

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6375 OF 2024

Rajmohan Narsingh Rao

... Petitioner

V/s.

Bank of Maharashtra and Ors.

... Respondents

Ms. Sharanya Shivaraman i/b. Meraki Chambers for the Petitioner
Mr. N.J. Devashrayee for Respondent No.1
Mr. Vishal Kanade with Bharat H. Mehta and Devang Parmar for Respondent
Nos. 2 and 4

CORAM : R.I. CHAGLA AND
FARHAN P. DUBASH, JJ.

RESERVED ON : 01ST DECEMBER 2025
PRONOUNCED ON : 13TH JANUARY 2026

ORDER (Per Farhan P. Dubash, J.) :

1. The present Writ Petition challenges an order dated 26th April 2023 (**impugned order**) passed by the Debt Recovery Appellate Tribunal, Mumbai (**DRAT**). By the impugned order (which was passed in two Appeals preferred by Respondent Nos.1 and 2 herein), the DRAT allowed both the appeals and set aside the order dated 13th October 2008 (**PO Order**) passed by the Presiding Officer of the Debt Recovery Tribunal (**DRT**), and confirmed the earlier order dated 3rd July 2007 (**RO Order**) passed by the Recovery

Officer of the DRT. Previously, by the PO order, the attachment of Unit No.515 situated in Bharat Industrial Estate, on the 5th floor, Givraj Tokaral Road, Sewri, Mumbai - 400 015 (**Suit Property**) confirmed under the RO order, came to be set aside. Consequently, pursuant to the impugned order, the attachment of the Suit Property was once again reinstated. In addition to the impugned order, the present Writ Petition also challenges subsequent orders dated 16th January 2024 and 28th February 2024 issued by the Recovery Officer of the DRT for appointment of the Receiver and also the consequent notice dated 8th April 2024 issued by the Receiver for taking physical possession of the Suit Property (**subsequent orders and notice**).

2. The array of parties to the present Writ Petition are as follows – The Petitioner is the son and administrator of the estate of late Mrs. Jayalaxmi Narsing Rao (**Owner**) who is stated to be the owner of the Suit Property. Respondent No.5 (since deceased) is stated to have entered into an agreement for sale dated 10th April 1972 which was followed by a subsequent agreement dated 27th April 1972 under which it was agreed that the Owner and the Petitioner would assign their business being carried out in the name of '*Sharda Art Printers*' from the Suit Property, along with the Suit Property, in favour of Respondent No.5. Respondent Nos. 2,3 and 4 are the legal heirs and representatives of Respondent No.5 who has since passed away. Respondent Nos. 6 and 7 are stated to be borrowers of certain financial

facilities from Respondent No.1 - Bank. Respondent No.5 (in her capacity as Director of Respondent No.6) is stated to have created certain interest in the Suit Property in favour of Respondent No.1 - Bank to secure repayment of the financial facilities availed by Respondent Nos.6 and 7. The Suit Property is located in Respondent No.8 – Society.

3. The dispute between the parties arose when Respondent No. 1 Bank sought to enforce its rights over the Suit Property upon default in payment by Respondent Nos. 2 to 7 of the financial facility and attached the Suit Property. This action is resisted by the Petitioner who contends that the Suit Property is owned by him (and previously, by the Owner) and hence, Respondent No. 1 Bank cannot attach the same. He further contends that even otherwise, there is no legal mortgage and/or charge over the Suit Property in favour of Respondent No. 1 Bank which would permit its attachment, as sought to be done under the PO order, and which attachment came to be reinstated pursuant to the impugned order.

FACTS IN BRIEF

4. The matter has a checkered history which is required to be taken note of in order to properly appreciate the issues that arise for consideration in present Writ Petition. For convenience, a brief narration of the same is set out hereinbelow:

(i) The Owner and the Petitioner are stated to have been carrying on business in the name and style of '*Sharda Art Printers*' from the Suit Property.

AGREEMENT BETWEEN THE PARTIES

(ii) An agreement for sale dated 10th April 1972 (**said agreement for sale**) came to be entered into between the Owner and Respondent No.5 in respect of the Suit Property. Subsequently, on 27th April 1972, another agreement came to be executed between the Owner, Petitioner and Respondent No.5 (**said agreement**) under which it was agreed that the Owner and the Petitioner would assign their business that was being carried out in the name of '*Sharda Art Printers*' from the Suit Property, along with the Suit Property, in favour of Respondent No.5, on the terms and conditions set out therein.

