IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 11324 OF 2015
...
The Cosmos Cooperative Bank Ltd. ... Petitioner
V/s.
Central Bank of India & Ors. ... Respondents
...
Mr.Rishabh Shah a/w Ms. Fatima Barodwalla I/b Raval Shah & Co. for the Petitioner.
Mr. Prathamesh Kamat a/w Mr.T.N.Tripathi, Ms.Sapna Rachure and Ms.Kalyani Wagle i/b T.N. Tripathi & Co. for the Respondent No.1.
...
CORAM : A.A. SAYED &
A.K.MENON, JJ.
DATED : 12 DECEMBER 2018

P.C.:

The Petitioner-Cosmos Co-operative Bank Ltd. (hereinafter referred to as "the Petitioner-Cosmos Bank) has filed this Petition against the Respondent No.1-Central Bank of India (hereinafter referred to as "the Respondent-Central Bank) and Respondents Nos.2 to 4, who are borrower/guarantors.

2. The Petitioner-Cosmos Bank is aggrieved by the order of DRAT dated 28-08-2015 passed in Appeal No.41 of 2007. This Appeal was filed by the Respondent-Central Bank against the order dated 30-11-2006 passed by the Presiding Officer, DRT in O.A. No.74 of 2002 pursuant to the defaults in payment committed in respect of various financial facilities

granted to the Respondent No.2-Borrower in the year 1989. Respondent Nos.3 & 4 were the guarantors as indicated above. On 21-11-1989, the Respondent No.3 deposited the title deeds of Flat No.C-28, Sahyadri Apartment, L.T.Road, Borivali (West), Mumbai-400 092 as security to create equitable mortgage in favour of the Respondent-Central Bank. The equitable mortgage is stated to have been recorded in Memorandum of Entry dated 21-11-1989 by the Respondent-Central Bank. It is required to be noted that the Petitioner-Cosmos Bank was not a party to the O.A. The DRT allowed the O.A. of the Respondent-Central Bank and directed the Defendants Nos.2 and 3 therein (Respondents Nos. 3 and 4 herein) to jointly and severally pay amount of Rs.43,15,405.56 ps. to the Respondent-Central Bank with interest at the rate of 15% p.a. from the date of filing of the O.A. till its payment and further directed the Defendant No.2 therein (Respondent No.3 herein) to pay amount of Rs.5,70,787.21 ps. as dues of Overdraft Accounts, Rs.4,08,157.25 ps. as dues of Short Term Loan Account and Rs.2,25,498.45 ps. as dues of Working Capital Loan with interest at the rate of 15% p.a.

3. At this juncture, it is necessary to state that though the O.A. was decreed in favour of Respondent-Central Bank, the decree was simplicitor for a money decree as the DRT held that there was no mortgage of the said

flat as security of loan advanced by the Respondent-Central bank, since the Respondent-Central Bank had failed to produce the title deeds which was the primary evidence of mortgage. The Respondent-Central Bank therefore had filed the aforesaid Appeal No.41 of 2007 before the DRAT as it was aggrieved by the finding of the Presiding Officer, DRT that the primary evidence i.e. title deeds in respect of the said flat is not produced before the Tribunal and therefore the Respondent-Central Bank had failed to prove that the Defendant No.2 (i.e. Respondent No.3 herein) had mortgaged the flat in question as security of the loan given by the Respondent-Central Bank. It appears that in the Recovery Proceedings No.21 of 2007 filed by the Respondent-Central Bank before the Recovery Officer, the Petitioner-Cosmos Bank had intervened on the ground that it had taken measures under the SARFAESI Act in view of the mortgage of the very flat in question to it against the loan advanced to the Respondent No.4 in October 1998. We are informed that in the S.A.No.128 of 2011 filed by the Respondent No.4 challenging the measures adopted by the Petitioner-Cosmos Bank, the DRT allowed the said flat to be sold in auction and the proceeds were directed to be deposited in the DRT. The said flat was accordingly sold for Rs.51,10,897/- and the amount is deposited with DRT. The issue which remains now is only with regard to rival claims in respect of the aforesaid amount interse between the two Banks.

