IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.649 of 2016
IN
Civil Writ Jurisdiction Case No. 17717 of 2010

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M/s Ram Pravesh Rai Estate Pvt. Ltd. a company registered under Company Act 1956, having its registered office at Goharua House, Sri Nagar Siwan, District-Siwan at present 44, Patliputra Colony, Patna, through its Managing Director- Sri Ram Pravesh Rai, S/o Late Kamla Rai, R/o 19, Patliputra Colony, Patna, P.S.-Patliputra, Patna- 800013, District- Patna.

.... Respondent No. 4 / Appellant

Versus

1. The Bihar State Financial Corporation, Fraser Road, through its Managing Director.
2. The Managing Director, Bihar State Financial Corporation, Fraser Road, Patna.
3. The Branch Manager, Bihar State Financial Corporation, Chapra.

…….. Respondent Nos. 1 to 3 / Respondent 1st Set.

4. Rajeshwar Prasad Sinha, Partner of M/s Hind Concrete Allied Manufacturing Company, R/o Chak Musallahpur, P.S.- Kadam Kuan, District- Patna.

.... Writ Petitioner / Respondent 2nd Set.

With

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Letters Patent Appeal No. 1207 of 2016
IN
Civil Writ Jurisdiction Case No. 17717 of 2010

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1. The Bihar State Financial Corporation, Fraser Road, Patna through its Managing Director.
2. Managing Director, Bihar State Financial Corporation, Fraser Road, Patna.
3. Branch Manager, Bihar State Financial Corporation, Chapra.

.... Respondent Nos. 1 to 3 - Appellants

Versus

1. Rajeshwar Prasad Sinha, Partner of M/s Hind Concrete Allied Manufacturing Company, Resident of Chak Musallahpur, P.S. - Kadam Kuan, District - Patna.

……….. Writ petitioner – Respondent.

2. M/s Ram Pravesh Rai Estate Pvt. Ltd. a Company Registered under Company Act, 1956 having its Registered Office - Goharua House Sri Nagar Siwan, District - Siwan, at present 44, Patliputra Colony, Patna, P.S. - Patliputra, Patna - 800013,

District Patna through its Managing Director, Sri Ram Pravesh Rai son of Sri Kamla Rai, resident of 19, Patliputra Colony, Patan, P.S. - Patliputra, Patna - 800013, District - Patna.

……… Respondent no. 4 – Respondent.
.... Respondents

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Appearance:

(In LPA No.649 of 2016)

For the Appellant/s	:	Mr. Binod Kumar Singh and Ms. Vagisha Pragya V, Advocates.
For the Respondent/s	:	Mr. Raju Giri, Mr. Santosh Kumar Mishra, Mr. Subhash Chandra Bose and Mr. Manik Vedsen, Advocates.

(In LPA No.1207 of 2016)

For the Appellant/s	:	Mr. Raju Giri and Mr. Santosh Kumar Mishra, Advocates.
For the Respondent/s	:	Mr. (Advocate).

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 18-05-2018

These two Letters Patent Appeals have been preferred for setting aside the judgment dated 21.01.2016 passed by the learned Writ Court in Civil Writ Jurisdiction Case No. 17717 of 2010 by which the learned Single Judge has been pleased to set aside the sale order dated 23.03.2007 and allowed the Writ Application preferred by the petitioner. The Bihar State Financial Corporation (hereinafter referred to as 'the Corporation') has been directed to take steps for completing the process of settlement with the writ petitioner under the

'OTS Scheme, 2009', the Corporation has been directed to issue No Objection Certificate as well as to refund the amount deposited by the auction purchaser (the present appellant) in accordance with law.

2. Letters Patent Appeal No. 649 of 2016 has been preferred by the auction purchaser, who was intervenor-respondent no. 4 in the Writ Application, whereas Letters Patent Appeal No. 1207 of 2016 has been filed on behalf of the Corporation and its authorities, who were respondents no. 1 to 3 in the Writ Application.

3. The facts revealed from the pleadings of the parties are not much in dispute. The writ petitioner was one of the partners of the partnership firm, namely, M/s Hind Concrete Allied Manufacturing Company (hereinafter referred to as 'the firm'). The firm was engaged in manufacturing of PSC electric poles. Since they required some financial assistance they approached the Corporation for sanction of loan which was sanctioned on 27.12.1985 for a sum of Rs. 9 lakhs. As the ill luck would have it, over a period the unit ran into certain difficulties which resulted in default in repayment of loan. The Corporation decided to auction sale the hypothecated assets of the firm. A decision in this regard was taken by the erstwhile Managing Director of the Corporation. Being aggrieved by the decision of the Managing Director of the Corporation, the petitioner being a partner of the firm preferred a Writ Application being CWJC No. 5907 of

2007 (**Rajeshwar Prasad Sinha Vs. The Bihar State Financial Corporation & Ors.**) in this Court. The petitioner challenged the action of the Corporation on several grounds *inter alia* stating that the Corporation had illegally denied reconstitution of the firm after resignation of one of the partners of the firm in the year 1987. It was submitted that belatedly when the Corporation allowed the request of the petitioner for reconstitution it was made subject to certain terms and conditions which were not possible to be agreed to.

4. Having taken note of the grievance of the petitioner a learned Single Judge of this Court in exercise of power under Article 226 of the Constitution of India held as under:-

> **"In the above circumstance the Court has no hesitation in recording that there has been failure on both sides. The corporation has accepted the reconstitution of the firm but has not deleted the name of another partner who has already retired leading to non-release of subsidy amount by taking a hyper technical view. There is failure on the part of the petitioner as well as he did not approach the court in the year 1990 or soon thereafter when the subsidy was not credited to the account of the firm.**
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> **In view of above stated position the Court is not inclined to pass any order in favour of the petitioner at such a belated stage more so when subsidy amount cannot be paid as it has lapsed in the year it was**

released.