(iii) Pursuant to the execution of the said agreement, Respondent No.5 is stated to have been handed over possession of the Suit Property in good faith upon payment of the earnest money by her. However, the said agreement required the parties to undertake various steps including *inter-alia* payment of

balance consideration and execution of necessary documents in order to effect the transfer of the Suit Property from the Owner to Respondent No.5.

(iv) It is contended (by the Petitioner) that since Respondent No.5 failed to make payment of the consideration thereunder, the said agreement came to be cancelled vide letter dated 11th August 1972 addressed by the Owner and accordingly, Respondent No.5 was called upon to deliver possession of the Suit Property back to the Owner. Correspondence was thereafter exchanged between the parties wherein Respondent No.5 disputed the allegations made by the Owner and contended that she had complied with all her obligations under the said agreement.

(v) This resulted in the Owner and the Petitioner instituting a suit in this Court being Suit No.894 of 1975 against Respondent No.5 for various reliefs including *inter-alia* re-delivery of the Suit Property back to them pursuant to the cancellation of the said agreement. However, it appears that Suit No.894 of 1975 came to be dismissed, for want of prosecution.

UNDERTAKING BY RESPONDENT NO. 5

(vi) In the interregnum, it appears that Respondent Nos.6 and 7 availed of certain financial facilities from Respondent No.1 - Bank and pursuant thereto, Respondent No.5 who was a Director of Respondent No.6 is stated to have executed an (undated) Undertaking (on a Stamp Paper dated 26th February 1982) in its favour **(said undertaking)**.

(vii) Since the entire case and subsequent actions of Respondent No.1 - Bank are based on the said undertaking, for the sake of convenience and ready reference, its contents are reproduced hereinbelow :

“I the undersigned Mrs. Gulab Pandurang More hereby declare that I am the owner of Gala No. 515 in Bharat Industrial Estate, Tokersy Jivraj Road, Sewree, Bombay-15 admeasuring 790 Sq. Ft. and its present market value at the minimum of the rate at Rs.300 per sq.ft. is Rs. 2,37,000 without any encumbrance.

I am also a Director of Bombay National Printers Pvt. Ltd. situated at 42, Ambekar Road, Wadala, Bombay-31 and the said company has approached to the Bank of Maharashtra, Mazagaon Branch, Bombay-10 for a loan of Rs. 5 lakhs and to this loan I have given my personal guarantee and offer my personal Gala as a further security, and hereby undertake not to sell or create any charge on the above said Gala till the loan taken by Bombay National Printers, Pvt. Ltd. is fully repaid with interest failing which the Bank will be at full liberty to sell, dispose of my above said Industrial gala

towards the recovery of dues.”

(emphasis provided)

(viii) On 17th July 1992, a letter also came to be addressed by Respondent No.1 - Bank to Respondent No.8 – Society, informing them that there was a ‘*negative lien*’ on the Suit Property (basis the said undertaking) and Respondent No.8 - Society was requested to register the charge of Respondent No.1 - Bank in its records and not permit any sale, transfer or mortgage of the Suit Property without the written permission of Respondent No.1 - Bank.

(ix) However, in the meantime, on account of the dues of Respondent No 8 - Society (in respect of the Suit Property) being outstanding, Respondent No. 8 – Society filed proceedings before the Co-operative Court for recovery of such outstanding dues, wherein the Petitioner was also impleaded as a party to Suit No. III/1674 of 1990 preferred by it.

PROCEEDINGS BEFORE THE CO-OPERATIVE COURT FOR MEMBERSHIP OF THE SOCIETY

(x) Simultaneously, Respondent No.5 also preferred an application before the Assistant Registrar of Co-operative Societies seeking transfer of the Suit Property in the records of

the Respondent No. 8 - Society into her name. By an order dated 16th January 1995, the Assistant Registrar allowed the said application and directed that the share certificate of the Suit Property be transferred in the name of Respondent No. 5.

