IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.5880 of 2016

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M/s Janta Ply –N- Glass, Shop No. 07 Uttam Palace, Khajpura, Bailey Road, Patna-800014, represented through its Proprietor Md. Asad Rahman

.... Petitioner

Versus

1. The Authorised Officer, the Dena Bank, Patna Branch, Maurya Lok Complex, Dak Bunglow Road, Patna- 800001
2. The Branch Manager, HDFC Bank Ltd., Raja Bazar, Bailey Road, P.S.-Shastrinagar, Patna- 800014.
3. Kaushlendra Kumar S/o Sri Siya Sharan Prasad, R/o 8M-11, Bahadurpur Housing Colony, Kankarbagh, Patna.
4. Punjab National Bank through Chief Manager, B.O. East Gandhi Maidan, Patna.

.... Respondents

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Appearance :

For the Petitioner : Mr. Sanjay Singh Thakur, Advocate.
For the Dena Bank : Mr. Shivendra Kumar Roy, Advocate.
For the HDFC Bank : Mr. Girijish Kumar, Advocate.
For the PNB Bank : Arvind Kumar, Advocate.
For Auction Purchaser : Mr. Prashant Sinha, Advocate.

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CORAM: HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

II Date: 03-05-2018

Heard learned counsel for the petitioner and learned counsel for the respondents.

2. The present writ petition has been filed for the following reliefs -

> *"(i) For issuance of a writ in the nature of certiorari for quashment of public notice for sale of assets through E-auction under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter SARFAESI Act) published in newspapers namely Dainik Bhaskar (Hindi) & The Telegraph (English) dated 06.03.2016 on the ground that u/s 31(e) the*

application of provisions under SARFAESI Act with respect to leased property is barred.

(ii) For issuance of a writ in the nature of certiorari for quashment of possession notice u/s 13(4) of SARFAESI Act dated 14.01.2016 and its publication in newspaper on 20.01.2016 holding it to be without jurisdiction in the light of the judgment passed in Harshad Govardhan Sondagar case by Hon'ble Apex court.

(iii) For issuance of a writ of prohibition against the respondent no. 1 not to proceed with the E-auction sale on 08.04.2016 on the ground that the reserve price of the property is grossly undervalued at Rs. 91.75 Lac when its market value in the year 2014 was assessed at Rs. 1,39,13,253/- by the approved valuer.

(iv) For holding that the action of the respondent no. 1 is in the teeth of the order and judgment passed by Hon'ble Apex court in Harshad Govardhan Sondagar vs. International Assests Reconstruction Company Ltd. & Ors. (reported in 2014 6 SCC 1), whereby and whereunder the Hon'ble Apex Court has held that "where the lawful possession of the secured asset is not with the borrower, but with the lessee under a valid lease, the secured creditor cannot take over possession of the secured asset until the lawful possession of the lessee gets determined and without the determination of the valid lease, the possession of the lessee is lawful and such lawful possession of a lessee has to be protected by all Courts and Tribunals."

(v) For holding that the purported notice under Rule 8(5) under the Security Interest (Enforcement) Rules, 2002 (hereinafter called the Rules) cannot be construed as 30

days clear cut notice under Rule 8(6) of the Rules and hence the notice dt. 07.03.2016 by respondent no. 1 under Rule 8(5) of the Rules is bad in law and that respondent no. 1 cannot circumvent the statutory mandatory provision as held by Hon'ble Apex Court in the case of Mathew Varghese vs. M. Amritha kumar reported in (2014)5 SCC 610.

(vi) For holding that the respondent no. which took over the loan of the petitioner from respondent no. 2 has been in the know of the fact that the latter bank is in the possession of the asset under lease for 9 years from 2009 till 23rd Nov. 2018 and yet not referring to this fact as required under 55(1)(a) & (b) of T.P. Act, 1882 in its advertisement for sale on "as is where is and whatever there is basis" is again violation of the order and judgment passed by Hon'ble Apex Court in Hariyana Financial Corporation & Anr. Vs. Rajesh Gupta reported in (2010) 1 SCC 655.

(vii) For any other reliefs for which the petitioner may be entitled in the facts and circumstances of this case.

3. By judgment dated 23.06.2016 the writ petition had been dismissed in view of the alternative statutory remedy available to the petitioner. The matter was carried before the Division Bench of this Court in LPA No. 1409 of 2016 which was disposed by judgment dated 19.09.2016, *inter alia*, with the following observations -

*"**38**. It is, thus, found that so far as the maintainability of the writ petition is concerned, the writ was maintainable for the reasons we have discussed above in as much as the*

writ petitioner challenged, in the light of law laid down in ***M/s Whirlpool Corporation*** *(supra), the jurisdiction of secured creditor to take recourse to the provisions of SARFAESI Act. The finding, therefore, as regards non-maintainability of the writ petition, needs to be interfered with.*

39. *However, in the course of hearing, it has been pointed out by the learned Counsel for the respondent No. 1 that the secured asset has been sold by a public auction to one Shri Kaushalendra Kumar, who has deposited the entire auction amount. It has also been stated that a sale certificate has been issued to the auction purchaser on 08.07.2016. Though, it is not clear whether the possession of the secured asset has been taken over from the respondent No. 2 or not.*

