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

INTERIM APPLICATION NO.636 OF 2021
IN
COMMERCIAL EXECUTION APPLICATION NO.108 OF 2017
IN
COMMERCIAL SUMMARY SUIT NO. 144 OF 2016

Mohinuddin Maqdum Sayyad ... Applicant/Plaintiff/Decree Holder
Vs.
Sumaraj Sea Foods Pvt. Ltd. & Ors.... Defendants/Judgment Debtors
and
Axis Bank Ltd. ... Respondent / Objectionist

Mr. Nandlal Agrawal for the Applicant.
Mr. Chetan C. Agrawal a/w. Ms. Nikita Banatwala for Respondent no. 4.

CORAM : A. K. MENON, J.
DATE : 29th NOVEMBER, 2021.

P.C. :

1. By this interim application the applicant-judgment creditor seeks to set aside an order passed by the Commissioner for Taking Accounts on 16th February, 2021, to stay/suspend further proceedings in execution till final disposal of the interim application and dispense with service of notice upon respondent nos. 1 to 3. Respondent nos. 1 to 3 are the judgment debtors and respondent no. 4 is Axis Bank Limited who claims a security interest in property that is subject matter of execution.

2. The facts in brief are that the applicant is a judgment creditor having obtained an ex-parte decree on 5th January, 2017 in the above suit. He has levied attachment on residential and commercial properties. This court has vide an order dated 19th March, 2018 permitted sale of only the residential property and accordingly a warrant of sale is been issued by the Sheriff of Bombay on 23rd April 2018. The Sheriff was directed to sell right title and interest of defendant nos. 1 to 3 in the residential flat.

3. Pursuant thereto on 28th May, 2018 notice was issued by the Commissioner for Taking Accounts, High Court Bombay to persons having any claim or charge in respect of the flat. 30th July, 2018 was the date fixed for lodging claims. On or about 17th /18 th July, 2018 Axis Bank filed an affidavit claiming that the flat was equitably mortgaged to the bank. The bank claimed that it was a secured creditor having paramount charge of the property and sought deferment of the public auction. Thereupon the applicants Advocate took search of the record and proceedings of this court and apparently did not find any claim filed by Axis Bank.

4. The only application by the bank was for deferring auction of the attached property. Thereafter an affidavit was filed on behalf of the plaintiffs annexing therewith a copy of a notification issued by the State on 1st October, 2013 wherein the State notified the requirement of registering the creation of an equitable mortgage. This was subject matter of a hearing before the Commissioner. The Commissioner after taking into consideration the

submissions made by the parties has concluded that the claim of Axis Bank would have to be included in the sale proclamation. Thereupon an appeal came to be filed by the applicants under Rule 586 of the Bombay High Court (Original side rules) by way of Chamber Summons no 928 of 2019. On 4th September, 2019 the court set aside the order dated 25th February, 2019 passed by the Commissioner and directed the Commissioner to hear the matter afresh and consider the applicability and consequences flowing from notification dated 1st October 2013 and pursuant to section 84A of the Registration Act, 1908. Axis Bank was expected to be heard since it had raised an objection to the sale and it was on 16th February, 2021 that the matter was heard afresh by the Commissioner and after hearing parties and considering the notification the Commissioner concluded that it is necessary to the include the claim of Axis bank as part of sale proclamation. The order of the Commissioner is thus called into question by the applicants.

5. On behalf of the respondent no. 4 bank the learned counsel Mr. Chetan Agarwal has submitted that the bank is a secured creditor as required under the The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). It is the banks duty to enter particulars of the mortgage created in the Central Registry as provided under the Act and this has been done. It was contended that the duty of notifying and registering creation of mortgage by title deeds is that of the mortgagor and not the mortgagee bank.

6. Inviting my attention to section 89B of the Registration Act it was submitted on behalf of the bank that a mortgagor who creates a mortgage by depositing title deeds under 58 F is required to file notice of intimation of having mortgaged the property within 30 days of the mortgage. Thus the bank disclaimed any responsibility of registering the mortgage and submitted that by virtue of the SARFEASI Act it is entitled to proceed to sell the flat and recover its dues.

7. Mr. Nandlal Agarwal learned counsel on behalf of the applicant has refuted the bank's contentions and submitted that the bank not having registered the creation of the mortgage mandated under the Registration Act as amended cannot take advantage of their own wrong The banks claim cannot be shown as an encumbrance and the Commissioner was wrong in having observed the banks claim is likely to be included. He invited my attention to the order passed by the learned Commissioner and stated that even the Commissioner has recorded the fact that the decree holder had conducted a search on 2nd February 2020 on the CERSAI portal and did not find any property such as flat being recorded in the Central Registry as being secured to Axis bank. He submitted that the Registration Act was amended by the Registration (Maharashtra amendment) Act 2010 and in section 17 after sub clause 1 a further clause (f) has been added whereby an agreement relating to deposit of title deeds is required to be registered. That provision read with Section 89 and 89B would require the bank to have registered this mortgage if at all. He has placed reliance on the fact that written submissions

were filed on behalf of the decree holder before the Commissioner but the Commissioner has not taken into consideration the submissions in the right spirit.