(xi) Subsequently, on 23rd November 2012, the Assistant Registrar passed an order directing the Chairperson of Respondent No. 8 – Society to implement the order dated 16th January 1995 and include the name of Respondent No. 5 as a member of Respondent No. 8 – Society in respect of the Suit Property. However, by an order dated 8th October 2015, the Divisional Joint Registrar set aside the orders dated 16th January 1995 and 23rd November 2012. By a subsequent order dated 9th May 2016, the Hon'ble Minister of Co-operation, Marketing and Textile set aside the order dated 8th October 2015 and restored/upheld the earlier orders dated 16th January 1995 and 23rd November 2012. Ultimately, in Writ Petition bearing no. 8046 of 2016, this Court, by an order dated 11th June 2018, set aside the order dated 9th May 2016 passed by the Minister and remanded the proceedings back to the Assistant Registrar for reconsideration. On remand, an order dated 20th October 2018 came to be passed by the Assistant Registrar observing that since

disputed questions of ownership and title were involved, he did not have jurisdiction to decide the same and observed that parties ought to file appropriate proceedings before a Civil Court and on that basis, dismissed the application preferred by Respondent No.5. This order has since also been upheld by the Divisional Joint Registrar vide his order dated 1st August 2022.

(xii) It appears that, Respondent No. 5 then filed a dispute against Respondent No. 8 – Society before the Co-operative Court and sought an order against the Petitioner not to transfer the Suit Property during the pendency of the said proceedings. However, by an order dated 21st August 2023, the Co-operative Court returned the plaint to Respondent No.5 to be presented before a Court of competent jurisdiction.

POSSESSION OF THE SUIT PROPERTY

(xiii) During the pendency of these proceedings, it appears that Respondent No.5 had addressed a letter dated 9th September 1998 to Respondent No.8 - Society informing it that all her movables and belongings had been removed from the Suit Property and she had no obligation to make payment towards the maintenance or dues of the Suit Property to Respondent No.8

– Society.

(xiv) Pursuant thereto, by a letter dated 29th December 2000, it appears that the Petitioner informed Respondent No.8 – Society that he would open the Suit Property to repair the same.

(xv) By a subsequent letter dated 9th January 2001, the Petitioner also informed the Senior Inspector of Police, Kala Chowki Police Station that pursuant to his earlier letter dated 29th December 2000, he had put his lock on the Suit Property and that he was going to open the Suit Property and take inventory of his machinery and articles lying therein. Since then, the Petitioner has been in uninterrupted possession of the Suit Property.

RECOVERY PROCEEDINGS BY RESPONDENT NO. 1 – BANK

(xvi) On account of defaults in repayment stated to have been made by Respondent Nos.6 and 7, Respondent No.1 - Bank initiated recovery proceedings against Respondent Nos.2 to 7 and filed Suit No.2019 of 1991 in this Court on 17th July 1992.

(xvii) The said Suit came to be allowed by this Court against Respondent Nos. 2 to 7 and upon the establishment of the Debt Recovery Tribunal (**DRT**) under the Recovery and Bankruptcy

Act, 1993 (**the Act**), the decree issued in favour of Respondent No. 1 – Bank was transferred to the DRT, who in turn issued a Recovery Certificate dated 25th February 2004 in its favour. The case of Respondent No. 1 – Bank appears to be based on this Recovery Certificate which is stated to recognize its claim on the Suit Property in the form of the '*negative lien*'.

(xviii) Pursuant to this Recovery Certificate, Respondent No. 1 – Bank initiated Recovery Proceeding No. 149 of 2004 and obtained a Warrant of Attachment dated 10th November 2004 on the Suit Property.

(xix) Being aggrieved by this attachment, the Petitioner preferred an appeal before the Presiding Officer of the DRT which subsequently came to be withdrawn by him with liberty to approach the Recovery Officer for the said relief, as more particularly reflected in the order dated 16th November 2005.

RO ORDER & PO ORDER

(xx) Under the circumstances, Petitioner filed an Application before the Recovery Officer of the DRT seeking to lift the attachment of the Suit Property. By an order dated 3rd July 2007, (RO Order) the said Application came to be rejected and being

aggrieved by this order, the Petitioner approached the Presiding Officer of the DRT and filed Appeal No. 6 of 2008 which came to be allowed by an order dated 13th October 2008 (PO Order) which set aside the order dated 3rd July 2007 passed by the Recovery Officer.

IMPUGNED ORDER

(xxi) Being aggrieved by this order dated 13th October 2008, Respondent No. 1 – Bank preferred an Appeal before the Debt Recovery Appellate Tribunal (**DRAT**) being Appeal No. 115 of 2009. Additionally, Respondent No. 2 also preferred an Appeal bearing no. 83 of 2009. Both Appeals came to be disposed of by the impugned order dated 26th April 2023 which allowed the Appeals and set aside the order dated 13th October 2008 passed by the Presiding Officer of the DRT whilst confirming the earlier order dated 3rd July 2007 passed by the Recovery Officer of the DRT in Recovery Proceeding No. 149 of 2004.