The petitioner as well as respondent Corporation however will be well advised to sit on a table, work out the liability keeping the totality of the situation in mind. If one time settlement scheme or any other scheme will facilitate any relief to the petitioner the Corporation would be well advised to do so to settle the dispute.

This writ application is however dismissed."

5. It appears that the Corporation rejected the request of the petitioner to consider his case for settlement under the OTS Scheme, 2009 on the ground *inter alia* that at the relevant time no One Time Settlement Scheme was in operation. Annexure-14 to the present Writ Application is a copy of the communication dated 21.07.2010 issued under signature of the Deputy Manager (Z-I) of the Corporation by which the petitioner was informed with reference to the order dated 18.03.2010 of the High Court in CWJC No. 5907 of 2007. He was told that the dues of the Corporation against the unit as on 28.02.2010 is Rs. 1,22,78,157/- and that at that time there was no OTS Scheme in the Corporation as well as in order to liquidate his dues the entire dues as on 28.02.2010 plus the additional interest, penal interest and another charges from 01.03.2010 till the date of

liquidation will be required to be paid failing which the Corporation shall have no option but to initiate the procedure for handing over the possession of the unit to the purchaser.

6. On receipt of the letter dated 21.07.2010 the petitioner sent a reply to the Corporation vide letter dated 28.07.2010 and while intimating the Corporation about the pendency of the Letters Patent Appeal against the order of the learned Writ Court, the petitioner offered to pay the dues subject to the Corporation allowing the facility of its ILRS Scheme 2008. The petitioner claimed that he had filed an application for the same on 25.09.2008 which was not considered by the Corporation on a wrong premise that the petitioner's unit was sold whereas from its own letter dated 2.07.2010 as well as the order of the High Court it was evident that the unit was not sold. The petitioner wanted to pay the restructured amount as per ILRS Scheme 2008. No response was received by the petitioner on his letter dated 28.07.2010 (Annexure-15).

7. The petitioner learnt later on that the Corporation has floated a new OTS Scheme 2009 vide Circular No. 02/10-11 dated 17.08.2010, the petitioner got a copy of the circular dated 17.08.2010 containing the scheme but was informed that on 17.08.2010 itself an order for take over of the petitioner's unit was also issued. The petitioner claimed that he still requested the Corporation to accept his

offer for settlement as per OTS Scheme and to defer the further action. The petitioner got prescribed application form downloaded, filled it up and after purchasing Bank Draft of Rs. 2,25,000/- being the application money went to the Branch Office of the Corporation to submit his application on 23.09.2010. The Branch officials refused to receive the application and directed him to submit it in the Head Office but the Head office also refused to accept it. The petitioner gave a detailed representation addressed to the Managing Director with a request for his personal indulgence and direction to the concerned authority to receive application for settlement of dues under Clause 5.1(a) of the OTS Scheme. It is stated that the petitioner assured that the entire OTS amount will be paid within 10-15 days. A copy of the letter dated 24.09.2010 has been enclosed as Annexure-21 to the Writ Application. It is the case of the petitioner that the Board of Directors of the Corporation had approved the OTS Scheme 2009 on 23.06.2010 itself, therefore, it was not correct on the part of the Corporation to say in its letter dated 21.07.2010 that no OTS Scheme was in existence in the Corporation.

8. The petitioner challenged the order dated 23.03.2007 (Annexure-13) by which the Assistant General Manager of the Corporation issued the sale order of the mortgaged / hypothecated assets of the firm in favour of the respondent no. 4 for a consideration

amount of Rs. 8,75,000/- only. The sale order (Annexure-13) was issued in the light of the decision of the Board of the Corporation in its meeting held on 25.08.2006 approving the sale of the hypothecated assets of the firm in favour of the respondent no. 4. The petitioner also prayed for quashing of the order dated 17.08.2010 (Annexure-17) by which the Corporation in purported exercise of its power under Section 29 of the State Financial Corporation Act, 1951 (hereinafter referred to as 'the Act of 1951') decided to enter into the premises of the firm and to take possession of the mortgaged / hypothecated assets of the said concern on behalf of the Corporation and to hand over the taken over assets to the purchasers after compliance of the terms and conditions of the sale order issued vide Annexure-13 to the Writ Application. The petitioner prayed for a direction to the Corporation to allow the petitioner to pay the dues under Clause 5.1(a) of its One Time Settlement Scheme 2009 circulated vide Circular No. 2/10-11 dated 17.10.2010.

9. The Corporation and its authorities respondents no. 1 to 3 and the private respondent (respondent no. 4) opposed the Writ Application on the grounds *inter alia* that the writ petitioner was a regular defaulter in maintaining its loan account and, therefore, the Corporation had decided to auction sale the mortgaged / hypothecated properties of the firm. A tender for auction sale was published in the

year 1998 and under its' continuing tender policy of respondent no. 1 when the respondent no. 4 offered Rs. 8,75,000/- against the assets in question the same was notified in daily newspaper AAJ on 28.10.2007. Since no body came to pay more than that amount sale order was approved in favour of respondent no. 4. Respondent no. 4 had deposited the amount as per sale order of the Corporation, details of payment have been provided in Para 6 of the Counter Affidavit filed on behalf of the respondent no. 4 in the Writ Application. The respondent no. 4 has brought on record Memo No. 184 dated 13.08.2010 (Annexure-R/6) to show that the respondent no. 3 had issued a certificate certifying that the respondent no. 4 had paid the entire sale price with interest as per the demand by the Corporation. It is the case of the respondent no. 4 that despite several letters written to the Corporation requesting for handing over the physical possession of the sold properties, the physical possession of the properties were not handed over to the respondent no. 4. The respondent no. 4, having deposited the dues amount as purchaser, was not getting possession of the properties despite his continuous persuasions with the authorities concerned. According to the respondent no. 4, the petitioner was not entitled for the reliefs prayed in the Writ Application.

