

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 9th August, 2011

+ W.P.(C) 6877/2009

NEELIMA BAGARIA Petitioner
Through: Mr. T.K. Ganjoo, Sr. Adv. with Mr.
Pallav Saxena, Adv.

Versus

GOVT. OF NCT OF DELHI & ORS. Respondents
Through: Ms. Sangeeta Sondhi, Ms. Nitika
Aggarwal & Mr. Ashish Virmani,
Adv. for R-1.
Mr. Nikhil Rohatgi & Mr. Nakul
Mohta, Adv. for R-3.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | Not necessary |
| 2. | To be referred to the reporter or not? | Not necessary |
| 3. | Whether the judgment should be reported in the Digest? | Not necessary |

RAJIV SAHAI ENDLAW, J.

1. CM No.6843/2011 has been filed by the petitioner for revival of the writ petition which was disposed of on 27th August, 2010. The said application came up before this Court first on 13th May, 2011 when notice

thereof was ordered to be issued to the respondents.

2. The petitioner applicant thereafter filed CM No.7734/2011 seeking *inter alia* stay of the action initiated by the respondent no.3 Standard Chartered Bank (Bank) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002. The said application came up before this Court on 27th May, 2011. Vide *ex parte* order of that date it was directed that no further steps be taken in terms of the possession notice dated 13th May, 2011 issued by the Bank.

3. CM No.10360/2011 was filed by the Bank for vacation of the *ex parte* order. The said application came up before the Court on 21st July, 2011 when the same was directed to be treated as the reply of the Bank to CM No.7734/2011 of the petitioner for stay.

4. The matter was listed on 3rd August, 2011. It was the contention of the Bank on that date that the petitioner had suppressed material facts from CM No.7734/2011 to obtain *ex parte* order and owing to which *ex parte* order the Bank had been unable to take possession of the property. After hearing the counsels on that date and being *prima facie* of the opinion that

the petitioner had indulged in abuse of process of this Court, the *ex parte* order dated 27th May, 2011 was vacated and the petitioner directed to appear in person before this Court today.

5. The petitioner has appeared today in person and has also filed CM No.11635/2011 for vacation of the order dated 3rd August, 2011 and *inter alia* seeking restoration of the order dated 27th May, 2011 granted earlier.

6. The senior counsel for the petitioner has contended that the petitioner has not indulged in any suppression. Attention is invited to ***S.J.S. Business Enterprises (P) Ltd. v. State of Bihar*** (2004) 7 SCC 166, in para 14 whereof the Apex Court observed that non-disclosure of a suit with respect to the same cause of action in a writ petition under Article 226 of the Constitution of India does not amount to suppression since parallel remedies can be availed of in law and further since availability of alternative remedy is not an absolute bar to the maintainability of a writ petition under Article 226. Attention is also invited to para 15 of the judgment where the Apex Court observed that withdrawal of a proceeding does not constitute *res judicata*. The senior counsel for the petitioner has thus contended that the non-disclosure by the petitioner in CM

No.7734/2011 of withdrawal on 19th November, 2010 of W.P.(C) 7707/2010 earlier preferred by the petitioner, also challenging the proceedings under the SARFAESI Act, does not amount to suppression.

7. The judgment cited by the senior counsel for the petitioner has no application to the present case. The present is not a case of a suit having been suppressed by the petitioner. The petitioner did not disclose to this Court while seeking the *ex parte* order in CM No.7734/2011 that she had earlier invoked the jurisdiction under Article 226 of the Constitution of India and had been unsuccessful in the same. W.P.(C)7707/2010 was withdrawn after the petitioner failed to convince this Court of merit thereof. The reasoning given by the Apex Court in ***S.J.S. Business Enterprises (P) Ltd.*** (supra) would not apply to the facts of the present case in as much as the present is not a case of alternative/parallel remedies but of the petitioner having availed of remedy under Article 226 twice without disclosing the factum of having been unsuccessful in the earlier round.

8. The senior counsel for the petitioner has next contended that the Bank had an opportunity to appear since advance copy had been given to it

of CM No.7734/2011 and having chosen not to appear cannot complain of concealment. I do not find any merit in the said contention also. The non appearance of the Bank is of no avail; the suppression practiced by the petitioner is of the facts from the Court and not from the respondents. A person who approaches the Court especially for a discretionary relief as under Article 226 Constitution of India owes a duty to the Court to make a complete disclosure and cannot be heard to plead that the opposite party ought to have made a disclosure and the fact that the opposite party can make disclosure does not relieve a party of himself/herself making a clean breast of the state of affairs.

