

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2714 OF 2015**

Mr Dipak Digambar Naik and others	... Petitioners
v/s	
Bank of Maharashtra and another	... Respondents

Mr Rafiq Peermohammad with Mr Gaurang Kinkhabwala, Ms Sonali Jain and Ms Shreya Deshpande i/b M/s Kaikini Phadke and Associates for Petitioners.

Ms Rathina Marvarman for Respondent No.1.

Mr M.S. Bharadwaj for DRAT.

**CORAM: V.M. KANADE &
B.P. COLABAWALLA JJ.**

Reserved on : 29th July, 2015

Pronounced on : 10th August, 2015

JUDGMENT / Per B.P. Colabawalla J. / :-

1. *“Hope springs eternal in the human breast”* is the best way to describe this Petition. This Petition is one more attempt, in

many, to try and stall the measures taken by the Respondent – bank under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**the SARFAESI Act**). For the reasons stated hereafter, we have no hesitation in dismissing this Petition and imposing heavy costs on the Petitioners.

2. In this Writ Petition, the Petitioners have assailed the order dated 12th March, 2015 passed by the DRAT, Mumbai in Appeal No.64 of 2014. This Appeal was filed by the Respondent – Bank against the order dated 8th January, 2014 passed by the DRT, Pune under which Petitioner Nos.1 and 2 were allowed to redeem the secured property bearing *Plot No.41, Ex-Servicemen Co-op. Society, CTS No.406, S.No.48/2, Paud Road, Village Erandwane, Pune, consisting of basement, ground, first and second floor* (**the mortgaged property**), for a sum of Rs.1,65,05,000/-, even though admittedly, the dues of the Bank, for which this property was secured, was an amount of Rs.23,12,15,977.99 as on 18th February, 2014. We were informed by the learned counsel appearing for the Respondent –

Bank that as on date, the dues owed to the Respondent – Bank are over Rs.30,00,00,000/-.

3. When arguments were first heard in this Writ Petition, the Petitioners submitted that they had filed M.A. No.159 of 2015 in Appeal No.64 of 2014 filed by the Respondent – Bank inter alia seeking to restrain the Respondent – Bank from taking physical possession of the mortgaged property. It is the case of the Petitioners that this Misc. Application was argued by the Petitioners on 12th March, 2015 and no arguments were advanced by them in Appeal No.64 of 2014 which was filed by the Respondent – Bank. In these circumstances, it was urged before us that the DRAT, Mumbai could not have passed the order dated 12th March, 2015 allowing the Appeal filed by the Bank when in fact it was only the Misc Application that was argued and heard by the DRAT. It was therefore submitted that the order of the DRAT dated 12th March, 2015 was vitiated on the grounds of impropriety and breach of principles of natural justice and required interference by us in our extraordinary writ jurisdiction.

4. In view of the specific stand taken by the Petitioners, we had directed the DRAT, Mumbai to submit a report to this Court. The DRAT has submitted its report in which it is mentioned that both, the Appeal (Appeal No.64 of 2014) as well as the Miscellaneous Application (M. A. No.159 of 2015) were disposed of on 12th March, 2015. Even otherwise, from the record, we find that counsel for the Petitioners as well as the Respondent – Bank were present and were heard by the DRAT as recorded in the impugned order. In fact, a separate order has been passed in M. A. No.159 of 2015 by the DRAT on the same day which categorically records that since the Appeal itself is disposed of, nothing survives in the Miscellaneous Application, and the same is also disposed of accordingly. In view of the specific orders passed by the DRAT, as well as the report submitted to this Court, we are unable to take cognizance of the argument on behalf of the Petitioners that only M. A. No.159 of 2015 was argued on 12th March, 2015 and that Appeal No.64 of 2014 was allowed without hearing the Petitioners.

5. Be that as it may, and not to give an opportunity to the

Petitioners to make any grievance about the fact that they were allegedly not heard, we have heard the Petitioners in this Writ Petition and are clearly of the view that the impugned order of the DRAT dated 12th March, 2015 requires no interference by us under article 226 of the Constitution of India. In our view, the DRAT has correctly set aside the order passed the DRT, Pune dated 8th January, 2014 under which the DRT allowed Petitioner Nos.1 and 2 to redeem the mortgaged property for a sum of Rs.1,65,05,000/-, when in fact, the dues of the Respondent – Bank for which this property was secured, were more than Rs.23,00,00,000/- as on 18th February, 2014.