10. In response to the submissions of the respondent no. 4 the petitioner has vehemently contended that the auction sale of the

properties was not held by following the norms and procedures laid down on this behalf. The details furnished in the Counter Affidavit were said to be lacking on several aspects of the matter, such as, details of the auction procedure, number of tenderers, valuation of assets, dates of deposit of tender money and the date of acceptance of offer. It is the specific case of the petitioner that the sale was conducted in a hush-hush manner and it was effected in favour of the only tenderer in the year 2006 against the sale notice of the year 1998 wherein offers were invited under Continuous Sale Policy of the Corporation as disclosed in Para 9 of the Counter Affidavit filed by the respondent Corporation.

11. It is the stand of the petitioner that such a policy which has been adopted by the Corporation has been held to be bad and illegal by this Court in the case of **Santu Lal Gupta Vs. Bihar State Financial Corporation**, reported in AIR 2000 Pat 300, and affirmed in LPA No. 286 of 2000 (R) vide order dated 14.08.2002 reported in AIR 2003 Jhar 44. It is submitted that a Special Leave Petition against the order passed in LPA No. 286 of 2000 (R) was also dismissed by the Hon'ble Supreme Court.

12. It is contended by the petitioner that an incorrect statement has been made by the respondent regarding the deposit date of draft of Rs. 1,70,000/- towards initial payment. In fact the draft was

deposited vide letter dated 24.04.2007 with condition attached to it, i.e., in the anticipation of approval of change in constitution of purchaser firm from partnership to proprietorship and thus, according to the petitioner, the deposit was not in compliance of sale order dated 23.03.2007 according to which the last date of payment of initial amount was 23.04.2007 and the consequence of failure to pay by the said date would have invited forfeiture of tender deposit and nothing else. It is pointed out that on 22.12.2008 an interim order was passed by this Court saying that if the petitioner's unit has not already been sold it shall not be sold. According to the petitioner, on the said date, i.e., 22.12.2008 the petitioner's unit was not sold. On 23.12.2008 the matter was placed before the Board of Directors of the Corporation and thereafter acceptance order was issued on 02.02.2009 paving way for sale, still then there was no handing over of assets, no sale deed was registered and, therefore, the unit was not transferred / sold.

13. The petitioner, therefore, contended that the fact that the tender was submitted on 01.08.2005 and after a lapse of about two years on same tender notice of 1998 and tender deposit of Rs. 50,000/- the sale order was issued on 23.03.2007, it becomes crystal clear that the entire auction sale was collusive and hence the same was fit to be set aside as the same cannot be validated on the grounds of subsequent payment made or demanded by the Corporation. It has

further been pointed out that the sale order could not have been acted upon because of the failure of the private respondent to deposit the initial cash component of the consideration money in time.

14. It appears that at a later stage the respondent no. 4 filed a Supplementary Counter Affidavit taking a preliminary objection as to the maintainability of the Writ Petition on the following grounds:-

(i) That no Writ of Mandamus can be issued in the present case to the respondent authorities in the matter of settlement because settlement pre-supposes consent of both the parties whereunder a creditor relinquishes his claim to a sum of money due to him and voluntarily agrees to take a lesser amount for the liquidation of the liability of the debtor.

(ii) That because the petitioner prays for a direction to the Corporation to allow the petitioner to pay the dues under Clause 5.1(a) of its One Time Settlement Scheme 2009 which applies when the unit has not been sold. It does not apply where unit is sold by the Corporation. In the present case, according to the petitioner (respondent no.4), the unit has been sold long back and the sale order has been passed on 23.03.2007.

(iii) That because the other partners of the firm are not coming to the court and challenging the impugned action of the respondent authorities.

15. The respondent no. 4 has explained the initial payment of Rs. 1,70.000/- stating that the initial deposit could not be made on that date in the office of the Corporation because when the petitioner went there the office was found to be closed due to holiday on Saturday, the next day was Sunday, on 23.04.2007 the office of the Corporation was closed as there was a holiday because of Veer Kunwar Singh Jayanti, therefore, the draft was received by the Corporation on 24.04.2007. Thus, there was no delay in payment of the initial cash amount. It is stated that the respondent no. 4 thereafter deposited Rs. 6,55,000/- vide Demand Draft dated 10.01.2008 on 11.01.2008 which was within the time prescribed. It is submitted that in the first Writ Application being CWJC No. 5907 of 2007 the petitioner had simply prayed for restraining the Corporation from raising illegal demands but did not challenge the sale order dated 23.03.2007. It is further submission of respondent no. 4 that ILRS, 2008 was a scheme introduced for defaulting units but not for units which were sold to the purchasers. This scheme was in existence from 01.07.2008 upto 31.12.2008. The case of the petitioner was contested also on the ground that the case of the petitioner is misconceived in view of the judgments reported in AIR 2002 All 96, AIR 2012 Pat 35 and the decision delivered in LPA No. 727/2013, decided on 16.07.2014 by this Court.

16. Before the learned Writ Court the respondents no. 1 to 3 also filed a Counter Affidavit in which a stand was taken that the Corporation vide its letter dated 21.07.2010 gave one opportunity to the petitioner in compliance of the order passed by this Court to liquidate its dues but the petitioner did not avail the opportunity. It is submitted that OTS Scheme which was available to a promoter whose unit has not been sold.

FINDING OF THE WRIT COURT

17. The learned Writ Court considered the submissions advanced on behalf of the parties at the Bar and held that when the learned Writ Court issued directions in CWJC No. 5907/2007 on 04.05.2007, neither the Corporation questioned the directives issued by the Writ Court regarding settlement of disputes nor did the purchaser (respondent no. 4) choose to get itself impleaded in the proceedings nor did it question the directions of the Writ Court before a superior forum and, therefore, the orders and directions issued by the learned Writ Court had attained finality.

18. The learned Writ Court has further held that although the sale order was issued on 23.03.2007 but neither any sale deed has been executed by the Corporation in favour of the auction purchaser (Respondent no. 4) nor the possession of the unit had been taken over and handed over. It was also noticed that even after depositing the

entire sale amount when the purchaser was not being handed over possession of the assets of the firm, the purchaser did nothing to knock the doors of the forums available to him for confirmation of sale and delivery of possession.

