IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.13998 of 2017

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M/s Afroz Alam, Son of Samsuddin Sekh, Besides Red Coloured, Mall Building opposite 'Khiri' Tree, Near Bright Jems Public School, Dargah Mohalla, Bettiah, District- West Champaran. .... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Department of Revenue, Government of Bihar, Patna.
2. The Presiding Officer, Debts Recovery Tribunal, Bihar, Patna.
3. The District Magistrate, Bettiah, West Champaran.
4. The Authorized Officer-cum-Senior Manager, Indian Bank, Zonal Office, Recovery Cell, Govind Bhawan, New Dakbanglow Road, Patna.
5. The Authorized Officer-cum-Senior Manager, Indian Bank, Bettiah Branch, Station Chowk, Supriya Road, Bettiah, West Champaran.
6. Mansur Alam, Son of Jaleel Ahmad, Resident of Mohalla- Dargah Bettiah, Police Station- Bettiah Town, District- West Champaran.

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 17913 of 2016

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Mansur Alam son of Jaleel Ahmad Resident of Mohalla - Dargah Bettiah, Police Station - Bettiah Town, District - West Champaran. .... Petitioner/s

Versus

1. The State of Bihar through the Principal Secretary, Revenue Department, Government of Bihar, Patna.
2. The District Magistrate, West Champaran at Bettiah.
3. The Authorised Officer-Cum-Senior Manager, Indian Bank. Zonal Office, Recovery Cell, Govind Bhawan, New Dakbunglow Road, Patna - 800001.
4. The Authorised Officer Cum-Senior Manager, Indian Bank, Bettiah Branch, Station Chowk, Supriya Road, Bettiah, West Champaran.
5. Afroz Alam Son of Samsuddin Shekh
6. Mohammadi Fatima Wife of Afroz Alam Both are resident of Vill- Beside Red Colour Mall Building Opptt. Khiri Tree, Near Bright Jems Public School, Dargoh Mohallah, Bettiah, West Champaran.

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.... Respondent/s

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Appearance :
(In CWJC No.13998 of 2017)
For the Petitioner/s : Mr. Ram Kishun Prasad, Adv.
For the Respondent Bank: Dr. Binay Kumar Singh, Adv.
For the State : Mr. Sajid Salim Khan – SC-25
For the Auction purchaser: Mr. Sanjay Kumar-7, Adv.
Mr. Anant Kumar Mishra, Adv,

(In CWJC No.17913 of 2016)
For the Petitioner/s : Mr. Sanjay Kumar No.-7, Adv.
For the respondent Bank: Dr. Binay Kumar Singh, Adv.
For the State : MD. Khurshid Alam- AAG-12
For the Borrower : Mr. Ram Kishun Prasad, Adv.

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CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL
CAV JUDGMENT
Date: 10-10-2018

The two writ applications, one filed by the borrower being C.W.J.C. No. 13998 of 2017 and another filed by the auction purchaser being C.W.J.C. No. 17913 of 2016, are with regard to the order passed by the Debt Recovery Tribunal, Patna vide its judgment and order dated 08.09.2016 passed in S.A. No. 28 of 2016. While the auction purchaser has challenged the said order dated 08.09.2016 passed in S.A. No. 28 of 2016 by the Debt Recovery Tribunal, Patna, the borrower has sought its implementation.

Heard Mr. Ram Kishun Prasad, Advocate, for the petitioner in C.W.J.C. No. 13998 of 2017 and for the respondent nos. 5 and 7 in C.W.J.C. No. 17913 of 2016, Mr. Sanjay Kumar-7 Advocate, for the auction purchaser the petitioner in C.W.J.C. No.

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17913 of 2016 and respondent no. 6 in C.W.J.C. No. 13998 of 2017 as well as Dr. Binay Kumar Singh, counsel for the Bank in both the writ applications and Mr. Sajid Salim Khan, SC-25 for the State in C.W.J.C. No. 13998 of 2017 and Md. Khurshid Alam AAG-12 for the State in C.W.J.C. No. 17193 of 2016.

Since, the issues involved in the two writ applications arise out of a common order dated 08.09.2016 passed in S.A. No. 28 of 2016 by the Debt Recovery Tribunal, Bihar Patna, the facts of C.W.J.C. No. 13998 of 2017 is being taken up which would decide both the writ applications.

