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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1717 OF 2016

1. Mr. Aejaz Ahmed
Son of Late Shri Amir Ahmed
Aged about 50 yrs., Indian Inhabitant,
R/at 802/B, Evergreen Apts., Belvedere
Road, Mazgaon, Mumbai 400 010.

2. Mrs. Shamim Siddqui,
Daughter of Late Shir Amir Ahmed
Aged 66 yrs., Indian Inhabitant,
R/at. 1-C, 44, Swagat Apts., Narendra
Park, Naya Nagar, Mira Road, Thane- 401 105. **…Petitioners**

Versus

1. **Asset Reconstruction Company**
A Company incorporated under Companies Act, 1956 having its Office at The 10th Ruby, 29, Senapati Bapat Marg, Dadar (W), Mumbai 400 028.

2. Mr. Anees Ahmed
Adult, Indian inhabitant R/at. Flat No.71, Sanjay Apartments, Sanjay Ashok CHS Ltd., 16, Hansraj Lane, Byculla, Mumbai 400 027. **…Respondents**

Mr. Girish Thanvi, for *the Petitioner.*
Mr. Mayur Khandeparkar, *with Mr. Vinod Kothari and Mr. Phiroze Merchant for the Respondent No.1.*

CORAM: B.R. GAVAI AND
RIYAZ I. CHAGLA, JJ.
DATED: 11th July 2017

PC:-

J U D G M E N T :- **(Per Riyaz I. Chagla J.)**

1. The Petitioners are the brother and sister of Respondent No.2. Respondent No.2 is the borrower who had availed of Export Credit Facility from the State Bank of India ("**SBI**") (Assignor of Respondent No.1). The Petitioners appear to have filed the present Petition a heirs of the deceased father and representing his estate. The Petition challenges an order dated 18th February 2015 passed by the Debts Recovery Appellate Tribunal, Mumbai (DRAT-Mumbai).

2. The Respondent No.2 had created on equitable mortgage in respect of Flat No.71, Sanjay Apartments, Hansraj Lane, Byculla, Mumbai 400 027 (the subject flat) with SBI for securing Export Credit Facilities. Respondent No.2 had deposited the original share certificate with SBI on the basis of loan granted. The society had also granted an NOC

to the bank in relation to the mortgage. On account of defaults in payments of dues the SBI filed a Suit for recovery of debts in this Court which was later transferred to the Debts Recovery Tribunal (DRT) and renumbered as original Application No. 3582 of 2000. On 9th August 2002, the original Application was allowed by an order passed by the DRT. It is ordered that the recovery certificate be issued in terms of the said order. The said order has also recorded that the outstandings were secured by a valid mortgage of the subject flat and the mortgagor is at liberty to pay all the outstandings within three months from the date of the order to avoid sale of the subject flat. Respondent No.2 had not challenged the said order and Respondent No.1 initiated recovery proceedings for executing the said order.

3. An application came to be filed under Section 22(2) of the Maharashtra Co-Operative Societies Act (MCS Act) by the now deceased father of Respondent No.2, Mr. Anees Ahmed seeking transfer of the share certificate in relation to the subject flat in his name. The application came to be rejected by the Deputy Registrar on 4th November 2003 and

it was clearly recorded that it would not be appropriate to transfer the membership of the society in relation to the subject flat having regard to the mortgage already created in favour of SBI. On 30th March 2005, SBI assigned its debts recoverable along with underlying security interest from Respondent No.2, to Respondent No.1. Mr. Anees Ahmed filed a Miscellaneous Application No. 38 of 2009 under Section 19 (25) of the RDDB & FI Act seeking modification of the order dated 9th August 2002 insofar as it related to declaration of a validity mortgage of the said flat. The DRT dismissed the Miscellaneous Application and has held that the aspect of ownership can only be decided by a Civil Court. The DRT has also observed that the agreement for sale relied upon by the Applicant contained the words in hand "for and on behalf of" and which according to the DRT had been put subsequently by the Applicant and could not have been present in the agreement for sale under which Respondent No.2 had purchased the subject flat.

