IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.152 OF 2022
WITH
INTERIM APPLICATION NO.999 OF 2022
IN
APPEAL FROM ORDER NO.152 OF 2022

Mr. Aejaz Amir Ahmed ...Appellant

Versus

1. Mr. Anees Ahmed ...Respondents
2. Sanjay Ashok Co-operative Housing Society Ltd.
3. State Bank of India
4. Asset Reconstruction Co. (I) Ltd.

....

Mr. Rajnish Agarwal with Mr. Arkesh Ayyagari i/b. Mr. Jamshed Ansari for the Appellant.
Mr. Rohit Gupta with Mr. Vinod Kothari with Ms Sonal Sanap i/b. M/s. Apex Law Partners for Respondent No.4.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

DATED: 28th FEBRUARY, 2022.

ORAL JUDGMENT:-

1. Heard finally with consent of learned counsel for the respective party.

2. The Appellant herein has challenged the order dated 08/02/2022 whereby the learned Judge, City Civil and Sessions

Court, Greater Bombay, has dismissed the Notice of Motion No.308 of 2022 filed in the Pauper Petition No.278 of 2019.

3. The dispute in the present case is in respect of flat No.71 on the ground floor of Sanjay Apartments, 16 Hansraj Lane, Byculla, Mumbai 400 027. Said flat shall be hereinafter referred to as the "suit flat".

4. The Appellant has sought to restrain the Respondent No.4 from taking possession of the suit flat mainly on the ground that he is the owner in possession of the suit flat. The case of the Appellant is that his father -Amir Ahmed had remitted money in the name of Respondent No.1 -Anees Ahmed for purchase of the suit flat. Instead of purchasing the suit flat in the name of Amir Ahmed, said Aneeds fraudulently purchased the suit flat in his own name. Having learnt about the same, Amir Ahmad entered into an agreement with Anees-Respondent No.1 for re-transfer of the suit flat in the name of Amir. This agreement was brought to the notice of Respondent No.2-Society, whereupon Respondent No.2 agreed to transfer the share certificate in the name of Amir Ahmed.

5. In the year 1982, Respondent No.4, Anees availed loan from Respondent No.3-Bank by creating equitable mortgage in respect of the suit flat. Respondent No.1 deposited share certificate with Respondent No.3-Bank with NOC from the society in relation to the mortgage. Respondent No.1 having failed to repay the loan amount, Respondent No.3-Bank initiated recovery proceedings. By order dated 09/08/2002, the Debt Recovery Tribunal, Mumbai allowed the application against the Respondent No.4 and orderd to pay an amount of Rs.35,94,915.30 with interest @ 16 .5% p.a. and Rs.36, 41, 355.15 @ 9% from the date of filing original application till full realisation, whereupon, Anis Ahmad filed an application under Section 22(2) of Maharashtra Co-op. Society Act seeking transfer of share certificate in respect of the suit flat in his name. The said application was dismissed by order dated 03/11/2003, wherein it is recorded that though Amir Ahmad is entitled to the membership under Section 22(2) of the Mah. Co-op. Societies Act the membership is in dispute and since the mortgage is already created in favour of Respondent No.3 Bank on the basis of share certificate it would not be appropriate to transfer the membership in relation to the suit flat.

6. In the year 2004, Amir Ahmad filed a suit for declaration that he is the sole owner of the suit filed and further that the mortgae executed by Respondent No.1-Anis Ahmad in favour of Respondent No.3 Banks is null and void. In the year 2009, Amir Ahmad, the father of the Appellant filed an application under Section 19(25) of the Recovery of Debts Due to Bank and Financial Institution Act, 1993 (RDDBI Act) claiming to be the owner of the suit flat and challenging legality of the mortgage created by his son Anis in favour of Respondent No.3-Bank. The said application came to be rejected by order dated 26/06/2009 and the Misc. Appeal No.210 of 2009 as well as Writ Petition No. 1717 of 2016 have been rejected by orders dated 18/02/2015 and 11/07/2017 respectively. Subsequent thereto the recovery officer passed an order for appointment of receiver in respect of the suit flat and letter was issued for police protection for taking possession of the suit flat. At this juncture the Appellant filed Notice of Motion in a suit filed in the year 2004 seeking to restrain Respondent No.3-Bank from taking possession of the suit flat.

7. Heard Mr. Rajnish Agarwal, learned counsel for the Appellant. He submits that the Appellant is the owner in possession

of the suit flat. He submits that Respondent No.1 had fraudulently purchased the suit flat in his name though the money for the same was remitted by his father. He contends that by a separate agreement Respondent No.1 agreed to transfer the suit flat in favour of his father Amir Ahmed. Learned counsel for the Appellant further submits that Respondent No.1 mortgaged the flat in favour of Respondent No.3-Bank on the basis of forged and fabricated share certificate. He submits that the Appellant is in possession of the suit flat and that his possession needs to be protected pending adjudication of validity of mortgage. Learned counsel for the Appellant relied upon the decision of Bombay High Court in ***Anil Nandkishor Tibrewala and Anr. vs. Jammu and Kashmir Bank Ltd. and Ors. (2007) 3 Bom CR 941,*** the decision of Madras Court in ***Arsa Kumar and Anr. Vs. Nallammal and Ors. 2004 (4) CTC 261*** and the decision of Gujarat High Court in ***Pranjivan Pirishottam Zaveri and Anr. Vs. Dena Bank Through Authorised Officer and Ors.*** Passed in ***Special Civil Application No.4822 of 2010.***