The petitioner availed credit facility from the respondent Indian Bank by mortgaging his residential house bearing Touzi No. 48B 50C, Khesra No. 6827/6, Jamabandi No. 1011, ward No. 7/5 under Bettiah Municipality, District-West Champaran. However, petitioner defaulted in making payment of dues as agreed and demanded, as such, a demand notice under Section 13 (2) of the Securitization and Reconstruction of the Financial Assets and Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act, 2002') dated 30.07.2013 was issued which was received by the petitioner which postulated that the dues mentioned was to be paid within 60 days. Having failed to repay, a possession notice was issued on 24.10.2013 against which the petitioner represented before the

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authorities of the Bank on 24.10.2013. Thereafter the Bank sat silent. After about two years again a possession notice was issued to the petitioner on 09.07.2015 and the property was put on E-auction sale by issuing E-auction sale notice dated 15.10.2015 fixing the lowest price of property of Rs. 18 lacs and the date of auction was fixed on 20.11.2015 wherein the security deposit amount was 1.80 lacs. The Bank published sale notice in two newspapers namely 'Prabhat Khabar' and 'The Telegraph' on 16.10.2015. The auction purchaser respondent no. 6 submitted his offer letter on 19.11.2015 and E-auction bid was held on 20.11.2015 who deposited the security money of Rs. 180000/- on 19.11.2015 along with tender. The purchase of the property offered to the respondent auction-purchaser was accepted by the respondent Bank. An acceptance letter was given by the respondent Bank vide Annexure-2 dated 23.11.2015 in C.W.J.C. No. 17913 of 2016. The respondent auction purchaser deposited the auction-purchase price of Rs. 18.10 lac within the time postulated under Rule 9 (3) and 9 (4) of the SARFAESI Act, 2002 by which 25% was paid immediately and the rest 75% within 15 days of confirmation of sale or such extended period. The auction-purchaser in Annexure-3 of C.W.J.C. No. 17913 of 2016 has enclosed a Bank statement stating therein that the entire amount of Rs. 18.10 lac was deposited by 24.12.2015 as per the extended period agreed by the

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respondent-Bank. Thereafter with the help of District-Magistrate, West Champaran, Bettiah vide letter no. 498 dated 21.06.2016 as contained in Annexure-5, in C.W.J.C. No. 17913 of 2016 the District Magistrate handed over possession of the said questioned property which physical possession was handed over by the bank to the auction-purchaser on 30.07.2016 which is Annexure-6 to C.W.J.C. No. 17913 of 2016. At this juncture, it may be mentioned that the Bank had also preferred O.A. No. 385 of 2015 against the petitioner before the Debt Recovery Tribunal, Patna for recovery of its dues and a certificate was obtained on 07.03.2016 but after auction sale of the property in question the order passed by the Tribunal was recalled and recovery proceeding and certificate dated 07.03.2016 was dropped. The petitioner challenged the auction of his property before the Debt Recovery Tribunal, Patna in S.A. No. 28 of 2016 challenging the auction on many a ground: (i) The representation of the petitioner dated 24.10.2013 after the possession notice of the same date was not yet decided by the Bank. (ii) The possession notice dated 09.07.2015 was not affixed on the secured assets neither served on the applicant which is in violation of Rule 8(i) of the SARFAESI Act, 2002. (iii) The value of the property was more than 50 lacs but it was sold at Rs. 18.10 lacs. (iv) Recovery certificate in O.A. 385 of 2015 was obtained by the Bank on 07.03.2016 but the property was already sold on

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21.11.2015 which the Bank had concealed. (v) No certificate of E-auction sale notice was published in the newspapers of the area where property was situated which is in violation of Rule 8(vi) of the Rules, 2002 and that in view of the decision in the case of **General Manager, Sri Siddeshwara Cooperative Bank Limited & Anr. Vs. Ikbal & Ors. since reported in (2013) 10 SCC 83 para 14,** since mandatory provisions of Section 9(3)(4) of the Rules, 2002 was not followed sale was not valid and also in view of the decision rendered in the case of **J. Rajiv Subramaniyan & Anr. Vs. Pandiyas & Ors. since reported in (2014) 5 SCC 651 para 15** the sale effected without complying with the aforesaid provision would be unconstitutional and therefore null and void. However, before the Debts Recovery Tribunal in S.A. No. 28 of 2016 the auction-purchaser refused to accept notice and did not appear, hence, the order was passed ex parte as against the auction purchaser. The respondent Bank appeared before the Debts Recovery Tribunal, Patna and submitted that after the notice under Section 13(2) dated 30.07.2013, the representation was not filed within 60 days. Representation was filed by the petitioner only on 24.10.2013 i.e. on the date when the possession notice under Section 13(4) was issued which was beyond 60 days. It was also submitted that even after possession notice, the Bank waited for 2 years for the petitioner to repay the loan which was