4. Mr. Anees Ahmed filed an Appeal before DRT being Appeal No. 210 of 2009. During the pendency of the Appeal,

the Mr Anees Ahmed passed away and the Petitioners were brought on records as Appellants. The DRAT by the impugned order dated 18th February 2015 dismissed the Appeal and has held that the DRAT cannot decide title of the Petitioners / Appellants who were representing the estate of the deceased father as against Respondent No.2 and the same is required to be adjudicated upon before the appropriate forum. In any event, Mr. Anees Ahmed had filed a Suit for declaration of title before this Court and the same was pending consideration. The DRAT has also recorded that the subject flat had been purchased in 1978 and that the father of Respondent No.2 had come to India in 1980 and had kept quite till 2001 and is now adjudicating his right which is impermissible in law. The DRAT has accordingly dismissed the Appeal.

5. Shri Girish Thanvi, learned counsel for the Petitioners has contended that mere deposit of share certificate by Respondent No.2 with SBI would not constitute a valid mortgage and that the original title deed was lying with the Petitioners and hence the mortgage in favour of the bank was

defective, improper and could not be enforced. The Petitioners have contended that DRT / DRAT ought to have decided the issue of whether the equitable mortgage could have been created by deposit of share certificate and that the subject flat could not be disposed of by Respondent No.1 without deciding this issue. Shri Thanvi has submitted a synopsis-cum-written arguments which contains various dates in order to contend that the Petitioners father had the title to the subject flat and that the deposit of share certificate by Respondent No.2 in favour of SBI was behind back of the Petitioners deceased father. The list of dates also mention the proceedings which were instituted by the Petitioners deceased father and which have been referred to above.

6. Shri Khandeparkar, learned counsel for the Respondent No.1 has submitted that the Petitioners had filed these proceedings representing the estate of the deceased father and the Petitioners have alleged that the title to the subject flat belonged to the deceased father. Shri Khandeparkar has contended that it is not open for the Petitioners to allege that their deceased father, who is also the father of Respondent

No.2, was not aware of the mortgage having been created of the subject flat and / or the deposit of the original share certificate with the bank. Shri Khandeparkar has stated that the DRAT in the impugned order has correctly observed that the deceased father of Respondent No.2 had come to India in 1980 and had kept quite till 2001 and is now adjudicating his right which is impermissible in law. Further, the deceased father had instituted proceedings by filing a Suit for declaration of title before this Court which is pending consideration. Shri Khandeparkar has accordingly submitted that the Petition is not maintainable and that the Petition ought to be dismissed.

7. We are of the considered view that the Petitioners have no independent right, title or interest in the subject flat, other than alleging that the subject flat belonging to the deceased father of the Petitioners and Respondent No.2. We are of the view that the Petitioners had availed of the alternate remedy by instituting proceedings before the DRT / DRAT, first by the deceased father and later by the Petitioners filing the Appeal before DRAT, which was disposed of by the impugned order.

We are of the considered view that the DRAT has correctly held that the issue of title ought to be determined in separate proceedings which have already been instituted by the deceased father i.e. by filling a Suit in this Court, which is pending consideration. It is not open for the Petitioners to raise the issue in this Petition as to whether Respondent No.2 could have created a mortgage in favour of SBI by depositing share certificate of subject flat. In any event, this mortgage had been created in 1984 and it is now not open for the Petitioners to contend otherwise. The Petitioners representing estate of the deceased father who was also the father of Respondent No.2 cannot contend that he was unaware of the subject flat having been mortgaged in favour of SBI. The Petitioners' deceased father had not taken any steps during his lifetime to challenge the mortgage created in favour of the Bank and it was only in 2004 that the Petitioners' father had filed a Suit claiming title to the subject property and that Respondent No.2 had no right, title or interest of any nature in the Suit property.

8. We are of the considered view that there is no infirmity in the impugned order and that the application of the Petitioners for raising the attachment and contending that the subject flat was in possession of their deceased father has been justifiably rejected by the DRT and which order has been upheld in the impugned order by the DRAT.

9. We accordingly dismiss the Petition with no order as to costs.

(RIYAZ I. CHAGLA J.) **(B.R. GAVAI J.)**