SUBSEQUENT ORDERS AND NOTICE

(xxii) Pursuant to the impugned order, the Recovery Officer of the DRT passed an order dated 16th January 2024 appointing a Receiver in respect of the Suit Property and pursuant thereto, an

order of appointment dated 28th February 2024 came to be issued by the DRT to the Receiver, who in turn issued a notice dated 8th April 2024 to the Petitioner to take physical possession of the Suit Property. In addition to the impugned order, the Petitioner has also challenged orders dated 16th January 2024 and 28th February 2024 issued by the Recovery Officer of the DRT for appointment of the Receiver and also the subsequent notice dated 8th April 2024 issued by the Receiver for taking physical possession of the Suit Property.

(xxiii) It appears that the Suit Property has currently been let out on leave and license basis by the Petitioner and accordingly, a third party is in possession of the Suit Property.

SUBMISSIONS OF THE PETITIONER

5. Ms. Sharanya Shivaraman, learned Counsel who appears on behalf of the Petitioner has painstakingly taken us through the entire chain of events that have transpired in the matter since the execution of the said agreement dated 27th April 1972. At the outset, she submits that the impugned order fails to appreciate that the ownership and possessory right of the Suit Property belong to the Petitioner and not Respondent No. 5. She submits that the said agreement was never consummated and since 2001,

admittedly, it is the Petitioner who has been in uninterrupted possession of the Suit Property and therefore, Respondent No.1 – Bank cannot assert any rights thereupon.

6. She submits that Respondent No. 5 is not entitled to claim any right, title or interest in the Suit Property inasmuch as, there is no registered agreement transferring ownership of the Suit Property in favour of Respondent No. 5. Accordingly, the only right asserted by Respondent No. 5 was that of a transferee in possession of the Suit Property in part-performance of the said agreement, in accordance with Section 53–A of the Transfer of Property Act, 1882 (**TOPA**). She submits that having asserted such (limited) right, and not filing any proceeding seeking specific performance of the said agreement in order to perfect such right, now disentitles Respondent No. 5 from claiming to be the owner of the Suit Property, especially when Respondent No. 5 has not been in possession of the Suit Property since 2001. In support, she relies on the decisions of the Supreme Court in ***Raheja Universal Ltd. Vs. NRC Ltd. & Ors.***¹, ***Ram Gopal Reddy Vs. Additional Custodian Evacuee Property, Hyderabad***² and that of this Court in ***Sadashiv Chander Bhamgare Vs. Eknath Pandharinath Nangude***³.

7. She then invites our attention to the impugned order which she

1 (2012) 4 SCC 148

2 1966 SCC Online SC 291

3 2004 SCC Online Bom 337

asserts, erroneously concludes that the Petitioner has trespassed upon the Suit Property without there being any documents or material before the DRAT to substantiate such assertion. She further submits that in any event, the DRAT had no jurisdiction to venture into such disputed questions of fact, let alone adjudicate the same in favour of any party and in this case, against her client and therefore, she submits that, the impugned order is bad in law, illegal and non-est since it proceeds on the basis that though the Petitioner is in possession of the Suit Property, such possession was illegally taken, pursuant to an act of trespass. To buttress this proposition, she relies on the decision of this Court in ***Bank of Baroda Vs. Gopal Shriram Panda***⁴.

8. Lastly, she submits that there is no legal charge in favour of Respondent No. 1 – Bank inasmuch as, the said undertaking (basis which, the order of attachment came to be levied) neither amounts to a mortgage or a charge and at best, would only amount to a ‘*negative lien*’. She relies on the decision of the Supreme Court in ***K. Muthuswami Gaunder Vs. N. Palaniappa Gounder***⁵ and submits that Respondent No. 1 – Bank cannot claim any security interest in respect of the Suit Property and/or accordingly, enforce any rights thereupon, as illegally sought to be done and which position has been recognized by the impugned order. She therefore submits that the impugned order and the subsequent orders and notice are required to be

4 2021 SCC Online Bom 466

5 AIR 1998 SC 3118

quashed and set aside.

