

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO.5227 OF 2017

Dena Bank

... Petitioner

Vs

The State of Maharashtra & anr.

... Respondents

Mr.Atul Damle, Senior Advocate with A.R. Bamne i/b A.R. bamne & Co. for the Petitioner

Mr.A.R. Patil, APP, for the Respondent – State

Mr.Aabad Ponda with Ms.Pranali Dixit i/b Amar Legal for Resp. No.2

CORAM: Mrs.MRIDULA BHATKAR, J.

DATED: APRIL 1, 2019

P.C.:

1. Pursuant to the order dated 4.3.2019, respondent NO.2, the main contesting party, i.e., the complainant in CC No.2087/SS/2008 is present in the Court through his Counsel. The complainant/Respondent No.2 has filed two criminal cases under section 138 of the Negotiable Instruments Act for recovery of the cheque amount of Rs.1,10,00,000/- against the absconding accused. The accused Om Prakash Gurbani and Purshottam Gurbani Janki did not appear in the said proceeding and, therefore,

the learned Magistrate issued proclamation against the accused persons. However, the accused did not appear in the said proceeding and therefore, the learned Magistrate issued proclamation against the accused persons. However, the police could not arrest those two accused and, therefore, the learned Magistrate issued orders of attachment of the property of the accused. Pursuant to that, the learned Magistrate, 43rd Court, issued warrant of attachment for the two flats at Bandra by order dated 28.1.2016. The warrant of attachment was executed and the flats were sealed on 29.1.2016.

2. The second leg of the proceeding was carried out by the present applicant Dena Bank in respect of these two flats and in the proceedings in the Debt Recovery going on before the Debt Recovery Tribunal in respect of the two flats in the proceedings before DRT, as these two flats were mortgaged by the accused persons against the loan which was disbursed by Dena Bank in favour of the accused. The loan amount was of Rs.17,50,00,000/-. In the Original Application No.7 of 2007 filed by the Dena Bank, the DRT passed an order dated 29.4.2008 in favour of the Bank and declared that the bank is entitled to realise the full loan amount

through the sale proceeds of the mortgaged flats. Pursuant to this order, the Bank moved the Court of Additional Chief Metropolitan Magistrate, under section 14 of the SARFAESI Act for taking possession of the secured assets i.e., the flats. The learned Additonal Chief Metropolitan Magistrate by his order dated 16.12.2012 directed taking possession of the properties i.e., the two flats. The flats were not sold from 2012 to 2016 and on 29.1.2016, the attachment was made pursuant to the orders of proclamation. The flats were sealed by the order of the learned Magistrate. After revelation of the order passed by the learned Magistrate under section 83, Dena bank moved application before the learned Magistrate, 43rd Court under section 84 of the Code of Criminal Procedure on 9.5.2016 and claimed the said property. The learned Magistrate by order 3.10.2017 took notice of the order passed under the SARFAESI Act and ordered that the said flats can be auctioned and both are entitled for proportionate share from the sale proceeds of two flats. The said order is challenged by Dena Bank by filing this Writ Petition.

3. I have heard the submissions made by the learned Senior Counsel for the petitioner and Mr.Ponda, who appears for the

complainant/Respondent No.2. The order of the learned Magistrate needs to be set aside in view of the judgment and decree passed by the DRT in respect of these two flats. The claim and entitlement of Dena Bank is already decided by DRT and, therefore, there is no question of deciding the title or entitlement of Dena Bank or the complainant under section 84 of the Code of Criminal Procedure. Undoubtedly, the bank is having the first claim over these two flats which were mortgaged with the bank in the year 2004. Subsequently, the transactions between the present complainant and the absconding accused persons has taken place.

4. Hence, I allow this petition on the following terms:

- i) The order of the learned Magistrate dated 28.1.2016 of attachment of the flats is hereby set aside;
- ii) The flats are to be auctioned and sold as per the order of the DRT;
- iii) The entire monetary claim of the bank is to be appropriated and after full and final satisfaction of the said loan claim, if there is an excess amount, then, the said

amount is to be transferred to the Court of learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai in CC No.2087/SS/2008, pursuant to the order of attachment under section 83 of the Code of Criminal Procedure.

5. The Writ Petition is disposed of on the above terms.

(MRIDULA BHATKAR, J.)