

Sharayu Khot.

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

WRIT PETITION NO. 1843 OF 2017

Popular Switch Gears Pvt. Ltd. Mumbai ...Petitioner

Versus

**1. Asset Reconstruction Company
(India) Ltd.**

**2. The Debts Recovery Appellate ...Respondents
Tribunal, Mumbai**

Mr. Advait M. Sethna, a/w Ms. Ruju R. Thakkar, for the
Petitioner.

Mr. Rohit Gupta a/w Ms. Pallavi Dhok, Ms. Manisha Pradhan,
i/by Manilal Kher Ambalal & Co., for the Respondent No. 1.

**CORAM : A.A. SAYED &
RIYAZ I. CHAGLA, JJ.**

DATE : 18 January 2019

JUDGMENT : (Per Riyaz I. Chagla, J.)

1. By the consent of the parties, the Petition itself is

being disposed of at the stage of admission.

2. The Petitioner has by this Petition impugned the order dated 30th January 2017 passed by the Respondent No. 2, the Debts Recovery Appellate Tribunal, Mumbai (for short “**D.R.A.T.**”). By the impugned order, the D.R.A.T. has dismissed the Application for Restoration of the Appeal preferred by the Petitioner. The Appeal had been dismissed by the D.R.A.T. vide order dated 5th February 2016 and being aggrieved by the said order, the Appellant had taken out the Restoration Application.

3. The Petitioner claims to be a *bona fide* purchaser for value of land bearing Block Nos. 295 and 298/C (Survey Nos. 513 and 514) situated in Village Lasundra, Taluka Savli, District Vadodara (hereinafter referred to as “***the subject property***”). The Petitioner had purchased the subject property from the vendors viz. Dr. Anil R. Mehta and Ms. Aditi A. Mehta by a Registered Sale Deed dated 14th August 2008. The Petitioner has stated that the subject property was purchased after a

thorough search of all revenue records for the past 30 years having been conducted and only after a title report dated 14th September 2008 was obtained from the Advocate Mr. Nayan C. Shah on 14th September 2008. The Petitioner states to have learnt of a loan having been taken by the vendor Dr. Anil R. Mehta which was subsequently repaid by him and Discharge Certificate to that effect had been issued by Central Bank of India in his favour on 6th September 2008. The Petitioner has stated that during the sanction of the loan, the Central Bank of India had carried out due diligence in respect of the subject property and concluded that the subject property had a clear, marketable and encumbrance free title. The Petitioner appears to have thereafter purchased the subject property and paid the requisite fees for conversion of the subject property from agricultural to industrial purpose.

4. The Petitioner has stated that it was shocked to learn of a public notice dated 6th April 2009 issued by the D.R.T. having been affixed on the subject property. The said notice

declared that the sale of the subject property was scheduled to be held on 24th April 2009. The said notice stated that auction was for recovery of a sum of Rs. 83,08,204/- from the defaulter M/s. Apex Petrochemicals Ltd. against whom the D.R.T. had passed a decree on 1st November 2002 in O.A. No. 317 of 1997 and for which Recovery Certificate was issued on 31st December 2002 in favour of State Bank of India. The State Bank of India later assigned its debts to Respondent No. 1, the Asset Reconstruction Company (India) Ltd. (for short "**ARCIL**"). The Petitioner upon becoming aware of the public notice, filed an Application in the O.A. No. 317 of 1997 for modification of the order dated 1st November 2002 by setting aside the order and withdrawal of the Recovery Certificate dated 31st December 2002 in respect of the subject property. The Petitioner has contended in the said Application that it was in possession of the subject property since 14th August 2008 and due care had been taken whilst purchasing the property. It is claimed therein that the charge of the said Bank is not registered. It was also stated that the revenue records did not disclose the name of the

principal borrower viz. M/s. Apex Petrochemicals Limited. The Application was opposed by ARCIL contending that the Application was belated and that the Applicant was challenging the judgment in the O.A. despite not being a party to the O.A. and hence, the Application was not maintainable. The Presiding Officer, D.R.T. -II, Ahmedabad initially granted relief to the Petitioner by directing the Recovery Officer not to confirm the sale of the subject property. However, the Presiding Officer after hearing the parties to the Application by order dated 22nd July 2011 dismissed the Application of the Petitioner. The D.R.T. has accepted the submissions of ARCIL that the Petitioner had not taken due care before purchase of the subject property and that the title clearance report dated 14th September 2008 appears to have been obtained after the Sale Deed dated 14th August 2008. The mortgage of the subject property had been created on 12th March 1997 and the sale of the property in favour of the vendor of the Petitioner was subsequent thereto i.e. in 1999. It was held by the D.R.T. that all further transactions which are subsequent to the mortgage of 1997 are subject to the said mortgage.

5. The Petitioner being aggrieved by the order dated 22nd July 2011 passed by the D.R.T.-II, Ahmedabad preferred an Appeal to the D.R.A.T. The D.R.A.T. by an order dated 5th February 2016 dismissed the Appeal preferred by the Petitioner by holding that the Petitioner had not complied with its prior order dated 5th August 2014 which had directed the Petitioner to serve notice of the Appeal by way of paper publication and file Service Affidavit. Further, the Appeal was dismissed, as the Counsel on record for the Petitioner was not present and the learned Counsel who was present in the Court was not ready to argue the matter. Being aggrieved by the dismissal of the Appeal, the Petitioner took out a Restoration Application wherein it was stated that the Counsel on record had remained absent on the date when the Appeal came to be dismissed, as he was unwell and could not appear due to his ill-health. A Doctor's certificate certifying the ill-health of the Petitioner's Counsel on record is also enclosed in the said Application. The Petitioner had also filed a Miscellaneous Application enclosing the Service Affidavit and paper publications made by the Petitioner of the

notice of the Restoration Application along with the Appeal filed by the Petitioner. The Application for restoration of the Appeal preferred by the Petitioner came to be dismissed by the D.R.A.T. by the impugned order dated 30th January 2017. Hence, the present Petition.