19. According to the learned Writ Court, in the light of the interim order passed by the Court on 27.10.2010 in the present proceeding the application form of the petitioner under OTS Scheme 2009 had been accepted and the entire settlement amount had been deposited by the petitioner. A statement to that effect had been made by the petitioner in Paragraph 13 of the Rejoinder to the Counter Affidavit of the intervenor-respondent no. 4 filed on 15.12.2014. The Writ Court took a view that at this stage neither the Corporation nor the private respondent are within their right to question the claim of the petitioner for settlement under OTS Scheme 2009 because they did not bother to question the decision of the bench in terms of the order passed in CWJC No. 5907/2007 which imposed an obligation upon the Corporation to consider the claim of the petitioner for settlement under any scheme to facilitate him relief of settlement.

20. In the opinion of the learned Writ Court, the letter dated 21.07.2010 written by the Deputy Manager (Z-I) (Annexure-14), issued with reference to the order passed in CWJC No. 5907/2007 directing the petitioner to liquidate the entire dues

mentioning that there was no OTS Scheme in operation was nearing to a case of contempt. The learned Single Judge also found that the Board of the Corporation had already decided to implement the OTS Scheme 2009 in its meeting held on 11.09.2009 and 23.06.2010, i.e., well before issuance of the letter dated 21.07.2010 and, therefore, it was a totally mala fide and contemptuous act on the part of the authorities of the Corporation including the Managing Director and the Deputy Manager to have permitted the petitioner to liquidate the dues. The learned Writ Court took note of the fact that at the stage of disposal of LPA No. 833/2010 filed by the present petitioner seeking permission of the Division Bench to approach the Corporation under the OTS Scheme 2009, no objection or a voice of protest was made by the Corporation questioning the eligibility of the petitioner on any ground whatsoever for seeking such settlement.

21. At last, the learned Writ Court answered the contention of the contesting respondents by relying upon the judgment in the case of **Smt. Kanti Devi Vs. The State of Bihar** arising from CWJC No. 103 of 2010 and the judgment of the Hon'ble Apex Court in the case of **Narandas Karsondas Vs. S.A. Kamtam**, reported in AIR 1977 SC 774, and held that in the case of **Smt. Kanti Devi** (Supra) identical issue had fallen for consideration before the learned Writ Court which was taken note of and answered in the following terms:-

"Learned counsel for the petitioners, meeting the aforesaid stand of the respondent Corporation, relies upon a decision of a learned single Judge of this Court in the case of M/s. Dayal Fuel Industry vs. Bihar State Financial Corpn. & Ors.: 2009(1)PLJR 800. He specifically relies upon paragraph Nos. 4,9,10 & 11 of the said decision, which are quoted below:

"4. Petitioner's prayer in the writ petition was that the Corporation came out with BSFC OTS Scheme, 2006. Petitioner, with due application money, made an application for settlement of all outstanding due under the said One Time Settlement Scheme. It had offered to take the settlement under Scheme 1A but the Corporation treating it to be a case under Scheme FA, ordered that the entire outstanding could be settled but petitioner would not be entitled to get back the unit, as the unit had been sold. In other words, the Corporation's stand is that petitioner may pay the outstanding under settlement and forgo the unit as well. Thus, in other words, the mortgage is foreclosed with liability to liquidate the due outstanding, which on the face of it appears to be peculiar. Thus, in my view, the question is whether the unit was sold or not?

9. Provision of sub-section (2) of Section 29 in no way retracts from the provision of Transfer of Property

Act. For a sale, the transfer of property has to be absolute in terms of Transfer of Property Act and that is to be achieved only by a document in writing duly registered. Section 29 of the State Financial Act authorizes the Corporation to execute such a document but even then such a sale takes place only when a transfer document is executed and duly registered as contemplated under the Transfer of Property Act, which has not been done in the present case.

10. I fail to understand on what basis Corporation took the stand that the property was sold by virtue of the sale letter. If the property was sold by virtue of sale letter then this Court fails to appreciate why in the very sale letter is stated that the petitioner had a right to retain the property on matching term. If the sale was already made and the property sold to respondent no.6 by the sale letter how could the property be retained by the petitioner after the sale had been made. Then again where is the consideration for sale. It was said that it was sold for a consideration of Rs.3.41 lakh but what happened to that money. The Corporation admits that after payment of initial amount of Rs.78,000/-no further amount was deposited by respondent no.6, who had abandoned the transaction without completing the legal formality. There was no documentation for sale nor registration thereof.

11. If on Corporation own showing legal formalities for sale were not completed, i.e., is neither was consideration received nor any document transferring the property executed nor any such document having been registered in terms of Transfer of Property Act, I fail to understand that on what basis Corporation takes the stand that the property was sold. The stand is misconceived in fact and in law and has no legs to stand. It is only a pretence for denying honorable exit to the petitioner from the debt trip laid out by the Corporation, where for a disbursement of Rs.82,000/- the petitioner had a liability to discharge now of over Rs.25 lakh. This Court can say no more. The stand of the Corporation being misconceived in fact and in law that the property was sold, the stand of the Corporation for settling the due under clause FA cannot be sustained either on fact or in law. The application of the petitioner for settlement otherwise was proper and had to be acted upon. Failure on the part of the Corporation to permit the petitioner to settle the due under the said scheme as per petitioner's option was thus wrongly denied to the petitioner. The Corporation is thus be liable to grant the facility to the petitioner to compound his liability in terms of BSFC OTS, 2006 as per his application or as per his desire under any of the scheme because choice is that of the defaulter under the scheme."