8. According to the learned counsel for the applicant the bank has not made any prayer seeking the encumbrance to be disclosed and hence no relief can be granted as is now done by the Commissioner. The effect of the registration under section 23 of the SARFAESI Act has been questioned since according to the plaintiff search showed that no property was registered in the Central Registry. Thus a factual dispute is sought to be raised as far as registration is concerned. It is further contended by Mr. Agarwal that assuming that the registration under the SARFAESI Act is in place it would not dilute the mandatory requirement of law namely section 17 of the Registration Act as amended that the SARFAESI Act and section 20(4) clearly envisages that the Act would be in addition to not in derogation of the provision of the Registration Act, Thus it is contended that the bank cannot prevent sale of the property by public auction.

9. The request for deferment of the sale cannot be accepted. The plaintiff as a decree holder is entitled to recover the decretal amount by executing the decree and he has been permitted to sell the flat that having been done it is not possible to accede to the request to treat the flat as encumbered. Mr. Nandlal Agarwal therefore prayed that the order of the Commissioner be set aside.

10. I have heard both learned counsel in support and in opposition. I find that the bank has filed a compilation of documents in which the bank has included a copy of the affidavit filed by it before the Commissioner. In that affidavit it is contended that the bank had advanced a housing loan of Rs. 3,53,69,166/- for the purpose of purchase of th flat which is subject matter of attachment. That flat is equitably mortgaged to the bank and a Memorandum of Entry dated 29th November, 2013 is duly registered with the sub-registrar, Kurla No. 4. That the subject property is clearly mentioned therein and therefore the mortgage will operate as a prior charge, security of the bank and the bank thus has paramount charge of the property.

11. The objections thus raised on behalf of the judgment creditor therefore cannot be considered. The bank has also relied upon board resolution issued by the Board of Directors of Sri Siddhi Freezers & Exporters Pvt. Ltd. authorising the creation of mortgage. The bank has placed reliance on Memorandum of Entry which evidences that on 29th November, 2013, the loan applicant Rajesh Ramu Chandan had deposited with the bank documents of title. These documents are listed in a schedule to the Memorandum of Entry and that includes the original registered agreement dated dated 12th November, 2013 between G.A. Builders Private Limited (G.A. Builders) and Mr. Rajesh Ramu Chandan, registration receipt, stamp duty receipt, Index II and NOC of the builders, the flat members described therein as 1302 on the 13th floor of the building. The bank has also provided proof of having paid the stamp duty on 23nd November, 2013 and a challan

in that respect as also a copy of an order dated 26th September, 2018 passed by this court in Chamber Summons no. 1094 of 2017 in Execution Application no. 83 of 2012 in which two rival claims of financial institutions one a bank and NBFC were called into question. The court decided in favour of the bank which had a prior claim over the mortgage flats as against the attachment levied by the NBFC. Relying upon these it is contended by Mr. Chetan Agarwal that the loan was sanctioned upon the purchase of the flat itself and this aspect cannot be overlooked. A charge under SARFAESI is therefore attracted, the loan was availed of in October/November, 2013 and as of 11th February 2021 there was outstanding of 3,12,81,424/-. The flat is obviously encumbered right from the inception and therefore the attachment cannot result in sale and sale proceeds being handed over to the applicant.

12. The issue is fairly narrow. The question that arises is whether the bank has a claim over the property that is attached and whether the sale can now proceed without the consent of the bank since the flat is said to be secured assets and the bank secured creditor. According to the bank the flat is the only available as security for recovery of the loan amount which is over Rs. 3 crores today. Mere attachment by the Sheriff of Bombay at the instance of the original plaintiff-the applicant in the Execution Application cannot deprive the bank of its rights. In this respect I had occasion to consider the plaintiffs contentions that the amendment to the Registration Act. In its submissions the affidavit the bank has submitted that the equitable mortgage has been registered while considering the Maharashtra Act 10 of 2012 it is

obvious that an agreement relating to deposit of title deed would have to be registered. The question is whether the present claim of the bank is on the basis of an agreement or a simple deposit of title deeds.

13. There is also no ambiguity as far as the applicability of 89A or 89B of the Registration Act as amended are concerned. Section 89 requires every court passing a decree or order to send a copy of the decree or order with a memorandum describing the property in the manner required under Section 21 of the Act to the registering authority within whose jurisdiction the property is situated. The intention being to enable the registry to make note of a claim in respect of a property. That every person who has mortgaged property is also required under section 89 B to inform the fact of having mortgaged the property to the Registering Officer under section 2 The obligation of so registering the property is that of the mortgagor.