40. *In view of the subsequent development, regarding the sale of the secured assets in public auction, it would not be proper for us to decide this writ appeal in its entirety without impleading the auction purchaser as a party to the writ proceedings, for, any decision, without hearing the auction purchaser, may prejudice the auction purchaser.*

41. *In the result, the order, dated 23.06.2016, under appeal, is hereby set aside and the writ petition is remitted to the learned single Judge to decide the writ petition afresh on merits of the case. The appellant-petitioner shall take necessary steps to implead the auction purchaser as a party to the writ petition and, upon hearing all the parties, the writ petition shall be disposed of, on merit, in accordance with law and in the light of the observations made hereinbefore."*

4. Accordingly, the auction purchaser has been impleaded through I.A. No. 8874 of 2016 as respondent no. 3 in the writ petition. A counter affidavit has been filed by him which is placed on record.

5. It is also relevant to take note of the intervention petition in I.A. No. 908 of 2018 filed by Punjab National Bank (hereinafter referred to as "PNB"), which was allowed on 19.03.2018 and the said Bank was permitted to be impleaded as respondent no. 4 in the writ petition.

6. The counter affidavit filed on behalf of the respondent-PNB has, for the first time, brought certain crucial facts on record which adds a completely new dimension to the case. It has been alleged that the petitioner had suppressed the fact that he had first obtained cash credit facility as well as loan from PNB against rent receivable by mortgaging the same property with the HDFC Bank. The petitioner approached the PNB on 01.03.2011 with his wife and applied for loan of Rs. One Crore by creating equitable mortgage with respect to the property vide Sale Deed No. 6676 dated 04.04.2008. Suspecting foul play when the petitioner changed its name to M/s A.R. Style, PNB's officials visited the collateral security property and found an HDFC Branch operating from the said premises. Thereafter, inquiry was made and legal opinion obtained from the PNB's panel advocate. After inspection of the documents from the office of the Sub-Registrar,

Patna he opined that Sale Deed No. 6676 dated 04.04.2008 having Token No. 7587 and serial no. 7587 deposited with the respondent-PNB was a fake one and that the borrower had forged and fabricated the same by using two different sets of stamp papers. This led to institution of F.I.R. in Gandhi Maidan P.S. Case No. 542 of 2017 on 20.11.2017 against the petitioner for defalcation of Rs. one crore.

7. In this backdrop, it has been contended that the benefit of the decision rendered by the Hon'ble Supreme Court in the case of Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. & Ors, (2014) 6 SCC 1 would not be available to the petitioner. It is submitted that the lease executed by the petitioner with the HDFC Bank got determined in view of the HDFC Bank subsequently becoming the mortgagee of the same property and the mortgage being taken over by the respondent Dena Bank. The lease having got determined, therefore, the benefit of Harshad Govardhan Sondagar's case (supra) will not be available to the petitioner as the same is available only to the lessee and not to the defaulting borrower, namely the petitioner in the present case, who has no locus to espouse the cause of the lessee. It is submitted that when the respondent Dena Bank took over the loan of the petitioner from the HDFC Bank by taking the same property on mortgage, it took over the right of the mortgagee from the HDFC Bank and hence the benefit of the lease agreement executed in favour of the HDFC Bank is

no longer available.

8. In any event, it is submitted that considering that the property in question was mortgaged vide Sale Deed No. 6676 dated 04.04.2008 to the respondent Dena Bank on 14.02.2012, the scanned copy of the said sale deed produced by the petitioner was fake. The petitioner has thus played fraud with the respondent-PNB and has thereby obtained a loan of Rs. One Crore on 21.03.2011.

9. The allegations raised in the counter affidavit and in I.A. No. 908 of 2018 filed by the respondent-PNB, as well as those contained in Gandhi Maidan P.S. Case No. 542 of 2017, are serious in nature. All these facts have a material bearing on the case at hand but have been suppressed by the petitioner all through and the same have come to light for the first time only when the PNB has been directed to be impleaded as party respondent in this case. Significantly, the petitioner has not denied any of these facts and allegations stated by the respondent-PNB and no rejoinder thereto has been filed on behalf of the petitioner.

10. There are categorical allegations that the petitioner has furnished forged and fabricated documents in order to obtain the loan of Rs. One Crore from the respondent-PNB and has committed fraud in this regard, about which no denial has been made by filing a response by the petitioner, despite having had sufficient opportunity to have done so.

11. Having regard to the conduct of the petitioner who has suppressed material facts before this Court, it must therefore be held that the petitioner has not approached this Court with clean hands and hence deserves no relief from this Court in its extra ordinary writ jurisdiction.

12. The writ petition stands dismissed.

13. I.A. No. 2406 of 2017 which has been filed by the petitioner for quashing of the entire e-Auction proceeding also stands dismissed.

14. Needless to say, the present judgment shall not come in the way of the petitioner in availing any other remedy as may be available to it in accordance with law.

(Vikash Jain, J)

Md. Ibrarul/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	09.05.2018
Transmission Date	N.A.