favour by the 6<sup>th</sup> Respondent. Repayment of the debt was defaulted and recovery action were taken. The 1<sup>st</sup> Respondent bank filed Original Application (O.A.) No. 365 of 2003 before the DR.T. for recovery of the amount. Vide judgment and order dated 09/09/2005, the O.A. was allowed and recovery of the outstanding debt with a charge over the mortgaged flat was allowed. A Recovery Certificate was issued on 05/12/2005. Thereafter, the bank took symbolic possession of the subject flat under the provisions of the SARFAESI Act on 13/03/2006. Recovery Proceedings were also filed before the Recovery Officer. After issuing a demand notice to the Certified Debtors, an attachment warrant was issued on 13/07/2006 ordering the attachment of the subject flat.

3. The Appellant claims to have purchased the subject flat on 06/02/2008 from the builder 6<sup>th</sup> of the Respondent. She claims to be a bona fide purchaser of the property without knowledge of the prior proceedings or the O.A. the issuance of the Recovery Certificate or the attachment. The Appellant came to know about the proceedings against the subject flat when she found a notice affixed in front of the flat. The Appellant filed an intervention application before the Recovery Officer on 18/06/2009. The Appellant had also addressed

a letter to the 1<sup>st</sup> Respondent bank on 05/08/2009 giving the details of the documents she has with her regarding the subject flat. The Ld. Recovery Officer refused to take any action on the intervention application filed by the Appellant. Hence, the Appellant approached the Ld. Presiding Officer with an application under section 19 (25) of the RDDB & FI Act.

4. The Ld. Presiding Officer by the impugned order observed that the O.A. was allowed in favour of the 1<sup>st</sup> Respondent bank vide judgment dated 09/09/2005 declaring the mortgage in favour of the 1<sup>st</sup> Respondent by the 4<sup>th</sup> Respondent who had entered into an agreement for sale with the 6<sup>th</sup> Respondent. The bank also took symbolic possession of the property on 23/12/2005. The attachment warrant was issued on 13/07/2006. It was observed that the Applicant/Appellant claims to have purchased the subject flat after the aforesaid events and therefore, in his view, the Applicant has no locus to apply. It is also observed that the Applicant seems to have purchased the property knowing about the transaction between the 6<sup>th</sup> Respondent with the 4<sup>th</sup> Respondent and they entering into an agreement for sale. It is stated that the Appellant cannot be heard about the infirmities in the creation of the mortgage. The Ld. Presiding Officer also relied upon a receipt produced by the 1<sup>st</sup> Respondent as Exhibit 28 dated 06/01/1999 in the O.A. wherein the 6<sup>th</sup> Respondent builder has acknowledged receipt of the entire sale consideration. It seems that the bank had also produced copies of letters dated 01/12/2000 addressed by the bank to the builder and the builder's reply dated 14/12/2000 stating that the builder would inform the

society as and when the societies formed, about the mortgage of the subject flat. The Ld. Presiding Officer also took exception to the possibility of an assignment in favour of the Applicant because a property valued at ₹44 lakhs was purportedly sold for only ₹30 lakhs, that too, against an advance payment of only ₹2 lakhs. According to the Ld. Presiding Officer, there seems to be an apparent collusion between the builder and the Applicant. The cancellation of the agreement to sell is eight years after the Tribunal declared the mortgage. Hence the application was dismissed. The Appellant is aggrieved and hence in appeal.

5. Heard the Ld. Counsel appearing for the Appellant, the Ld. Counsel appearing for the 1<sup>st</sup> Respondent bank and also the Ld. Counsel appearing for the 6<sup>th</sup> Respondent builder. Records perused.