6. The brief facts for the purpose of disposing of the present Petition are that the Respondent – Bank had sanctioned certain credit facilities to Petitioner No.3 alongwith Petitioner No.1 who was the guarantor for the said transaction. The mortgaged property was owned by one Smt Vimala Naik (who expired on 4th September, 2010), and Petitioner No.1. This property was mortgaged by the said deceased alongwith Petitioner No.1 for securing the dues of the Respondent – Bank. As defaults were committed in repayment of the

facilities, the Respondent – Bank initiated proceedings under the SARFAESI Act by issuing a notice dated 21st April, 2010 under section 13(2) thereof. In furtherance of the proceedings under the SARFAESI Act, the Tahasildar and Executive Magistrate, Pune City, Pune, Khadakmal Ali, Pune (Respondent No.2 herein), passed an order dated 11th September, 2012 under section 14 of the SARFAESI Act. This order under section 14, was challenged by Petitioner Nos.1 and 2 before the DRT, Pune, by filing Securitization Application No.121 of 2012. It is important to note that as recorded in the order of the DRT, Pune, creation of the mortgage has not been disputed and there is a finding of fact in the said order that the said property was mortgaged by Smt Vimala Naik alongwith Petitioner No.1 who were the owners thereof.

7. The contention raised by Petitioner Nos.1 and 2 before the DRT, Pune was that they were ready to redeem the mortgaged property and therefore, there was no question of proceeding further under the SARFAESI Act. It was contended by Petitioner Nos.1 and 2 that the mortgaged property was valued at Rs.1,65,05,000/- and that

they were willing to pay the said price for the purpose of redemption of the mortgaged property. Though this Application was vehemently opposed by the Respondent – Bank, this argument seems to have found favour with the DRT, Pune, and by its order dated 8th January 2014, the DRT, Pune allowed the said Securitization Application No.121 of 2012 and directed Petitioner Nos.1 and 2 to pay a sum of Rs.1,65,05,000/- towards redemption of the mortgaged property in the following manner :-

- (i) 25% of the amount within one month from 8th January, 2014; and
- (ii) the balance 75% of the amount in five equal monthly installments;

8. It is important to note that the DRT, Pune also directed that in case Petitioner Nos.1 and 2 failed to follow the above repayment schedule, the Respondent – Bank was at liberty to appropriate the payments already made, if any, and thereafter dispose of the mortgaged property in accordance with law. Being aggrieved by this order, on 28th February 2014, the Respondent – Bank filed Appeal No.64 of 2014 before the DRAT, Mumbai. The Petitioners

herein did not challenge this order of the DRT, Pune.

9. It appears that in part compliance of the order of the DRT, Pune, Petitioner No.2 deposited through RTGS a sum of Rs.41,26,250/- with the Respondent – Bank in the account of Petitioner No.3. It is an admitted fact before us that the balance 75% of the amount, as directed by the DRT, Pune, was not deposited in five equal monthly installments. In fact, no further amount has been deposited by the Petitioners. Furthermore, it is also an admitted fact that till date, no application for extending the time to make the aforesaid payment has been made by the Petitioners to the DRT, Pune. In view of the fact that the Petitioners had not adhered to the time schedule as set out in the order of the DRT, Pune, the Respondent – Bank was entitled to proceed to take possession of the mortgaged property. In view thereof, Respondent No.2 (i.e. Tahasildar and Executive Magistrate, Pune City, Pune, Khadakmal Ali, Pune), issued a notice dated 5th January, 2015 to the Petitioners for the purpose of taking physical possession of the mortgaged property. It is in these circumstances that the Petitioners moved M.

A. No.159 of 2015 in Appeal No.64 of 2014 to restrain the Respondent – Bank from implementing and/or taking action as per the said notice dated 5th January, 2015.