9. The senior counsel for the petitioner has next contended that the challenge in the earlier writ petition was on entirely different grounds. Attention is invited to W.P.(C)7707/2010 wherein the petitioner had disclosed about the present writ petition.

10. However what we are concerned with over here is the disclosure in the present proceedings and not the disclosure in W.P.(C) 7707/2010.

11. As far as the argument of the challenge in the two petitions being on different grounds is concerned, it is not open to a litigant to file successive

petitions for same relief albeit on different grounds. Moreover, a litigant cannot choose what to disclose to the Court and what not to disclose. The present was not a case where the filing of W.P.(C) 7707/2010 can be said to be so extraneous to CM No.7734/2011 to be not within the contemplation of the petitioner for disclosure. It cannot be disputed that the remedy claimed in both proceedings was the same i.e. to stall the action under SARFAESI Act initiated by the Bank. In fact it appears that had the petitioner been successful in W.P.(C)7707/2010 the occasion for filing CM No.7734/2011 may not have arisen. What is being urged today before this Court, that the filing of W.P.(C)7707/2010 and withdrawal thereof would not have come in the way of the petitioner being entitled to the interim relief ought to have been urged on 27th May, 2011 when *ex parte* relief was claimed from this Court and it ought to have been left to the Court at that stage to accept or reject the said contention of the petitioner. The charge of suppression cannot be defended by contending that the petitioner was entitled to relief even if had made the disclosure.

12. The senior counsel has with reference to paras 2&3 of the order dated 3rd August, 2011 contended that the impression given to the Court on

that date was that the petitioner was in possession of the property or by obtaining the *ex parte* order aforesaid had delayed parting with possession of the property. It is further stated that W.P.(C) 952/2011 referred to in para 3 of the order dated 3rd August, 2011 was withdrawn by the Bank itself and without any statement by the petitioner herein.

13. It was informed to this Court during the hearing on 3rd August, 2011 by the Bank that the possession of the property was with the Recovery Officer of the DRT and was to be delivered by the Recovery Officer to the Bank. It thus cannot be said that there was any misrepresentation by the Bank on that day. Similarly what is recorded in para 3 of the order is the comprehension by this Court of the argument on that date. Moreover, the misrepresentation even if any by the Bank cannot relieve the petitioner of her guilt.

14. The senior counsel for the petitioner has also contended that the Bank moved the application for vacation of *ex parte* order after as many as 45 days. In my opinion the said factor is also irrelevant.

15. The senior counsel has lastly contended that the error in not disclosing the factum of W.P.(C) 7707/2010 is *bona fide*. It is stated that

the petitioner is a housewife and is not actively involved in the business affairs which are looked after by her husband. The petitioner present in person states that her husband has not accompanied her to the Court today. The counsel for the Bank at this stage informs that the stand taken by the petitioner today is contrary to the stand taken by the petitioner and her husband before Debt Recovery Tribunal (DRT) that their relationship is strained and that they are not living together.

16. The counsel for the petitioner states that the stand before DRT is of the husband having deserted the petitioner at an earlier point of time.

17. Having found the petitioner to have indulged in suppression of facts, she cannot be held to be entitled to the relief of pursuing this petition, even if her application for revival of this writ petition otherwise had any merits. For the same reasons, I also do not find any merit in the application of the petitioner for restoration of the order dated 27th May, 2011.

18. As far as the punishment to be meted out to the petitioner is concerned, I tend to accept the contention of the senior counsel for the petitioner of the facts having remained to be informed to this Court owing to a *bona fide* mistake. Considering the said fact and further considering

that the counsel advising the petitioner is a young professional, I tend to put the matter to quietus by imposing punishment on the petitioner of payment of ₹1 lac to be deposited with Delhi High Court Legal Services Authority. The same be done within four weeks. If the proof of payment is not deposited with the Registry within four weeks, the matter to be re-listed for appropriate directions.

The applications are disposed of

**RAJIV SAHAI ENDLAW
(JUDGE)**

AUGUST 9, 2011

PP