4. In the Appeal No.41 of 2007 before the DRAT filed by the Respondent-Central Bank, it had preferred Misc. Application No.280 of 2008, wherein it sought to produce (i) the original Agreement for Sale dated 15-10-1973 executed between M/s.V.K.Builders Associates and Mrs.Bhanumati Bachhubhai Kanani (predecessor-in-title of the Respondent No.3) and (ii) original Agreement dated 9-11-1978 executed between Mrs.Bhanumati Bachhubhai Kanani and Mrs.Madhubala N. Waghani @ Kamdar (Respondent No.3 herein) by way of additional evidence. It was contended in the Misc.Application that the aforesaid original title deeds were not traceable earlier during the pendency of the O.A. The said Misc.Application filed by the Respondent-Central Bank came to be allowed by order dated 31-03-2009 of the DRAT and the aforesaid two documents were taken on record. In this Misc.Application, the Counsel for the Petitioner-Cosmos Bank (proposed Respondent therein) was also heard. This order dated 31-03-2009 was however not challenged by the Petitioner-Cosmos Bank and it had attained finality. The Petitioner-Cosmos Bank was ultimately impleaded as party-Respondent No.4 in the Appeal No.41 of 2007 of the Respondent-Central Bank before DRAT. The Appeal No.41 of 2007 was ultimately allowed by the DRAT by order dated 28-08-2015 holding that the Respondent-Central Bank had a valid mortgage of the said flat, which order is impugned in the present Petition filed by the Petitioner-

Cosmos Bank.

5. We have heard the learned Counsel for the Petitioner-Cosmos Bank and the learned Counsel for the Respondent-Central Bank. We have also perused the impugned order dated 28-08-2015 of the DRAT. Paragraphs 6, 7 & 8 of the impugned order read as follows:

> "6. The next contention is that the original documents have not been produced before the trial court is not in dispute. Now it has been produced before this court which pertains to the mortgaged property and original agreement are now brought on record and is taken on record. It is pertinent to note that the original title deeds are with the appellants and mortgage Is not denied by the guarantor. It is also clear that respondent no.4 do not have title deeds pertaining to the property and their alleged mortgage is very much subsequent to the mortgage of appellants. Hence, I am of the view that it can be accepted that the appellant bank has valid and subsisting mortgage in its favour and in turn mortgage is admitted and finding given by the DRT in this regard has to be set aside and the O.A. against the defendant No.1 also decreed and allowed as all parties are properly sued and joined.
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> 7. The appeal is allowed.
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> 8. Subsequent to sale by respondent No.4 in favour of third party and amount of deposit is concerned, this point is left open to agitate before the appropriate forum."

(emphasis supplied)

6. By the impugned order, therefore, the DRAT had arrived at a clear finding of fact that the mortgage of the said flat to the Petitioner-Cosmos Bank is `subsequent' to the mortgage of the Respondent-Central Bank apart from the fact that the Petitioner-Cosmos Bank did not have title deeds pertaining to the said flat. This finding was arrived at by DRAT as the said flat was mortgaged to the Respondent-Central Bank on 31-10-1989, whereas the mortgage claimed by the Petitioner-Cosmos Bank was of October 1998.

7. It is brought out in the Affidavit-in-Reply of the Respondent-Central Bank that the the Respondent-Central Bank had initially filed a suit against the borrower/guarantors (Respondents Nos.2 to 4 herein) in this Court on 5 September 1994. By an interim order dated 20-10-1994, this Court had appointed a Court Receiver in respect of the said flat.

8. It would thus be evident that at the time of sanction and grant of the loan by the Petitioner-Cosmos Bank i.e. sometime in November 1998, the said flat was in custodia legis as the Court Receiver was appointed in the year 1994. In these circumstances, there appears to be substance in this submission of the learned Counsel for the Respondent-Central Bank that

the validity of the mortgage of the said flat in favour of the Petitioner-Cosmos Bank was even otherwise questionable. The suit which was filed in this Court was ultimately transferred to DRT only in the year 2002 and numbered as O.A.No.74 of 2002. Before this Court, the Petitioner-Cosmos Bank have essentially relied upon the Share Certificate which was as a matter of fact issued by the Society only in the year 1989 (as the Society itself was formed in the year 1986-87) and Agreement for Sale dated 7-12-1978 (which is subsequent to Agreement for Sale dated 09-11-1978 relied upon by the Respondent-Central Bank). Both the Agreements are unregistered. It is not even pleaded by the Petitioner-Cosmos Bank in the present Petition that the documents of title deeds relied upon by the Respondent-Central Bank were not credible or that the mortgage of the said flat in favour of the Respondent-Central Bank was not valid. In any event, it can be hardly disputed that the mortgage in favour of the Respondent-Central Bank was prior in point of time. In the circumstances, in our view, the DRAT rightly held in the impugned order that the alleged mortgage of the Petitioner-Cosmos Bank was subsequent in point of time to the mortgage of the Respondent-Central Bank.

9. In view of the aforesaid discussion, we are unable to find fault with the impugned order of the DRAT. The Petition is, accordingly, dismissed.

The Recovery Officer, DRT may now pass appropriate orders as regards the distribution of the sale proceeds of the said flat which has been deposited in the DRT.

(A.K.MENON,J.) **(A.A.SAYED, J.)**