10. To our mind, once Petitioner Nos.1 and 2 did not adhere to the time schedule set out in the order of the DRT, Pune, coupled with the fact that the Respondent – Bank was thereafter granted liberty to take possession of the mortgaged property and dispose it of in accordance with law, the Appeal filed before the DRAT, Mumbai itself did not survive. However, from the record it appears that the DRAT heard the Miscellaneous Application No.159 of 2015 as well as Appeal No.64 of 2014 (filed by the Respondent – Bank), in view of the fact that the DRT, Pune had allowed redemption of the mortgaged property for a sum of Rs.1,65,05,000/- when in fact, the dues of the Bank were to the tune of more than Rs.23,00,00,000/- as on 18th February, 2014. The DRAT therefore proceeded to hear the Appeal itself and thereafter set aside the order of the DRT, Pune.

11. We have perused the orders passed by the DRT, Pune as

well as the order of the DRAT impugned in this Writ Petition. On going through the aforesaid orders, we find that the DRAT was fully justified in setting aside the order of the DRT, Pune. We are clearly of the view that the DRT, Pune could not have allowed redemption of the mortgaged property for the sum of Rs.1,65,05,000/- when the mortgage was created for securing the dues of the Bank which was in excess of Rs.23,00,00,000/- as on 18th February, 2014. In fact, even the principal amount (as per the facilities granted by the Respondent – Bank) was to the tune of Rs.12.30 crores. In this regard, it would be apposite to refer to the provisions of section 60 of the Transfer of Property Act, 1882 which read as under:-

“60. Right of mortgagor to redeem.— At any time after the principal money has become due, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished:

Provided that the right conferred by this section has not been extinguished by act of the parties or by decree of a Court.

The right conferred by this section is called a right to redeem and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Redemption of portion of mortgaged property.—*Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.*

(emphasis supplied)

12. Section 60 clearly provides that at any time after the principal money has become due, the mortgagor has a right to seek redemption of the mortgaged property on him paying or tendering the mortgage money. If the mortgage money is paid/tendered as required under section 60, the mortgagee is required (a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee; (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor; and (c) at the

cost of the mortgagor, either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered, an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee, has been extinguished. The said section further provides that nothing therein shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor. This section therefore clearly provides that a mortgaged property cannot be redeemed on payment of a part of the mortgage money. If the mortgaged property has to be redeemed in terms of section 60 of the Transfer of Property Act, 1882, the entire mortgage money has to be tendered in terms of section 60, before redemption can be ordered. The only exception is when a mortgagee has acquired, in whole or in part, the share of a mortgagor. We find that the DRT, Pune has completely lost sight of this fundamental principle enshrined in

section 60 of the Transfer of Property Act, 1882. We therefore find that the DRAT, Mumbai was fully justified in setting aside the order passed by the DRT, Pune.

13. Having said this, we will now deal with the decision of this Court in the case of ***Bank of Poona, now merged with Sangli Bank Ltd., v/s Navrajasthan Co-op. Housing Society Ltd., Poona and others***¹ which has been relied upon by the DRT, Pune. In the order passed by the DRT, Pune, the observation with reference to this decision is as follows:-

“The above inference is supported by law laid down by Hon'ble Bombay High Court in the case of Bank of Poona Vs Navrajasthan Co-op. Housing society Ltd., Poona and others (AIR 1968 Bombay 106)”

14. To our mind, the reliance placed on the aforesaid decision is totally misplaced. The facts before the Division Bench of this Court in the case of ***Bank of Poona (supra)*** was that a portion of the mortgaged property was sold by the mortgagor. The mortgagee, not knowing this fact, obtained a decree, and in execution thereof, itself

1 AIR 1968 BOMBAY 106 : 1967 SCC OnLine Bom 34

purchased the entire mortgaged property. The purchaser from the mortgagor was not made a party to the suit. It was in these circumstances, and taking into consideration the provisions of Order 34 Rule 1 of the Code of Civil Procedure, 1908 that this Court held the purchaser could redeem only the portion purchased by him on payment of the proportionate amount, as he was not a party to the suit in which the decree was passed in favour of the bank. The Court held that the sale in execution, although valid and effective as against the mortgagors who were parties to the action, did not affect the right of redemption of the purchaser from the mortgagor, inasmuch as he had not been impleaded as a party to the action as required under Order 34 Rule 1 of Code of Civil Procedure, 1908. We fail to see how this decision supports the case of the Petitioners that a mortgagor can redeem a mortgaged property on part payment of the mortgaged money. In fact, paragraphs 8, 9 and 10 [of the SCC OnLine Report] supports the view that we have taken earlier, and read thus:-