8. Per contra, Mr. Rohit Sharma, learned counsel for Respondent No.4 submits that recovery proceedings were initiated in

the year 2002. He further submits that the Appellant had filed an application under Section 19(25) of the RDDB and FI Act before the DRT where all these objections were considered on merits. He submits that the unregistered agreement does not create right, title and interest in his favour. He further submits that letter dated 26/1/1982 refers to the share certificate before Kotak Mahindra Bank and is not relevant to decide the issue involved in the case. He further submits that Section 34 of the Act excludes the jurisdiction of the Court in granting any injunction in respect of any action taken or to be taken in pursuance of powers conferred in the Act. He has relied upon the decision of the Division Bench of this Court in ***State Bank of India vs. Jigshaben B. Sanghavi and Ors. 2011 (2) Mh.L.J.***

9. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties. The questions for consideration are whether the Appellant has prima facie established that he is the owner in possession of the suit flat and whether Respondent No.1 has mortgaged the suit flat on the basis of forged and fabricated share certificate.

10. It is not in dispute that by an agreement dated 30/05/1978 Respondent No.1-Anees had purchased the suit flat from M/s. K.P. Enterprises. It is also not in dispute that the Respondent No.1 had availed loan from Respondent No.3-Bank and created mortgage in respect of the suit flat in favour of Respondent No.3 Bank to secure the dues. The Respondent No.1 also deposited the share certificate issued in the name of Respondent No.1 and the NOC issued by the Society for creating mortgage. It is not in dispute that Respondent No.1 has failed to pay the dues and Respondent No.3-Bank initiated recovery proceedings and that the judgment is also passed against Respondent No.1 for recovery of money. The Appellant has sought to restrain Respondent No.3-Bank from taking possession of the suit flat on the premise that he is the owner in possession of the suit flat.

11. The Appellant claims title to the suit flat on the basis of the agreement dated 13/03/1980. By the said agreement, Respondent No.1 had agreed to transfer the suit flat in the name of his father Amir Ahmed. This unregistered agreement was not acted upon during the life time of Amir Ahmed. Though the Appellant has challenged the

genuineness of the share certificate, there is nothing on record to prima facie suggest that it is forged. The pleadings indicate that Amir Ahmad was well aware that the share certificate was issued in the name of his son Anees. He had made an application to transfer the share certificate in his name. Apart from correspondent in this regard with the society in the year 1982, till the date of the order in recovery proceedings said Amir Ahmad had not taken steps to transfer the share certificate in his name. The allegation that the certificate is forged and fabricated are not consistent with the pleadings in the suit and are made only after the order passed in the recovery proceedings. The letter dated 12/02/2022 referred to by the learned counsel for the Appellant is in respect of the share certificate deposited with Kotak Mahindra Bank and not the one deposited with Respondent No.3 Bank. Hence, prima facie there is no merit in the contention that the share certificate is forged.

12. The Misc. Application No.38 of 2009 filed by Amir Ahmed, the father of the Appellant and Respondent No.1, under Section 19(25) of the RDDB Act seeking modification of order dated 09/08/2002 in so far as it relates to declaration of validity of mortgage, has been dismissed by holding that the validity of mortgage

can be decided only by Civil Court. Appeal filed against the said order has been dismissed and the writ petition No.1717 of 2016 filed by the Appellant and his sister has also been dismissed by the Division Bench of this Court. While dismissing the said writ petition, the Division Bench of this Court has held as under:

> "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.*
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> ...
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> *in any event the mortgage was 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."*

13. While dismissing the petition, the Division Bench of this Court has held 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.

14. In the light of these observation, prima facie the Appellant cannot claim independent title to the suit flat nor can he challenge the mortgage created in 1994. The contention of the Appellant that he is in possession of the suit flat also stands falsified by re-verification at page 99-100, which indicates that the Appellant is residing of 802-B, Evergreen Apartment, Belvdre Road, Mazgaon. The decision in ***M. Kallappa Setty vs. M.V. Lakshminarayana Rao (1973) 2 SCC 358*** is thus not applicable to the facts of the present case. The Appellant has

thus prima facied failed to prove that the mortgage created in favour of Respondent No.3-Bank is sham and bogus. The Appellant has failed to prove that he has right, title or interest to the suit flat. Despite this the Appellant has sought injunction in respect of action which has been taken in pursuance of the Act. Such recourse is barred under Section 34 of the Act, particularly in view of observations of the Division Bench of this Court that the Appellant has no independent right to the property and it is not open to challenge the mortgage created in the year 1984. This being the case, the decisions relied upon by the Appellant are not applicable to the facts of the case.

15. It may be mentioned that the primary object of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) was to bring into existence Specialised Procedural Mechanism for expeditious adjudication of the disputes and speedy recovery of the dues. In the instant case, the Appellant has adopted every possible tactics to delay the auction. This is evident from the fact that even during pendency of the Notice of Motion the Appellant has filed yet another application

under Section 19(25) of the RDDB FI Act and it is stated that the application for interim relief has been filed after dismissal of Notice of Motion without bringing to the notice of the Court the recourse taken to alternative remedy. The conduct of the Applicant invoking simultaneous jurisdiction of the civil court and the statutory authority even after the order has attained finality, is only to delay the recovery and frustrate the object of the Act.

16. Under the circumstances and in view of discussion supra, the appeal has no merits and is accordingly dismissed.

17. In view of dismissal of the appeal, the interim application does not survive and hence stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.)