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not paid and as such possession of the property was taken on 09.07.2015 by the Respondent Bank which was sent by the enforcement agent of the Bank to the petitioner but he refused to accept, which was later on sent by post. The possession notice was also published in two leading newspapers namely, 'The Telegraph' and 'Prabhat Khabar' and the property was valued by the approved valuer on 15.09.2015. Thereafter, auction was held and the private respondent auction-purchaser was declared a successful bidder who deposited 25% of the bid amount within time and the rest 75% within the extended period as agreed between the respondent-Bank and the auction-purchaser. Although no written agreement was filed by the Bank in the proceeding before the DRT, Patna, the Tribunal found that the mandatory procedure as laid down under the SARFAESI Act and Rules were not followed and in view of the decisions of the Apex Court as referred to hereinabove came to a conclusion that the mandatory procedure having not been followed the sale was not valid. Hence, the Tribunal set aside the possession notice and E-auction notice and directed the respondent-Bank to return the auction amount to the auction-purchaser within 10 days of receipt of its order dated 08.09.2016 passed in S.A. No. 28 of 2016. The order having not been complied, the petitioner filed M.A. No. 101 of 2016 in which from the order sheet as contained in Annexure-2 it is evident that the Bank had

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prepared a draft of Rs. 18.10 lacs but the auction-purchaser refused to accept the same, instead moved this Court in writ petition being C.W.J.C. No. 17913 of 2016 challenging the order dated 08.09.2016 passed in S.A. No. 28 of 2016 by the Debt Recovery Tribunal, Patna.

Learned counsel for the respondent no. 6, the auction-purchaser submits that he was a bona fide purchaser of the property at a auction sale and after the sale having been confirmed and possession handed over in his favour, he has made certain constructions and spent about Rs. 8,75,000/- for its remodeling and repairing. He submits that even after having purchased the said property through E-auction and delivery being handed over to him but he has not been able to enjoy its fruits since last two years and is embroiled in litigation. He submits that the rights of auction-purchaser in the property purchased by him cannot be extinguished except on the ground of fraud or collusion and the auction-purchaser being the bona fide purchaser for value in auction sale, his interest be safeguarded and has placed reliance in the case of Ashwin S. Mehta & Anr. Vs. Custodian & Ors, (2006) 2 SCC 385 and in the case of Janatha Textiles & Ors. Vs. Tax Recovery Officer & Anr. since reported in (2008) 12 SCC 582.

Mr. Binay Kumar Singh, learned counsel for the Bank also impresses upon the Court that the auction was held in accordance with

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law as per the procedure followed, as the petitioner had defaulted in payment of the loan taken as credit facility and after the default was committed by the petitioner himself, the Bank waited for more than two years after the notice under Section 13 (2) dated 30.07.2013. As such the auction of the property in question and purchase by the auction purchaser cannot be faulted on any ground.

Learned counsel for the State is also present.

Heard the parties.

The petitioner was borrower of the respondent-Bank and having defaulted in payment of loan taken as credit facility, the respondent-Bank initiated SARFAESI proceedings and also preferred original application before the DRT, Patna being O.A. No. 385 of 2015 for recovery of its dues. A notice under Section 13(2) of the SARFAESI Act was served on the petitioner on 30.07.2013 to repay the dues within 60 days which the petitioner failed to deposit. The petitioner did not file any objection prescribed under Section 13(A) of the SARFAESI Act within time but when the possession notice was issued on 24.10.2013, the petitioner submitted a representation dated 24.10.2013 which was at a belated stage, it was not entertained and neither could be entertained. The respondent-Bank, thereafter, waited for two years for the petitioner to repay the loan which was declared NPA but the petitioner failed to repay the same. Thereafter,

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possession notice dated 09.07.2015 was sent by post which the petitioner has not disputed. The possession notice was also published in two leading newspapers namely, The Telegraph and Prabhat Khabar on 15.07.2015 which is Annexure-1 of C.W.J.C. No. 17913 of 2016 which is circulated also at Bettiah where the property was situated. The auction was held on 20.11.2015 and respondent no. 6 the auction-purchaser was declared a successful bidder who deposited 25% within time and rest 75% within extended time as mutually agreed. In fact, from the statement of accounts as contained in Annexure-3, it is evident that on 24.12.2015 the entire E-auction amount of 18.10 lacs was deposited by the respondent auction-purchaser.