SUBMISSIONS OF RESPONDENT NO. 1 – BANK

9. Mr. N.J. Devashrayee, learned Counsel who appears on behalf of Respondent No. 1 – Bank submits that the impugned order and the subsequent orders and notice have been passed in accordance with law and ought not to be interfered with by this Court exercising writ jurisdiction. He submits that there is gross delay on the part of the Petitioner in approaching this Court and the Petitioner has failed to show any cause explaining the same and as a result, this Court ought not to exercise discretionary relief in favour of such a litigant especially when, the subject matter involves a dispute between two private parties in respect of the Suit Property.

10. He invites this Court's attention to a letter dated 17th January 2001 addressed by Respondent No. 8 – Society to the Petitioner in which the Society has also contended that the Petitioner has trespassed into the Suit Property by breaking open the lock in January 2001.

SUBMISSIONS OF RESPONDENT NOS. 2 AND 4

11. Mr. Vishal Kanade, learned Counsel who appears on behalf of Respondent Nos. 2 and 4, the legal heirs and representatives of Respondent No.5 (since deceased) also supports the impugned order and the subsequent

orders and notice and submits that the DRAT has correctly recorded a finding that the Petitioner was a trespasser in the Suit Property. He relies on the said agreement and submits that pursuant thereto, Respondent No.5 was put in possession of the Suit Property in part-performance thereof and was in possession of the Suit Property from 1972 until January 2001 when she was illegally dispossessed by the Petitioner.

12. Mr. Kanade then invites our attention to Suit No. 894 of 1975 that was filed by the Owner and the Petitioner against Respondent No. 5 and submits that since the said Suit came to be dismissed for want of prosecution, the Petitioner cannot be permitted to now assert ownership rights in the Suit Property since the Petitioner has not challenged the said order of dismissal of the said Suit which has since become final and binding upon him. He submits that Respondent No. 5 was entitled to have become the owner of the Suit Property notwithstanding the fact that there was no registered instrument to that effect transferring title in her favour. In any event, he submits that the Petitioner cannot assert any reliefs in respect of the Suit Property against Respondent No.5 and his clients who are entitled to the benefit afforded to them by virtue of Section 53-A of the TOPA and relies on the decision of the Supreme Court in *Nathulal Vs. Phoolchand*⁶ in that regard.

6 (1969) 3 SCC 120

13. He submits that during the period of 1995 till 2001, Respondent No. 5 had kept the Suit Property locked and taking undue advantage of this position, the Petitioner had illegally broken into and trespassed upon the Suit Property in January 2001. As a result, the Petitioner cannot claim to be in lawful possession of the Suit Property. He relies on a letter dated 17th January 2001 addressed by the Respondent No. 8 – Society to corroborate his said assertion and submits in such circumstances, the DRAT was perfectly entitled to record a finding that the Petitioner had trespassed into the Suit Property and as a result, cannot claim any benefit to that effect. In response to the letter dated 9th September 1998 relied upon by the Petitioner, he submits that the same is forged and fabricated since the signature on the said letter is not that of the husband and constituted attorney of Respondent No. 5 and as a result, such letter cannot be relied upon.

14. Mr. Kanade further submits that Respondent No. 8 – Society has also issued various maintenance bills in favour of Respondent No. 5 thereby corroborating his clients' case that Respondent No. 5 has been admitted as a member of Respondent No. 8 – Society insofar as the Suit Property is concerned.

15. He contends that since the Petitioner has neither established his title to the Suit Property nor obtained any order/s from a competent court

confirming the cancellation of the said agreement, he cannot claim any ownership rights in the Suit Property, which vests in Respondent No. 5 and upon her demise, his clients. Accordingly, he submits that the DRAT has correctly recognized the title of Respondent No. 5 to the Suit Property and set aside the PO order. He submits that the Petitioner has not satisfactorily explained how he regained possession of the Suit Property and in such circumstances, the mere fact of the Petitioner being in possession of the Suit Property at the time of its attachment is of no consequence since the Petitioner is a trespasser thereupon and cannot defend his possession of the Suit Property. He further submits that the reliance on the provisions of the Second and Third Schedule of the Income Tax Act and Rules in the PO order is entirely misplaced, as more particularly held in the impugned order passed and relies on the decision of this Court in ***Keshrimal Jivji Shah Vs. Bank of Maharashtra and others***⁷. He therefore submits that no interference is warranted in the instant case and the present Writ Petition ought to be dismissed.