6. The learned Counsel for the Petitioner has submitted that the Application for Restoration of the Appeal came to be dismissed solely on the ground that the Service Affidavit evidencing attempted service in respect of the other Respondents had not been filed as per the satisfaction of the D.R.A.T. He has submitted that the D.R.A.T. has erred in dismissing the Application for restoration by observing that the Petitioner had not complied with the order of the D.R.A.T. He has submitted that D.R.A.T. has not considered the Miscellaneous Application filed by Petitioner seeking valid substituted service upon the other Respondents which the Petitioner had effected through paper publication i.e. publication in English as well as in Gujarati newspapers on 24th

October 2016. Further, in the Miscellaneous Application taken out by the Petitioner for treating the newspaper publications as valid substituted service upon the other Respondents, reference had been made to the Service Affidavit filed by the Petitioner on 11th July 2016, wherein efforts made to serve the other Respondents are mentioned. He has submitted that the other Respondents were aware from the newspaper publication of the status of the Restoration Application along with Appeal filed by the Petitioner. He has submitted that every possible attempt was made to serve the other Respondents and this has not been considered by the D.R.A.T. which has gone only on the premise that two adjournments had been granted for the purpose of filing satisfactory Service Affidavit evidencing notice having been effected on the other Respondents which was mandatory and the same had not been complied with. He has submitted that the D.R.A.T. should have also considered the prior order passed in the main Appeal where the Chairperson had granted permission to the Petitioner to serve the other Respondents by way of paper publication. The said order had been complied

with after the Appeal was dismissed by carrying out the paper publication of the notice of the proceedings upon the other Respondents. He has submitted that the impugned order has been passed, despite the Respondent No. 1, being the contesting Respondent in the Appeal filed before the D.R.A.T. having remained present since inception by reason of being effectively served with the main Appeal and the Restoration Application. He has submitted that the Petitioner has a good case on merits, particularly since the Petitioner is a *bona fide* purchaser for value of the subject property without notice of any mortgage of the subject property in favour of the bank. He has submitted that the Application for restoration of the Appeal should not have been dismissed without granting an opportunity to the Petitioner to make out its case. The learned Counsel for the Petitioner has thus, submitted that the impugned order be quashed and set aside and the Appeal be restored to the D.R.A.T.

7. The learned Counsel for the Respondent No. 1 has

supported the impugned order.

8. We have considered the submissions. We are of the view that the D.R.A.T. in dismissing the Application for Restoration of the Appeal has not considered the Miscellaneous Application preferred by the Petitioner applying for valid substituted service upon the other Respondents of the Restoration Application by the newspaper publication made by the Petitioner. The Miscellaneous Application also referred to the Service Affidavit filed. It was stated that from the newspaper publication, the other Respondents were well aware of the status of the Restoration Application along with Appeal filed by the Petitioner and yet chose not to come before the D.R.A.T.

9. We find that the D.R.A.T. in the main Appeal had permitted the Petitioner to serve notice of the proceedings by way of paper Publication in two newspapers, one in Gujarati and other in English, apart from filing the Service Affidavit. Although the order dated 5th August 2014 passed by the

D.R.A.T., had not been complied with when the main Appeal was dismissed by the D.R.A.T. vide order dated 5th February 2016, the Petitioner had thereafter made the necessary paper publication and filed the Service Affidavit.

10. We are of the view that the D.R.A.T. should have considered the Miscellaneous Application for valid substituted service and should not have dismissed the Restoration Application by observing that the Petitioner had been permitted to serve the notice by way of paper publication in the main Appeal and not in the Restoration Application. We have perused the paper publications as well as the Service Affidavit and we find that the Petitioner had made all possible attempts to serve the other Respondents prior to passing of the impugned order. Further, the D.R.A.T. has not considered as to whether the other Respondents were aware of the Restoration Application along with Appeal filed from the newspaper publications, particularly when the Petitioner has in the Miscellaneous Application expressly stated that they were

aware. We further find that the Respondent No. 1, who is the main contesting party, has at all times been appearing in the main Appeal proceedings as well as in the Restoration Application by reason of having been effectively served with these proceedings. We are of the view that the Petitioner's application for valid substituted service of notice upon the other Respondents by the newspaper publications is required to be allowed, particularly since the Petitioner had been previously permitted to do so by the D.R.A.T. in the main Appeal. Although having held so, we find the Petitioner to have been negligent in complying with the orders of the D.R.A.T. and for such negligence on the part of the Petitioner, which has led to these proceedings, we consider it appropriate to impose costs on the Petitioner payable to Respondent No. 1.

11. We are of the considered view that in the interest of justice, the Petitioner should not be deprived of having its Appeal heard by the D.R.A.T. It is a well settled position of law that mere technicalities should not be allowed to

defeat the substantive rights of the Petitioner i.e. in having its Appeal heard.

12. In view of these findings, we pass the following order:-

- (i) The impugned order dated 30th January 2017 passed by the D.R.A.T. is quashed and set aside and the Appeal, being Appeal No. 75 of 2013 is restored to file and shall be heard and decided by the D.R.A.T. in accordance with law;
- (ii) The Petitioner shall pay costs of Rs. 15,000/- (Rupees Fifteen Thousand only) to the Respondent No. 1, which shall be paid within a period of one week from the date of uploading of this order and judgment and that prayer (a) shall come into effect only upon the Petitioner making payment of the said costs;

(iii) The Petition is accordingly, disposed of on the above terms.

[RIYAZ I. CHAGLA J.]

[A.A. SAYED, J.]