6. The important question that arises for consideration in this appeal is whether there was a valid mortgage created in favour of the 1<sup>st</sup> Respondent by depositing an unregistered agreement for sale dated 06/01/1999 by the 4<sup>th</sup> Respondent for creating an equitable mortgage. The question would also arise as to whether the unregistered agreement for sale would confer any right title or interest over the mortgagor concerning the subject flat given specific bar under section 54 of the Transfer of Property Act, 1882 (T.P. Act) and under section 4 of the Maharashtra Ownership Flats Act, 1963 and under section 17 (1) of the Registration Act, 1908. It is pointed out that the Ld. Presiding Officer had while dismissing the O.A., done so without even the unregistered/ insufficiently stamped agreement for sale being annexed and tendered in evidence to the O.A. The Ld. Counsel

appearing for the Appellant submits that even if the said unregistered/unstamped agreement for sale had been produced, it could not have been admitted in evidence given section 34 of the Bombay Stamp Act, 1958 and the Registration Act. It is also pointed out that there was no prayer for the declaration of the mortgage in the O.A. It is submitted that when the mortgage itself was not valid all subsequent orders concerning the passing of a charge decree in the O.A., the issuance of the Recovery Certificate, the filing of the Recovery Proceedings No. 380/2005 and the warrant of attachment would be legal, void ab initio and deserves to be set aside exercising jurisdiction under section 19 (25) of the RDB Act.

7. The Ld. Presiding Order has in the impugned judgment relied upon the decision of *Syndicate Bank vs. Estate Officer, A.P.I.I.C. Ltd. & Ors AIR 2007 SC 3169* to conclude that the registration of the agreement for the sale of the subject flat was not required to create an equitable mortgage. The principal question that arose for consideration for that decision was whether for satisfying the requirements of Sec. 58 (f) of the T.P. Act, was it necessary to deposit documents showing complete title or good title and whether all the documents of title to the property are required to be deposited. It was observed that a title which is subordinate to that ownership and which need not be created by reason of a registered deed of conveyance may at times create a title. It is, however, also held that complete title over a property can be acquired by a vendee only when a deed of sale is executed and registered by the vendor in terms of Sec. 54 of the T.P. Act. In the instant case, the mortgagor admittedly had no title over the

property. The only right that he had was based on an agreement for sale which was not even registered or duly stamped. The only right that the mortgagor had over the subject flat was to enforce specific performance of the contract in view of the unregistered agreement for sale and also due to lapse of time the right of the mortgagor against the vendor is not capable of being executed. Under the circumstances, the bank as a mortgagee, would get no saleable right over the subject flat. The debt due from the borrowers cannot, therefore, be enforced by a charge decree. Despite payment of the entire sale consideration, as claimed by the first Respondent, no action is taken for executing a deed of conveyance. Any contract of sale which is not a registered deed of conveyance would fall short of the requirement of sections 54 & 55 of the T.P. Act and will not confirm any title nor transfer any interest in the immovable property except to the limited right granted under Sec. 53A of the T.P. Act. The mortgagor herein is not in possession of the property and cannot, therefore, enforce a right of specific performance nor can any right be protected under Sec. 53A. The Hon'ble Supreme Court has in *Narandas Karsondas vs. S.A. Katam & Ano.* (1977)3 SCC 247 had observed that a contract of sale does not of itself create any interest in, or charge on, the property. This decision has been followed in a later decision of the Supreme Court in *Suraj Lamp & Industries Pvt. Ltd. vs. State of Haryana & Ors.* AIR 2012 SC 206 and it was held that a transfer of the immovable property by way of a sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right title or interest in an immovable property can be

transferred.

On the upshot of the discussion made above, it is to be concluded that the fourth Respondent mortgagor did not have any right title or interest over the subject flat sufficient to create a mortgage in favour of the first Respondent. He did not even have possession of the property. Hence, it was an error on the part of the D.R.T. to have granted a charge decree in favour of the first Respondent Bank in O.A. No.365 of 2003 with regard to the subject flat. The judgment and order of the D.R.T. dated 09/09/2005 granting a declaration with regard to the existence of a mortgage is, therefore, recalled and M.A. No. 62 of 2009 stands allowed.

Hence, the Appeal is allowed.

Sd/-  
Chairperson

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