REASONS AND FINDINGS

16. We have heard the parties and considered the submissions made by them. A perusal of the impugned order reveals that in paragraph 10 thereof, it is held that a transferee in possession of immovable property in

⁷ 2004 (3) Mah.L.J. 893

part-performance of the contract is entitled to remain in possession and can also defend such possession and a trespasser who displaces such as person in possession cannot succeed under Order XXI Rule 63 of the Code of Civil Procedure, 1908 (**CPC**) against the decree holder who seeks to attach such property on the ground that the judgment debtor only has a possessory title.

17. In paragraph 11 of the impugned order, it is then held that since the Owner and the Petitioner had handed over possession of the Suit Property to Respondent No.5 pursuant to the execution of the said agreement and thereafter, even filed Suit No. 894 of 1975 seeking re-delivery of possession thereof, which came to be dismissed for default on 19th June 1989, the Petitioner could not explain how he regained possession of the Suit Property and his explanation that possession was voluntarily surrendered to him by Respondent No.5 or her husband/constituted attorney was not acceptable. Similarly, the impugned order also holds that the finding in the PO order that at the time of attachment of the Suit Property, the Petitioner was in possession thereof and relying thereupon, the resultant finding that the attachment thereof was not proper was also not acceptable. The reason for not accepting the above-mentioned contentions which had earlier found favour in the PO Order is also recorded in the said paragraph 11, *viz.* “*The trespasser of a property cannot defend his right over the property in any*

manner because the possessory right of a trespasser is not legally sustainable". The impugned order then distinguishes the reliance placed on the second and third provisions of the Income Tax Act and Rules by holding that since they are applicable only '*as far as possible*', they could not have been relied upon and the PO Order ought not to have set aside the attachment of the Suit Property by relying upon these provisions.

18. The first issue that is required to be gone into and considered by this Court relates to possession of the Suit Property. The impugned order has been passed on 26th April 2023. Admittedly, on that date, the Petitioner was in possession of the Suit Property. In fact, the record clearly reveals that even according to the contesting Respondent Nos. 2 and 4, possession of the Suit Property has been with the Petitioner since January 2001. However, they contend that the Petitioner had illegally trespassed into the Suit Property and therefore, cannot claim to be in lawful possession thereof and/or claim any rights therein, by virtue of being in possession of the Suit Property. In this connection, it is relevant to note that despite such trespass that the Petitioner is stated to have committed, and that too, as far back as in January 2001, no proceedings whatsoever have been instituted against him for such alleged trespass. Respondent Nos. 2 and 4 have not exercised their rights and/or sought themselves to be put back in possession of the Suit Property. This

court takes judicial notice of the fact that in the ordinary course of events, any person who is illegally dispossessed from immovable property by another, would inevitably take some measures pursuant thereto, and seek restoration of possession. Strangely, this has not been done in the present case. There is no pleading and/or any explanation as to why this was not done. When a pointed question to that effect was put to Mr. Kanade in this regard also, he was unable to come up with any plausible response. Instead, such conduct leads to the conclusion that there was no illegal trespass committed by the Petitioner in January 2001.

19. In response to the allegation of trespass, the Petitioner contends that Respondent No. 5 had vacated the Suit Property in September 1998 and by her letter dated 9th September 1998, informed Respondent No. 8 – Society of the same and only thereafter, and pursuant to the Petitioner's letters dated 29th December 2000 and 9th January 2001, did he enter upon the Suit Property. However, Respondent Nos. 2 and 4 contend that no such letter was addressed by their father, as the constituted attorney of their mother, Respondent No. 5. Here again, Mr. Kanade is unable to offer any cogent explanation as to why his clients and more importantly, Respondent No.5 or her husband did not file any complaint and/or proceedings challenging this letter and/or even dispute its existence during their lifetimes. Such conduct is

contrary to the usual and normal conduct that is expected from a litigant, especially one, who seeks to assert a factual position to the contrary. Consequently, this Court is not inclined to accept the case of Respondent Nos. 2 and 4 about Respondent No.5 being illegally dispossessed from the Suit Property by the Petitioner in January 2001 and/or that the Petitioner is a trespasser therein. Thus, whilst deciding the dispute that is subject matter of the present Writ Petition, the Court will proceed on the basis that since January 2001, the Petitioner has been in possession of the Suit Property and that, he is not a trespasser thereupon and his possession thereof cannot be treated as unlawful and/or illegal.