22. Paragraphs 35 & 37 of the judgment in the case of **Narandas Karsondas** (Supra), on which the learned Writ Court has relied upon, are also quoted hereunder for a ready reference:-

> **"35. The mortgagor's right to redeem will survive until there has been completion of sale by the mortgagee by a registered deed. In England a sale of property takes place by agreement but it is not so in our country. The power to sell shall not be exercised unless and until notice in writing requiring payment of the principal money has been served on the mortgagor. Further Section 69 (3) of the Transfer of Property Act shows that when a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale. Therefore, until the sale is complete by registration the mortgagor does not lose right of redemption.**
>
> **37. In view of the fact that only on execution of conveyance, ownership passes from one party to another it cannot be held that the mortgagor lost the right of redemption just because the property was put to auction. The mortgagor has a right to redeem unless the sale of the property was complete by registration in accordance with the provisions of the Registration Act."**

In view of the aforesaid proposition, there being no denial of the fact that there has been no registration or even execution of a deed of sale in favour of the auction purchaser, the petitioner's right to redeem the mortgaged property continues and was in existence on 17.8.2010 when the OTS Scheme, 2009 was floated by the respondent Corporation and still continues to exist. So long as the right to redeem the mortgaged property remains and in the meantime any OTS is floated by the Corporation then it would be open to the promoter of the Unit to take the benefit of the said OTS Scheme as the owner of the said Unit."

23. In ultimate analysis, the learned Writ Court found that the petitioner was fully entitled for consideration of his case for settlement under 'OTS Scheme 2009' and mere issuance of the sale order by the Corporation on 23.03.2007 and/or the deposit by auction purchaser neither takes away the right of the petitioner nor completes the sale transaction in absence of any sale deed having been executed by the Corporation in favour of the auction purchaser and in absence of the possession being handed over to the auction purchaser. It was found that under the interim order of this Court passed on 27.10.2010 the application filed by the petitioner had been accepted by the Corporation, the settlement amount had been worked out and the same

had already been deposited by the petitioner, the legal formalities towards the One Time Settlement stands completed and the order of the Writ Court passed in CWJC No. 5907 of 2007 has been acted upon.

24. In this background of the facts and adjudications led by the learned Writ Court, the sale order dated 23.03.2007 (Annexure-13) became unsustainable and the same has been quashed by the learned Writ Court.

SUBMISSIONS IN APPEAL

25. Learned counsel representing the respondent no. 4 – appellant has made the arguments. It is once again contended before us that the writ petitioner having failed to challenge the sale order dated 23.03.2007 in the first Writ Application had waived his right to challenge the same in the subsequent Writ Application and, to that extent, the principle of constructive *res judicata* would be applicable. It is submitted that the petitioner was never interested in redemption of mortgage and, for that reason, he never challenged the sale order. Referring to Annexure-5 to the Writ Application learned counsel submits that a perusal of the legal notice dated 06.06.2005 issued on behalf of writ petitioner would show that he was aggrieved only with the outstanding demand raised for the period after sale of the unit. He was not aggrieved by the sale. Referring to Paragraphs 12 & 13 of

Annexure-5 to the Writ Application, learned counsel submits that the writ petitioner was only challenging the demand and, therefore, he had willingly waived his right to redemption. In order to support his contention on the applicability of the principle of constructive res judicata learned counsel for the appellant has relied upon the judgment of the Hon'ble Apex Court in the case of **State of U.P. Vs. Nawab Hussain**, reported in AIR 1977 SC 1680 : (1977) 2 SCC 806 (Para 3 & 4).

26. It is further submitted that Section 60 of the Transfer of Property Act confers a right to redemption which is subject to the proviso to Section 60 which has not at all been looked into by the learned Single Judge. According to the learned counsel, the petitioner never challenged the auction sale on the ground of non-observance of any mandatory provision of law. It is submitted with reference to the order dated 18.03.2010 passed in CWJC No. 5907/2007 (Annexure-8) that the learned Writ Court had refused to pass any order in favour of the petitioner taking note of the belated stage at which the petitioner had approached the Court only when the Corporation had taken steps for recovery of the dues or when an offer was made for One Time Settlement.

27. Referring to Section 58 of the Transfer of Property Act which defines "Mortgaged Money", learned counsel for the petitioner

submits that the learned Single Judge could have considered as to whether the right to redemption in the present case has got extinguished due to the conduct of the writ petitioner. It is pointed out that in all those cases which have been relied upon by the learned Writ Court the auction purchaser had not deposited the auction money whereas in the present case the auction purchaser (appellant) had already deposited the entire money and was pursing with the Corporation for handing over of the auction sold assets of the firm.

28. Learned counsel representing the Corporation in the second Letters Patent Appeal being LPA No. 1207 of 2016 has by and large adopted the same line of arguments as have been advanced on behalf of the auction purchaser – appellant. It is submitted that in terms of the judgment of the Hon’ble Division Bench of this Court in L.P.A. No. 861 of 2015 **(Hotel J.K. & Anr. Vs. The Bihar State Financial Corporation & Ors.)** relying on the judgment of the Hon’ble Apex Court in the case of **L.K. Trust Vs. Vs. EDC Ltd. & Ors.**, reported in AIR 2011 SC 2060, a purchaser can redeem in exercise of his right of redemption only by paying the principal amount plus the interest due. Referring to the provisions of the OTS Scheme 2009 learned counsel submits that the writ petitioner was not eligible to apply under Clause 5.1(a) of the OTS Scheme 2009, he could have applied only under Clause 5.1(c) of the Scheme. It is

contended that the auction sale in the present case has been conducted in accordance with the norms and procedures and no illegality may be found with the procedures adopted by the Corporation.