“8. The question then is what are the rights of the Society as an assignee of a portion of the mortgaged property in its favour under the provisions of the Transfer of Property Act. We would like to consider the question first apart from authorities. The relevant sections which fall to be considered are ss. 60, 82 and 91 of the

Transfer of Property Act. Section 60 defines the rights and liabilities of the mortgagor. The first part of the section entitles him to redeem the property as soon as the mortgage amount becomes payable it being subject to the proviso, "Provided that the right conferred by this section has not been extinguished by the act of the parties or by decree of a Court". The last clause in this section is relevant and it is:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or, if there are more mortgages than one, all such mortgagees, has or have acquired in whole or in part, the share of a mortgagor".

9. Now, the purport of this section seems to be very clear. As soon as the mortgage money falls due the mortgagor is entitled to redeem the property. But this right is subject to the continued existence of the mortgage. If the right is extinguished either say by conveyance of the said right by the mortgagor to the mortgagee by a voluntary act or by a decree of a Court such as one of foreclosure or by a completed sale in execution, then, the right could no longer subsist. Subsequent provisions must be read in the light of this fundamental requirement. The last clause in this section provides that where a mortgagor owns only a share of the mortgaged property to be redeemed, he cannot break up the mortgage and insist on redemption of his share only. He must, if he wants to redeem the property, redeem the entire mortgage. To this again there is an exception and that is where a part of the equity of redemption is acquired by the mortgagee he can redeem his share only. The exception in this clause is a consequence to the proviso to the first part of the section and recognises the principle that redemption of the mortgage can be only to the extent to which the equity of redemption is not extinguished. As has been frequently observed this rule has been enacted both for the benefit of the mortgagor and mortgagee in order to prevent multiplicity of suits. If redemption can be permitted in part each one of the sharers may institute separate suit against the mortgagee without making other sharers parties and there may even be conflicting decrees and confusion and chaos may result. Similarly, if the mortgagee was entitled to file separate suits against the co-sharers a similar result may follow. Where, however, the mortgagee acquires a part of the

property the mortgage is broken up and the sharer is entitled to redeem his share only.

10. Section 91 provides for right of redemption and enables amongst others redemption of the property by any person who has any interest in, or charge upon, the property mortgaged or in or upon the right to redeem the same, except the mortgagee of the interest sought to be redeemed. Under this section a co-mortgagor is entitled to redeem the mortgage and when read with the last clause of s. 60 already referred to he must redeem the whole of the mortgage but if the exception in that clause applies then of course he can redeem his share.

(emphasis supplied)

15. It is indeed not the case of the Petitioners that the facts in present case would fall within the exception carved out in section 60 of the Transfer of Property Act, 1882.

16. In this view of the matter, we find absolutely no merit in this Writ Petition and the same is hereby dismissed. We find from the record that the Petitioners have been trying to constantly thwart and frustrate the proceedings initiated by the Respondent – Bank by filing one application after another. The details of these proceedings are set out at paragraph 12 of the Affidavit of Mr. Manish Kumar Madhukar (Senior Manager Law, of the Respondent – Bank) dated 28th April, 2015, in reply to the Writ Petition. We, therefore, are of the view that

this is a fit case to award costs of Rs.50,000/- to be paid by the Petitioners jointly and / or severally to the Respondent – Bank within a period of two weeks from today.

(B.P. COLABAWALLA, J.)

(V.M. KANADE, J.)

After the judgment was pronounced, the learned counsel for the Petitioner sought continuation of the interim stay granted earlier by this Court. In view of what we have held earlier, we are unable to accede to this request.

(B.P. COLABAWALLA, J.)

(V.M. KANADE, J.)