20. In the premises, the finding arrived at in paragraph 10 of the impugned order which proceeds on the basis that Respondent No.5 and upon her demise, Respondent Nos. 2 and 4 are entitled to remain in possession of the Suit Property and defend their possession thereof, against the Petitioner, who is treated to be a trespasser thereupon cannot be sustained. This is for more than one reason. Besides the discussion and finding recorded hereinabove on the Petitioner not being a trespasser on the Suit Property, admittedly on the date of the attachment of the Suit Property, they were admittedly not in possession thereof and hence, the order of attachment of the Suit Property could not have been passed since the Suit Property was not

in the possession of the judgment debtors *viz.* Respondent Nos.2 to 5.

21. Similarly, in paragraph 11 of the impugned order, the reasons set out for not accepting the contentions which earlier found favour with the Presiding Officer of the DRT and were the basis of the PO Order, are entirely incorrect and cannot be accepted by this Hon'ble Court. As already held hereinabove, the Petitioner cannot be treated as a trespasser and consequently, the findings recorded in paragraph 11 of the impugned order on such basis, cannot be sustained.

22. Under clauses 3 and 4 of the said agreement, parties had agreed that within four weeks, the Owner and Petitioner would make out a marketable title and shall perform all acts and execute the necessary documents, Deed of Conveyance and any other papers so as to effectively transfer, assign and convey the Suit Property in favour of Respondent No.5. Prior thereto, Respondent No.5 was required to make payment of the balance consideration of Rs.45,000 (out of the total consideration of Rs.50,000). However, admittedly, since then, neither has Respondent No.5 called upon the Owner and Petitioner to execute any document, conveyance, etc. nor have the parties in fact, executed any such document, Deed of Conveyance, etc. so as to effectively transfer, assign and convey the Suit Property in favour

of Respondent No.5. Moreover, even though the Petitioner contends that Respondent No.5 has failed to make payment of the balance consideration, which has been disputed by Respondent Nos.2 and 4, they have not been able to point out any documentary evidence from the record, which would corroborate their contention of such balance consideration having been paid. As a result, admittedly there is no document, registered or otherwise, transferring ownership of and/or title to the Suit Property from the Owner in favour of Respondent No.5. In such circumstances, the mere fact that Suit No. 894 of 1975 came to be dismissed, and which order has since, not been challenged, would not result in the ownership of the Suit Property being divested from the Owner, as erroneously sought to be contended by Respondent Nos. 2 and 4.

23. The reliance on Section 53-A of the TOPA by Respondent Nos. 2 and 4 is entirely misconceived inasmuch as, the said provisions can come to the defence of part-performance to a transferee to an action for ejectment by the owner of the property. In the present case, the Owner had preferred Suit No. 894 of 1975 for re-delivery of possession of the Suit Property. However, this suit came to be dismissed for non-prosecution. Hence, there is no occasion for Respondent Nos. 2 and 4 to now take shelter under the said defence of part-performance in the present Writ Petition or before the DRT or

the DRAT, especially since, they have admittedly not been in possession of the Suit Property since January 2001. Resultantly, the reliance on the judgment in *Nathulal (supra)* is entirely misconceived and of no assistance to Respondent Nos. 2 and 4. On the other hand, as more particularly held in *Raheja Universal (supra)*, *Ram Gopal Reddy (supra)* and *Sadashiv Chander Bhamgare (supra)*, since Respondent No. 5 has claimed to be a transferee in possession of the Suit Property under Section 53-A of the TOPA, she cannot simultaneously claim to be its owner.

24. Moreover, despite continued efforts, Respondent No.5 has not been successful in getting her name added as a member of Respondent No.8 – Society in respect of the Suit Property. As more particularly highlighted hereinabove, the last order that has been passed in the long list of proceedings filed by the parties is that of the Divisional Joint Registrar dated 1st August 2022 upholding the earlier order of the Assistant Registrar, who, on remand by this Court, held that since disputed questions of ownership and title were involved in the matter, he did not have jurisdiction to decide the same and accordingly, directed the parties to file appropriate proceedings before a civil court to adjudicate the same. Admittedly, Respondent Nos. 2 and 4 have not approached any civil court since then and in these circumstances, they cannot rely upon earlier receipts issued by Respondent

No.8 – Society and/or contend that the share certificate/membership has been transferred in the name of Respondent No.5. On the contrary, if pursuant to the execution of the said agreement, Respondent No. 8 – Society treated Respondent No. 5 as its member in respect of the Suit Property, there was no need and/or occasion for the Petitioner to be impleaded as a party to Suit No. III/1674 of 1990 preferred by Respondent No. 8 – Society before the Co-Operative Court for recovery of outstanding dues of the Suit Property.