29. Refuting the submissions made on behalf of the appellants in both the Letters Patent Appeals learned counsel representing the writ petitioner – respondent no. 4 submits that the contention of the appellants that the petitioner did not challenge the sale as contained in Annexure-13 to the Writ Application would not be just and proper. Attention of this Court has been drawn towards Annexure-13 to the Writ Application. It is submitted that in Paragraph 15 of the Sale Order (Annexure-13) it is clearly provided that the sale order was subject to the condition that the process of execution of sale documents / agreements and handing over the mortgaged / hypothecated assets must be completed within a period of three months from the date of crediting of the amount paid by the purchaser in the Corporation's Bank A/C. It is submitted that the terms and conditions of the Sale Order was not accepted by the auction purchaser inasmuch as the auction purchaser did not deposit the initial amount within the prescribed period and also failed to pay the balance amount within the stipulated period of six months. It is pointed out that in terms of Clause 3 of the Sale Order the remaining balance was to be paid as a term loan to the purchaser who was required to be

repaid in eight quarterly installments, the first installment was due to fall on completion of six months from the date of issue of Sale Order. However, the auction purchasers deposited the balance consideration amount on 11.01.2008 which is evident from their own statements in the letter as contained in Annexure-8 to the Counter Affidavit filed on behalf of the respondent no. 4 in the Writ Petition. Learned counsel submits that the whole contention of the appellants that the right to redemption got extinguished by the conduct of the petitioner is based on the fallacy of the argument that once the Sale Order has been issued the petitioner has lost its right to redemption.

30. This contention, according to the learned counsel representing the writ petitioner, is not correct inasmuch as, according to him, it is well settled that the One Time Settlement (OTS) Scheme is one of the modes of redemption. He has relied upon the judgment of this Court in the case of **Vijay Kumar Vs. Bihar State Financial Corporation**, reported in AIR 2008 Pat 105 (Para 18). It is submitted that this case is squarely covered by the Patna judgment.

31. Learned counsel for the petitioner submits that in the present case the Advertisement in question was itself bad. Referring to Annexure-R/14 to the Supplementary Counter Affidavit by the intervenor – respondent no. 4 filed in the Writ Application, learned counsel submits that earlier vide Annexure-R/13 the Corporation had

published a Tender Notice for sale of the mortgaged assets of its assisting units under Section 29 of the State Financial Corporation Act, 1951. Annexure-R/13 was issued in the daily newspaper on 23.02.1998. Clause 3 of the Tender Notice stated that "**If no tender or no acceptable tender is received by the Corporation on the above date for any particular unit, the tenders shall continue to be received against this advertisement in the concerned Branch Office of H.O. of the Corporation until an offer is accepted by the Corporation or dues of the Corporation are liquidated by the promoter. Up-to-date information regarding the units whose tenders remain awaited shall be displayed on the Notice Boards of the Corporation's Head Office as also in its concerned Branch Office. Such offers shall also be decided in the presence of the promoters, if available, on every 1st/16th of the month following the receipt of the tender in the Corporation's Head Office or the Branch Office. ……**"

32. It is submitted that Annexure-R/14 is in the nature of a fraud played by the Corporation inasmuch as pursuant to the Tender invited in the year 1998 (Annexure-R/13) the tender received by the auction purchaser in the year 2005 was accepted by simply notifying to the general public about the offer received in respect of the assets of the firm and calling upon any other party willing to pay more than

the sale amount indicated in the notice to submit his offer in the office of the Corporation at Patna. Learned counsel submits that the mode adopted by the Corporation in terms of Paragraph 3 of Anneuxre-R/13 has been deprecated by the courts. Reference in this regard has been made to the judgment of the Hon'ble Jharkhand High Court in the case of **Bihar State Financial Corporation Vs. Santu Lal Gupta**, reported in AIR 2003 Jhar 44 (Para 8). Giving some dates and events learned counsel submits that against the Advertisement dated 23.02.1998 the tender was received and opened without any information to the promoters. It is pointed out that in terms of the settled law a tender could have been opened only on the given date and time and no subsequent tender could have been accepted. It is submitted that from Annexure-24 dated 02.08.2007 attached to the Supplementary Affidavit of the petitioner filed in the Writ Application it would appear that on the said date the Dy. Manager (Z-I) informed the Branch Manager of the Corporation at Chapra Branch that the request of Sri Ram Pravesh Rai was placed before the Managing Director and the same was rejected on the ground that the said request was not acceptable in terms of the Sale Order issued after approval of the sale proposal by the promoters of the Corporation, it is submitted that there was no approval of the sale proposal by the promoters. The Branch Manager was told that his recommendation through his letter under reference, i.e., letter no. 118 dated 06.07.2007 had accordingly been declined. He was directed to take necessary action for compliance of the Sale Order dated 23.03.2007.

33. Learned counsel submits that from the letter dated 02.02.2009 of this appellant (Annexure-R/16) only the writ petitioner could come to know that the Sale Order dated 23.03.2007 had been revived. It is pointed out from Annexure-R/16 that earlier the sale order was issued jointly to Sri Vinod Kumar Dubey and Sri Ram Pravesh Rai in partnership but later on a request was made to the Corporation to allow change in constitution from partnership to a Private Limited Company in the name and style of M/s Ram Pravesh Rai Private Limited which was approved by the Board in its meeting held on 23.12.2008 and thereafter the order dated 02.02.2009 (Annexure-R/16) was issued. It is submitted that the sale order dated 23.03.2007 could not have been revived once the auction purchaser failed to comply with the terms and conditions therein and in that view of the matter the principle of constructive *res judicata* would not apply against the present writ petitioner.