14. In the course of arguments, Mr. Nandlal Agrawal has raised a serious dispute as to whether the bank advanced monies toward the housing loan at all. According to him, it was a personal loan granted to the borrower. No home loan at all has been granted. He said the bank has therefore deliberately not disclosed documents pertaining to the loan transactions despite several requests. Faced with this, Mr. Chetan Agrawal undertook to provide these documents. Inspection was offered of some documents and post that, an additional compilation of loan documents has been filed, which inter alia consists of a Home Loan Application Form dated 18th November 2013. It

shows the name of the applicant as Rajesh Ramu Chandan and Mrs. Saubhagyalata Chandan, spouse of Rajesh Chandan as co-applicant. The loan application is signed by both these persons. Although this document also discloses the property details as Flat No.D3-1302, RNA Continental, being the subject attached property.

15. In support thereof, Mr. Chetan Agrawal has pointed out that a Power Home Sanction Letter had also been issued on 22nd November 2013, wherein the transaction is reflected. I have therefore perused the compilation in some detail. The Power Home Sanction Letter indicates that the loan was bearing interest at a floating rate linked to base rate. The base rate has been specified and the loan amount is shown as Rs.3,71,65,498/- with insurance and Rs.3,60,00,000/- without insurance. EMIs are also specified separately. The Sanction Letter is also signed by the bank, Rajesh Ramu Chandan, Saubhagyalata Chandan and the guarantor Sri Siddhi Freezers and Tran porters Private Limited by a Director, who appears to be Rajesh Ramu Chandan.

16. Apart from the fact that the documents disclosed payment of stamp-duty of an amount of Rs.19,33,400/- by online payment for franking, it appears that creation of mortgage is also reflected on the website of the Credit Information Bureau (India) Limited (CIBIL). The bank is relying upon a Memorandum of Entry dated 29th November 2013, which is said to be a record of equitable mortgage by the title-deeds. This is a document recording that Rajesh Ramu Chandan, son of Ramu Chandan, has deposited with Mr.

Ujwal Upadhyay, Manager of Axis Bank, the documents listed in the annexure to this memorandum. The memorandum is not signed by the borrower. Stamp-duty appears to have been paid in a sum of Rs.70,740/-. It details the facilities as "Mortgages Power Home" in an amount of Rs.3,53,69,166/-, however a further Declaration-cum-Confirmation Deed is executed, by which the borrower-mortgagor Rajesh Ramu Chandan has declared that the property is mortgaged. Thus, a memorandum does exist which records creation of a mortgage, although the memorandum of deposit itself is not signed by the borrower. It merely records the deposit. The memorandum at hand by itself is not an "agreement". It reflects the bank having accepted deposit of title-deeds. It inter alia records the fact that the mortgagor stated while depositing the documents of title that deeds being deposited with intent to create a charge.

17. The compilation also contains (a) a disbursal receipt of payment of Rs.3,42,60,000/- by the Axis Bank to one G.A. Builders Private Limited and an RNA Group Company, (b) a home loan agreement setting out particulars of the loan transaction. The schedule described as the property in question and the home loan facility for a sum of Rs.3,53,69,166/-. There are various other documents such as PDC, covering letters etc.. The original Articles of Agreement dated 12th November 2013 between GA Builders Private Limited and Rajesh Ramu Chandan as purchaser is also on record. Thus, it appears that Rajesh Ramu Chandan is the sole purchaser of the flat although his spouse Saubhagyalata is the co-applicant in the loan transaction.

18. This brings me to consider the contention of Mr. Nandlal Agarwal that by virtue of the Maharashtra Amendment to the Registration Act and the incorporation of Section 89B registration was compulsory. In this respect a fair reading of Section 89B reveals that the obligation is on mortgagor to file the notice of intimation of having mortgaged the property by giving details of his name, address and name and address of the mortgagee, date of mortgage and amount of mortgage debt, rate of interest payable and list of documents deposited and description of the immovable property. Such intimation is to be given to the registering officer in the local limits of whose jurisdiction whole or any part of the property is situated.

19. Section 89B(2) provides that if such a notice is not filed before the registering authority and the mortgagor enters into any transaction in relation to or affecting the immovable property with a third party, such transaction shall be void and the third party shall be entitled to refund of any amount paid by him alongwith 12% interest so as to compensate him for damages suffered. Such amount shall be a charge on the property. However proviso to Section 89 clarifies that nothing in Section 89B shall apply to the "instruments of agreement relating to mortgage by title deeds" which are duly registered in accordance with provisions of the Act.