At one point of time I was tempted to relegate the parties to an appellate forum as provided under the SARFAESI Act but considering the delay it would cause and in view of the observation of the Apex Court in the case of **Sadashiv Prasad Singh Vs. Harendar Singh & Ors. since reported in AIR 2014 SC 1078** considering the case of **Ashwin S. Mehta & Anr.** (supra) and case of **Janatha Textiles & Ors**. (supra) has held in para 12 which is extracted below:

> *"12. Learned counsel for the auction purchaser Sadashiv Prasad Singh, in the first instance vehemently contended, that in terms of the law declared by this Court, property purchased by a*

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third party auction purchaser, in compliance of a court order, cannot be interfered with on the basis of the success or failure of parties to a proceeding, if auction purchaser had bona fidely purchased the property. In order to substantiate his aforesaid contention, learned counsel representing Sadashiv Prasad Singh placed emphatic reliance, firstly, on a judgment rendered by this Court in Ashwin S. Mehta & Anr. v. Custodian & Ors., (2006) 2 SCC 385) : (AIR 2006 SC 795 : 2006 AIR SCW 243). Our attention was drawn to the following observations recorded therein :

"In that view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subject to any order of this Court. In any event, ordinarily, a bona fide purchaser for value in an auction-sale is treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction-sale is saved. (See Nawab Zain-ul-Abdin Khan v. Mohd. Asghar Ali Khan (1887) 15 IA 12). The said decision has been affirmed by this Court in Gurjoginder Singh v. Jaswant Kaur (1994) 2 SCC 368)."

(Emphasis is ours)

On the same subject, and to the same end, learned counsel placed reliance on another judgment rendered by this Court in Janatha Textiles & Ors. v.

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Tax Recovery Officer & Anr., (2008) 12 SCC 582, wherein the conclusions drawn in Ashwin S. Mehta's case (supra) came to be reiterated. In the above judgment, this Court relied upon the decisions of the Privy Council and of this Court in Nawab Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan, (1887-88) 15 IA 12; Janak Raj v. Gurdial Singh, AIR 1967 SC 608; Gurjoginder Singh v. Jaswant Kaur, (1994) 2 SCC 368; Padanathil Ruqmini Amma v. P.K. Abdulla, (1996) 7 SCC 668 : (AIR 1996 SC 1204) : 1996 AIR SCW 1218), as also, on Ashwin S. Mehta (supra) in order to conclude, that it is an established principle of law, that a third party auction purchaser's interest, in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aide or otherwise. It is, therefore, that this Court in its ultimate analysis observed as under:

"20. <u>Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the court because they are not connected with the decree.</u> Unless the protection is extended to them the court sales would not fetch market value or fair price of the property."

(Emphasis is ours)

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On the issue as has been dealt with in the foregoing paragraph, this Court has carved out one exception. The aforesaid exception came to be recorded in Velji Khimji and Company v. Official Liquidator of Hindustan Nitro Product (Gujrat) Limited & Ors., (2008) 9 SCC 299 : (AIR 2009 SC (Supp) 776 : 2008 AIR SCW 5828), wherein it was held as under :

"30. In the first case mentioned above i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud.

31. In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by anyone in this case."

(Emphasis is ours)

It is, therefore, apparent that the rights of an

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> *auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion.*

Admittedly, the lis was between the respondent-Indian Bank on the one hand and the petitioner who was the borrower on the other, the auction-purchaser was not a party to the said proceeding initiated by the Bank till its auction in favour of the auction-purchaser. Applying the law declared by the Apex Court in the case of Sadashiv Prasad Singh (supra) rendered in forgoing paragraphs irrespective of the merits of the lis between the rival parties namely, the Indian Bank and the petitioner the borrower, it is not open to anyone to assail the purchase of the property made by the auction-purchaser in the above view of the matter, especially in the absence of any allegation of fraud or collusion by the auction-purchaser who was the bona fide purchaser for consideration having purchased the property in E-auction and who has spent huge amount of money on the property so purchased for its remodeling and repairing. The petitioner having defaulted in payment of Bank dues, the right of the auction-purchaser being a bona fide purchaser ought to be protected. The right of the auction-purchaser respondent no. 6 in the land and building in Touzi No. 48B 50C, Khesra No. 6827/6, Jamabandi No. 1011, ward No. 7/5, Deed No. 17509 dated 29.07.2007 under Bettiah Municipality,

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District-West Champaran is hereby confirmed. The order dated 08.09.2016 passed in S.A. No. 28 of 2016 by the Debt Recovery Tribunal, Bihar, Patna is set aside. As a consequence, M.A. No. 101 of 2016 is quashed.

Accordingly, C.W.J.C. No. 17913 of 2016 is allowed and C.W.J.C. No. 13998 of 2017 is dismissed.

(Nilu Agrawal, J)

Devendra/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	10.10.2018
Transmission Date	NA

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