CONSIDERATION

34. Having heard learned counsel for the appellants in both the appeals and learned counsel representing the original writ petitioner, who is respondent no. 4 in these appeals, as also on perusal

of the pleadings available on the record we find that the issues raised before the learned Writ Court as well as in this Court have a different dimension. It is a matter of record that after issuance of the Sale Order dated 23.03.2007 but before deposit of the entire auction sale amount by the auction purchaser (respondent no. 4), the Writ Petition being CWJC No. 5907/2007 was preferred by one of the partners of the firm. The facts reveal that earlier there were four partners of the firm, however, one of them resigned in the year 1987 and thereafter the partnership was sought to be reconstituted with the permission of the Corporation, it was applied for and was allowed to be reconstituted vide communication dated 07.09.1989. Apparently the writ petition was filed when the Corporation initiated action for recovery of its dues and an offer was made by the writ petitioner for one time settlement. As the facts reveal, the learned Writ Court in C.W.J.C. No. 5907/2007 even though refused to pass any order in favour of the petitioner as regards his claim for allowing subsidy amount, having taken note of the fact that both the Corporation and the petitioner are at fault the learned Writ Court issued a direction under which an obligation was cast upon the petitioner as well as the Corporation to sit on a table, work out the liability keeping the totality of the situation in mind and if One Time Settlement Scheme or any other scheme will facilitate any relief to the petitioner the Corporation would be well advised to do so to settle the dispute. The order passed by the learned Writ Court in CWJC No. 5907/2007 was passed on 18.03.2010. Prior to that, on 22.12.2008 the learned Writ Court had passed an interim order creating an embargo on the sale of assets if those were not already sold. By virtue of the interim order dated 22.12.2008 the sale could not be confirmed and in fact not confirmed. It has neither been contended before us nor before the learned Writ Court in the second round of litigation that the order dated 18.03.2010 was passed in the first round of writ petition in absence of the information that the Sale Order dated 23.03.2007 (Annexure-13) was already issued in favour of the private respondent no. 4. It has to be, therefore, held that the learned Writ Court while passing the order dated 18.03.2010 was fully aware of the facts and circumstances under which the disputes were being contested by the parties and in the given circumstance what the learned Writ Court had observed and directed in the last paragraph of its order dated 18.03.2010 had virtually nullified the effect, if any, of the Sale Order dated 23.03.2007 (Annexure-13).

35. We have got records of CWJC No. 5907/2007, a perusal of the same would show that in the said case a Counter Affidavit was filed on behalf of respondents no. 1 to 5 in which the fact that pursuant to advertisement of 1998 under continuous sale policy one tender was received and the Corporation took a decision to

sell the mortgaged assets of the unit on 25.08.2006 was brought to the notice of the learned Writ Court. Paragraph 19 of the Counter Affidavit filed in CWJC No. 5907/2007 reads as under:-

> **“19. That against the sale advertisement under continuous sale policy one tender was received and the Corporation took a decision to sell the mortgaged assets of the unit on 25.8.2006. After adopting proper procedures sale order under memo no. 493 dated 23.3.2007 in favour of Shri Vinod Kumar Dubey and others for a consideration of Rs.8.75 lakhs was issued. The petitioner was also given an opportunity to retain the assets on matching terms but the petitioner failed to retain the unit.”**

36. It is thus apparent that despite being aware of the fact that the Corporation conducted the sale vide sale order dated 23.03.2007, the learned Writ Court was persuaded to pass the order dated 18.03.2010 (Annexure-8 to the Writ Application). It is not the case of the auction purchaser – respondent no. 4 that he was not aware of pendency of CWJC No. 5907/2007. It is also not his case that he was not aware of the order dated 18.03.2010 passed by the learned Writ Court whereunder the petitioner as well as the respondent Corporation were obligated to sit on a table, work out the liability and to facilitate settlement under One Time Settlement Scheme.

37. This being the position we concur with the opinion of

the learned Single Judge expressed in the impugned judgment that the order dated 18.03.2010 passed in CWJC No. 5907/2007 has attained finality and it was required to be complied with.

38. Keeping in mind the aforesaid aspect of the matter when the communication dated 21.07.2010 as contained in Annexure-14 to the Writ Application is tested, it may be easily concluded that the Corporation was not justified in saying that there was no 'OTS Scheme' in the Corporation on the said date. This we have to say because it remains uncontroverted that much before 21.07.2010 the Board of Directors of the Corporation had approved the OTS Scheme 2009. None of the parties have challenged the finding of the learned Single Judge in the impugned judgment that the Board in its meeting held on 11.09.2009 and 23.06.2010 had already decided to implement the OTS Scheme 2009. Apparently, the Corporation was not justified in calling upon the petitioner to pay the sum of Rs. 1,22,78,157/- as on 28.02.2010 with further interest and not allowing him to settle the account in terms of the OTS Scheme 2009. The Corporation having accepted the judgment of the learned Writ Court in CWJC No. 5907/2007 had no option but to work out the liability of the writ petitioner in terms of the 'OTS Scheme 2009' giving an opportunity to the petitioner to settle the account in terms of the Scheme. The subsequent action of the Corporation in issuing the order dated

17.08.2010 (Annexure-17 to the Writ Application) is wholly illegal, arbitrary and bad in law because the order as contained in Annexure-17 to the Writ Application did not take care of the directions and observations of the learned Writ Court in CWJC No. 5907/2007 and the compliances required at the end of the Corporation. A bare perusal of Annexure-17 would show that this order does not mention anything beyond the fact that the order for sale was issued vide Memo no. 493 dated 23.03.2007. The fact that the petitioner had moved this Court in CWJC No. 5907/2007 and directions were issued on 18.03.2010 requiring the Corporation to do certain significant act providing relief to the petitioner under One Time Settlement Scheme were not at all taken care of. Annexure-17 is, therefore, required to be held bad in law.

39. In the aforementioned background the contention of the learned counsel representing the appellant that the petitioner cannot be allowed to challenge the sale order dated 23.03.2007 on the principle of constructive *res judicata* has to be taken note of only for purpose of rejection.

40. The further argument of the learned counsel that the petitioner has lost its right to redemption or in any case it may be deemed to have been extinguished taking note of the conduct of the petitioner is also liable to fail for the simple reason that not only it is

well settled in law that mere issuance of the sale order unless confirmed and a deed of conveyance is registered would not debar a mortgagor from seeking his right to redemption; in the facts of the present case the learned Writ Court in the first round of the Writ Application despite knowledge of the fact that the sale order dated 23.03.2007 was issued directed the Corporation to re-work out the liability of the petitioner and give relief to him under One Time Settlement Scheme, the petitioner's right to redemption was kept open by a judicial order of the Court. Thus, in law as well as by virtue of the judicial order of the Court as well right to redemption remained available to the petitioner and cannot be said to have been extinguished.