25. Section 29 of the Recovery of Debts due to Banks and Financial Institutions Act, 1991 (**RDB Act**), prescribes that the provisions of the Second and Third Schedules to the Income Tax Act, 1961 (**IT Act**) and the Income Tax (Certificate Proceedings) Rules, 1962 (**1962 Rules**), as in force from time to time shall, as far as possible, apply with necessary modifications, as if the said provisions and the rules referred to the amount of debt due under the RDB Act instead of the IT Act. Rule 11(4) of the Second Schedule Part 1 of the IT Act prescribes that when the property is not in the possession of the defaulter on the date of its attachment, the Tax Recovery Officer is required to make an order releasing such property. In the present case, admittedly, on the date of its attachment, the Suit Property was in the possession of the Petitioner and therefore, the PO Order correctly relies on these provisions and directs such attachment to be lifted. The reliance on the decision of this Court

in *Keshrimal Jivji (supra)*, in the impugned order to contend that these provisions should be followed only ‘*as far as possible*’ and made applicable with ‘*necessary modifications*’ and thereafter, the confirmation of the earlier RO Order and attachment of the Suit Property, is therefore entirely misconceived, in the facts and circumstances of the present case. The PO Order had rightly relied upon these provisions whilst setting aside the order of attachment of the Suit Property and the DRAT has entirely misdirected itself in reversing this finding.

26. Similarly, even the reliance of Mr. Kanade on the decision of the Andhra Pradesh High Court in *Uppala Kanakaiah Vs. Mahaboob Singh and others*⁸ to contend that Respondent No. 5’s possessory title must prevail over that of the Petitioner is misconceived inasmuch as, the said decision would apply only in the case of a suit under Order XXI Rule 63 of the CPC. In any event, as discussed at some length hereinabove, on the date of attachment of the Suit Property, admittedly, Mr. Kanade’s clients were not in possession of the Suit Property. Moreover, Rule 63 of Order XXI of the CPC has since been omitted by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976), s. 72 (w.e.f. 01-02-1977).

27. Lastly, the impugned order also fails to appreciate that there is no legal charge on the Suit Property in favour of Respondent No. 1 – Bank inasmuch as, the said undertaking (basis which, the order of attachment came to be levied) neither amounts to a mortgage nor a charge and at best, would only amount to a ‘*negative lien*’ and in such event as more particularly held by the Supreme Court in *K. Muthuswami Gaunder (supra)*, the Bank cannot claim any security interest in respect of the Suit Property and/or accordingly, attach the same by enforcing any rights thereupon, especially since, the Suit Property has been in possession of the Petitioner 5 since January 2001.

ORDER

28. Considering the above findings, this Court is inclined to allow the present Writ Petition, which is accordingly, disposed of, in terms of the following order:

:: ORDER ::

- (i) The impugned order dated 26th April 2023 passed by the DRAT, Mumbai in Appeal No. 83 of 2009 and Appeal No. 115 of 2009 is hereby quashed and set aside.
- (ii) The attachment of the Suit Property being Unit No.515 situated in Bharat Industrial Estate, on the 5th floor, Givraj Tokaral Road, Sewri, Mumbai - 400 015 is forthwith released.

- (iii) The subsequent orders dated 16th January 2024 and 28th February 2024 passed by the Recovery Officer of the DRT for appointment of the Receiver of the Suit Property and also the consequent notice dated 8th April 2024 issued by the Receiver for taking physical possession of the Suit Property are also hereby quashed and set aside.
- (iv) There shall be no order as to costs.

(FARHAN P. DUBASH, J.)

(R.I. CHAGLA J.)

29. After the order was pronounced, Mr. N.J. Devashrayee, learned Counsel who appears on behalf of Respondent No.1 – Bank seeks a stay of the order for a period of six weeks from today so as to enable his client to challenge the same before the Hon’ble Supreme Court of India. In response, Ms. Sharanya Shivaraman, learned Counsel who appears on behalf of the Petitioner, on instructions, states that instead, the Petitioner will not alienate and/or create any third party rights in the suit property for a period of six weeks from today. The said statement made by the learned Counsel who appears on behalf of the Petitioner is accepted.

(FARHAN P. DUBASH, J.)

(R.I. CHAGLA J.)

Jyoti Pawar

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