20. Section 89C provides for punishment in the event of failure to file such intimation. Thus it is seen that the amendment does not contemplate

any change in the position as far as registration of the instrument of agreement relating to mortgage by title deeds is concerned. That obligation is not contemplated by the amendment Act, but the principal Act. On facts it appears that the Memorandum as appearing in the present case does not appear to fit the description of "instruments of agreement relating to mortgage by deposit of title deeds" and does not appear to be fitting the description in the newly inserted provision of section 17(f) since the Memorandum does not appear to be signed by the mortgagor.

21. There is of course a newly introduced provisions of Section 89A which requires every Court passing a decree or order of interim attachment to send a copy of the decree or order together with the memorandum describing the property to the registering officer.

22. The Memorandum prima facie does not comply with the definition of agreement under section 2(e) of the Contract Act, 1872 which in Section 2(e) defines an agreement as follows :

> *2(e) Every promise and every set of promises, forming the consideration for each other, is an agreement.*

This would require at least two parties, the person making the proposal and the person accepting the proposal. In the present case the memorandum is executed only by the bank. In *State of Haryana and Ors vs. Narvir Singh and Ors and connected matters*[1] the Supreme Court observed that if a simple Memorandum is prepared to evidence handing over title deeds it does not

1 (2014) 1 SCC 105

require registration, but if the Memorandum is constitutive of the transaction it would be registrable. In the present case the Memorandum does not appear to be constitutive of the transaction since it is not even signed by the borrower and therefore it is not possible to hold that the memorandum was compulsorily registrable. In any event these are aspects which are not relevant for the purpose of the present application since it is limited to a challenge to the requirement of disclosing the banks security interest. On facts it is evident that the bank has advanced the loan for purchase of the flats and it cannot be deprived of its right to proceed against the flat. It is for the borrower to contest the claim of the bank.

23. My attention is also been invited by Mr. Nandlal Agarwal to the decision of the Madras High Court in *T.K. Sathiyanarayanan vs. S. Jaganathan*[2] in which Mr. Agarwal has sought to stress upon the observation that an unregistered mortgage deed is inadmissible in evidence. What this decision also holds is that while a mortgage may be assailed, the unregistered document can still be used to establish loan/debt and in the present case I have no doubt that the bank had advanced the loan for purchase of the flat which is now sought to be sold.

24. Besides under Rule 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Central Registry) Rules 2011 a Central register is to be maintained for recording registration of transactions relating to security interest created over properties. Mr. Chetan

2 CDJ Law Journal MHC 2298

Agarwal had relied upon the fact that such registration has been made and he has invited my attention to the encumbrance recorded in the central register. According to Mr. Chetan Agarwal if the search had been taken by the judgment creditor – applicant his security interest in favour of the bank could have been ascertained. Mr. Nandlal Agarwal however relied upon search report obtained by his client which did not indicate any such encumbrance. To my mind the search report relied upon by the applicant appears to be a result of a query based on incomplete information about the property as evident from the search report itself. Exhibit A to the affidavit dated 10th December, 2019 filed on behalf of the bank is a document described as "Addition of Security Interest Acknowledgment Report issued by the Central Registry" on 3rd December, 2019. As against this Mr. Agarwal has relied on a report described as Search Result for matching property dated 2nd February, 2020 which sets out that no property registered in the Central Registry matches the search criteria. It appears therefore that the search criteria entered by the applicant did not match with that of the property. In any event report relied upon by the bank is of the year 2019 and there is no reason to doubt the same.

25. What really, in my view, clinches the issue is the fact that the contention of the applicant that no disbursal has been made by the bank to the borrower, is not correct, since the account statement of the Power Home Loan account is also forming part of the compilation and that clearly indicates description of the property, the product being power home loan, name of the

applicant, borrower and co-borrower, rate of interest, date of disbursal, period of the loan and also clearly indicates debit of Rs.3,53,69,166/- on 28th November 2013 and several other debits towards stamp-duty and other charges and interest from time to time. Mr. Nandlal Agrawal sought to contend that this is merely an account statement of the bank account, which contention cannot be accepted since this is clearly, in my view, a statement of the home loan account. Besides, if it was a simple savings bank account or a current account it would show an opening balance. In the present case, there is no opening balance except for a debit, as aforesaid. It also contemplates penal interest, bouncing of cheque charges etc. The account title itself shows the loan agreement number. At the foot of the account as of 11th November 2021, it shows a debit balance.

26. In the circumstances, I am not inclined to accept the applicant's contentions that the impugned order is liable to be set aside. As far as the provisions of the amended Act are concerned, the obligation is clearly on the mortgagor, as aforesaid. In the circumstances, the application cannot succeed and I pass the following order :-

(i) Interim Application is dismissed.

(ii) No order as to costs.

(A. K. MENON, J.)