41. Learned counsel for the auction purchaser-appellant has even though taken us through Sections 58 and 60 of the Transfer of Property Act to impress upon this Court that the Mortgaged Money includes the principal as well as the interest, in the facts of the present case, in our considered opinion, the issue which has been falling for consideration is not as to whether the petitioner has a right to redemption in terms of Section 60 of the Transfer of Property Act or not. As we have said at the outset this case is to be looked at from a different dimension and the peculiarity of the facts coupled with the judgment of the learned Writ Court in the first round of the Writ

Application make us to take a view that the right of the petitioner to settle the account and keep possession of the property with himself was not closed.

42. Learned counsel representing the Corporation has placed before us a copy of the judgment dated 22.09.2016 passed by a Co-ordinate Bench of this Court in LPA No. 861/2015 wherein the learned Co-ordinate Bench, in the given facts of the said case, when found that pursuant to the auction sale of the property the appellant was informed that if the offer of the auction purchaser is matched within 21 days then it can retain the property but when the appellant did not come forward to retain the property the Corporation got deputed a Magistrate with necessary Police force and took over possession of the assets on 24.05.2012 did not interfere. The appellant in the said case had applied for settlement of loan under OTS Scheme on 09.11.2010 and had deposited 25% of the entire settlement amount but later on the balance 75% of the amount could not be deposited for the reason beyond its control. It was contended on behalf of the appellants in the said case that at best the Corporation can charge interest on the delayed amount of 75% for the delayed period. The contention of the Corporation was that the Scheme itself contemplated that on failure to deposit 75% of the amount, the Scheme shall be deemed to have been withdrawn and the original loan amount shall

continue. Thus, it was contended that when later on two Demand Drafts dated 30.04.2011 and 23.09.2011 were sent by the appellants towards 75% of the balance amount those were adjusted by the Corporation towards the loan amount and were not adjusted towards One Time Settlement Scheme. The learned Co-ordinate Bench found that in the meantime the possession of the appellant was taken over by the Corporation. In this fact situation, when the appellants placed reliance on the judgments of the Hon'ble Supreme Court in the case of **L.K. Trust** (Supra), **Vasu P. Shetty Vs. M/s Hotel Vandana Palace & Ors.** reported in AIR 2014 SC 1947 and the order passed in Special Leave Petition (CC) 17305 of 2009 **(Bihar State Credit & Investment Corporation Ltd. Vs. Jagdish Prasad & Anr.)** on 18.12.2009, the learned Co-ordinate Bench of this Court refused to accept the contention of the appellants and held as under:-

> **"We do not find any merit in the said argument. The auction in favour of the auction purchaser is an independent transaction. On auction being conducted, the account of the appellant is entitled to be credited of the entire auction amount. It is thereafter the Corporation can deal with the auction purchaser on such terms and conditions as it may consider appropriate, but violation of the terms of auction is bilateral transaction between the Corporation and the auction purchaser in which the appellant, the original mortgagor, has no right to**

intervene. Since the right of the appellant in property ceases on auction of the property, therefore, the appellant cannot claim any right on the basis of violation of any condition of auction, if any, conducted by the auction purchaser. It is a transaction between the Corporation and the auction purchaser alone.

In view thereof, we do not find any merit in the present Letters Patent Appeal. The same is, therefore, dismissed."

43. In our considered opinion, the judgment dated 22.09.2016 passed in LPA No. 861 of 2015 has been rendered by the learned Co-ordinate Bench of this Court in a totally different fact situation. In the said case there was no previous order or direction of a Writ Court and the Corporation was not required to act in terms of the order of the Court whereas in the present case we have found that by virtue of the order dated 18.03.2010 passed in CWJC No. 5907/2007 the Corporation was under obligation to act in terms of the order because the same had attained finality. The Corporation failed to work out the liability in terms of the direction of the learned Writ Court and despite there being One Time Settlement Scheme in existence, in its letter dated 21.07.2010 (Annexure-14) the Corporation wrongly stated that there was no 'OTS Scheme' in the Corporation. The

uncontroverted fact is that the Board of Directors of the Corporation had much before 21.07.2010 decided to implement One Time Settlement Scheme known as 'OTS Scheme 2009'. This being the distinguishing feature of the present case, the contention raised on behalf of the Corporation is equally liable to fail. The learned Writ Court has rightly concluded that in the given facts, the Court was not required to express any opinion as to whether or not the petitioner would come within the parameters of Clause 5.1(a) & (b) of the OTS Scheme 2009 for consideration of his claim. The settlement of the claim was to be provided to the petitioner in terms of the order of the learned Writ Court and we fully concur with the views expressed by the learned Writ Court placing reliance upon the judgment of this Court in the case of **Smt. Kanti Devi** (Supra) and the judgment of the Hon'ble Supreme Court in the case of **Narandas Karsondas** (Supra).

44. Learned counsel for the writ petitioner-rspondent has though contended various aspects of the tender process which we have taken note of here-in-above, since we have held that the action of the Corporation in issuing the sale order dated 23.03.2007 was nullified by virtue of the orders of the learned Writ Court in the first round of the Writ Application and the subsequent orders / communicated dated 21.07.2010 (Annexure-14) was not justified as also that the order dated 17.08.2010 (Annexure-17) by which the

Corporation decided to take over possession of the assets of the firm in question was wholly illegal, arbitrary and bad in law for the reasons stated here-in-above, the other and further submissions advanced on behalf of the writ petitioner – respondent no. 4 are not required to be dealt with in the present appeals.

45. We find no error in the impugned judgment of the learned Writ Court. The Letters Patent Appeals being devoid of merits are hereby dismissed. However, there will be no order as to costs.

(Rajeev Ranjan Prasad, J)

Rajendra Menon, C.J. I agree.

(Rajendra Menon, CJ)

Dilip, AR

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