(2010) 06 BOM CK 0002

In the Bombay High Court

Case No : Writ Petition No. 1747 of 2009

Nitin Gunwantrai Shah APPELLANT

Vs

Indian Bank and Others RESPONDENT

Date of Decision : 30-06-2010

Acts Referred:

Citation : (2010) 06 BOM CK 0002

Hon'ble Judges : Mohit S. Shah, C.J;S.C. Dharmadhikari, J

Bench : Division Bench

Advocate : V. Dhond instructed by Deepak Chitnis Chiparikar and Co, for the Appellant; Deepak Chitnis Chiparikar and Co., Satish Shetye instructed by y Pandya Gandhi, for the Respondent

Judgement

S.C. Dharmadhikari, J.—The Petitioner is aggrieved by an order passed by the learned Chairperson of the Debts Recovery Appellate Tribunal at Mumbai in Misc. Appeal No. 186 of 2009 dated 21st July, 2009 and prays that this Court should issue a writ of certiorari or 4 any other appropriate writ, order or direction to quash and set aside the same. In this Appeal the petitioner impugned the order dated 10th June, 2009 passed by the learned Presiding Officer, DRT-II, Mumbai. By this order, the Debt Recovery Tribunal dismissed Appeal No. 11 of 2008 filed by the petitioner impugning the order dated 9th August, 2008 passed by the Recovery Officer.

2. The Petitioner who is the original appellant before the Debt Recovery Appellate Tribunal contends that the 1st respondent-bank filed a suit being Suit No. 3083 of 1992 initially in this Court for recovery of money. It was filed inter alia against the Petitioner, the borrower and the guarantors. The bank also claimed a declaration that their dues are fully secured by a mortgage of the immovable property viz. a residential flat at Malbar Hill, Mumbai, more particularly described in the cause title of this Petition.

2. The petitioner was the original defendant No. 5 in the suit. The suit came to be transferred to the Debt Recovery Tribunal at Mumbai and registered as

Original Application No. 3583 of 2000. The original application was decreed against the borrower and guarantors but dismissed as against the petitioner/ original defendant no. 5. The Tribunal, according to the petitioner, gave a declaration that it does not have jurisdiction to adjudicate upon the rights of the petitioner/appellant in so far as the title to the property allegedly mortgaged in favour of the bank.

3. On the basis of recovery certificate issued in its favour, the bank commenced execution proceedings which were numbered as Recovery Proceeding No. 252 of 2002. In execution, the flat came to be attached and put up for sale. It is at that stage, the petitioner/appellant raised objections before the Recovery Officer contending that he is a tenant in respect of the said flat and the bank cannot put up the said property for sale on the basis that the petitioner''s claim of tenancy does not survive. The objections were dealt with by the Recovery Officer and finding that there is no substance in the same they were rejected. Aggrieved thereby, the matter was carried in appeal initially before the Debt Recovery Tribunal and on being unsuccessful there eventually to the Debt Recovery Appellate Tribunal. As the Debt Recovery Tribunal upheld the orders of the lower authorities, the petitioner has approached this Court.

4. The only contention raised by Shri Dhond, learned counsel appearing for the petitioner is that the Recovery Officer, Debt Recovery Tribunal and the Debt Recovery Appellate Tribunal were in error in concluding that the petitioner was allowed to remain in possession of the flat as an agent of the Court Receiver without any independent right, title and interest in his favour. He submits that the conclusion is based upon the interim order in the very suit which was subsequently transferred to the Tribunal and numbered as O.A. No. 3583 of 2000. The interim order is appointing a Court Receiver of the said flat. He submits that this interim order did not survive after the final order in the Original Application and particularly the finding in Petitioner''s favour that the declaration in bank''s favour cannot be given in the limited jurisdiction of the Debt Recovery Tribunal. Therefore, placing reliance upon the observations in the interim order of this Court, the Tribunal could not have held that the property should be put up for sale and that the petitioner has no right to remain in possession thereof.

5. Shri Dhond, learned counsel for the petitioner submits that the second finding of fact that the suit for declaration filed by the petitioner in the Court of Small Causes at Mumbai is dismissed is equally erroneous. In this behalf, he invites our attention to the order dated 21st July, 2009 passed by the Court of Small Causes at Mumbai below applications at Exhibits 19 and 21 in R.A.D. Suit No. 1389 of 2006. Shri Dhond submits that it may be that the earlier suit filed by the petitioner in the Small Causes Court for declaration of his tenancy right has been dismissed in 1993 but the instant suit for the same declaration is pending and that in the said suit, to which the bank and the Recovery Officer are parties, the learned Judge of the Small Causes Court has directed that status quo be maintained as regards the petitioner/original plaintiff''s possessions in respect of

the suit flat. The attention of the DRAT and earlier authorities was invited to the order of the Small Causes Court but they have ignored it.

6. In such circumstances, according to Shri Dhond, the learned Chairperson was in error in dismissing the Misc. Appeal and instead should have directed that the sale of the property in execution of the recovery certificate would be subject to the rights claimed by the petitioner/plaintiff.

7. After we heard Shri Dhond and Shri Shetye for the original appellant-Bank (the 1st respondent) at some length, we indicated to the parties that interest of justice would be served if while disposing off this Petition, we direct the Small Causes Court at Mumbai to hear and decide the application at Exhibit-19 for Temporary Injunction) pending before it, within the time limit specified by this Court and until the said application is heard and disposed of, the status quo would be preserved in respect of the subject flat.

8. We also indicated to Shri Dhond that the petitioner should give undertaking to this Court that he will abide by the orders passed by the Small Causes Court in the application for temporary injunction subject to his legal rights and vacate and hand over the peaceful possession of the subject flat to the Recovery Officer if the temporary orders are not passed in his favour.

9. On both counts, learned counsel took instructions and Shri Dhond submits that the petitioner will not be able to give an undertaking but would be satisfied if the Court passes an order of protection of possession until interim application is decided. Shri Shetye, learned counsel appearing for respondent no. 1/bank stated that the bank would have no objection to the order of status quo regarding possession being continued till the interim application is decided but the petitioner is occupying the premises without any compensation and he should pay the amount; at least to the extent determined by this Court in its Interim order. After taking instructions from the petitioner, who is present in court, Shri Dhond states that the arrears of compensation as per the Interim order dated 13th January 1997 would be deposited in the trial court within a period of 10 days from today. The amount if deposited, shall be retained by the Court of Small Causes till further orders in the application for temporary injunction.

10. Considering the peculiar facts of this case, we direct that the Court of Small Causes should dispose of applications at Exhibit-19 and 21 in R.A.D. Suit No. 1389 of 2006 pending before it as expeditiously as possible and within a period of Eight weeks from today. Till the application is disposed of, the 1st respondent/ bank will not dispossess the petitioner from the subject premises. However, it is directed that if the petitioner is unable to secure any interim protection in the pending suit, he can be dispossessed in execution of the Recovery certificate by the 1st respondent/bank and the Recovery Officer will be entitled to enforce the certificate and sell the property/flat for recovery of the dues mentioned therein. The petition stands disposed of in the above terms. All concerned to act on the authenticated copy of this order.

