Uday S. Jagtap

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3597 OF 2018
ALONG WITH
INTERIM APPLICATION NO. 1229 OF 2020
WITH
NOTICE OF MOTION NO. 58 OF 2019
WITH
NOTICE OF MOTION (L) NO. 57 OF 2019
WITH
INTERIM APPLICATION (L) NO. 2995 OF 2021
WITH
INTERIM APPLICATION NO. 1229 OF 2018
WITH
C.R.R. NO. 271 OF 2018
IN
WRIT PETITION NO. 3597 OF 2018

Bharat Shah & Anr. .. Petitioners
Vs.
Bank of Baroda & Ors. .. Respondents

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Mr. Gautam Ankhad a/w Mr. Ankur Shah, Mr. Murtuza Federal and Ms. Paulomi Mehta i/b Federal & Co. for petitioners.
Mr. A.R. Bamne i/b A.R. Bamne & Co. for respondent no.1.
Mr. Amit Tungare a/w Mr. Deep Dighe and Ms. Jill Rodricks for Resolution Professional of respondent no.2 and applicant in IA(L) No.2995/2021.
Mr. Shishir Joshi i/b Ms. Priti Joshi for respondent no.3.
Mr. Hemant Haryan, AGP for respondent no.4.
Mr. S.K. Dhekale, OSD, Court Receiver's Office present.

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CORAM : K. R. SHRIRAM &
PRITHVIRAJ K. CHAVAN, J.J.

DATED : 7th JUNE, 2022

UDAY SHIVAJI JAGTAP
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Date: 2022.06.09 11:33:57 +0530

P.C.

1. Mr. Joshi, for respondent no.3 – builder who did not appear when the matter was called out in the morning session, requested for an adjournment. Adjournment refused.

2. On 9th February 2018, following order came to be passed:-

> "1. *The Petitioners are aggrieved by the order dated 16 December 2017 passed by the Additional Chief Metropolitan Magistrate, Mumbai in Case No.495/SA/2016 filed by the Respondent No.1 Bank under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "SARFAESI Act") whereby the Authorized Officer of the Respondent No.1 Bank was permitted to take over possession of the alleged secured asset viz- Office Premises No. 401 , 4th Floor, Rasal Plaza, Andheri-Ghatkopar Link Road, Andheri (E), Mumbai - 400059 (hereinafter referred to as Office Premises No. 401 or subject premises). According to the Petitioners, pursuant to the passing of the impugned order, the Petitioners have been forcibly dispossessed from Office Premises No. 401 on 6 February 2018 without any notice. We may clarify here that though the impugned order permits the taking over possession of another secured asset also viz- Row House No 3, Juhu Road, Mumbai, the subject matter of the present Petition is confined to Office Premises No. 401. We further make it clear that there would be no impediment in DRT proceeding with the hearing of the pending SA and passing appropriate orders in respect of the Row House No. 3.*
>
> *2. The case of the Petitioners is as follows:*
>
> *(i) On 1 July 2009 the Petitioners and Respondent No.3 Builder executed a registered agreement for sale, initially for the purchase of premises on the 3rd floor of Rasal Plaza, which was under construction at that period of time. By supplementary agreement dated 31 July 2013, the agreement for sale dated 1 July 2009 was modified to the effect that the Petitioners, in lieu of third floor of Rasal Plaza would*

purchase the fourth floor of Rasal Plaza, being the subject premises. On 2 September 2009, the Respondent No.2 Borrower and Respondent No.3 Builder executed a registered agreement for sale, initially for the purchase of premises on the fourth floor of Rasal Plaza, which was under construction at that period of time. By supplementary agreement dated 31 July 2013, the agreement for sale dated 2 September 2009 was modified to the effect that the Petitioners in lieu of fourth floor of Rasal Plaza, would purchase the third floor of Rasal Plaza.

ii) In 2015, the Respondent No.3 Builder completed construction of Rasal Plaza and obtained occupation certificate for the same. On 9 October 2015 Respondent No.3 Builder, vide its possession letter, handed over possession of the subject premises to the Petitioners. From 2015 till date, the Petitioners have been in peaceful occupation and possession of the subject premises, and are running a clinic by the name of "Anil Clinic", in the subject premises. The Petitioners have been paying the electricity bills and telephone bills for the subject premises, which are issued in the name of the Petitioners.

iii) Respondent No.2 Borrower prior to executing the supplemental agreement dated 31 July 2013, appears to have mortgaged the subject premises to the Respondent No.1 Bank. The Petitioners were not made aware of the same. However, Respondent Nos.2 Borrower and Respondent No. 3 Builder duly informed the Respondent No.1 Bank about the supplemental agreement dated 31 July 2013, pursuant to which Respondent No.2 Borrower had purchased the third floor of Rasal Plaza in lieu of fourth floor of Rasal Plaza (subject premises).

iv) The Respondent No.3 Builder had addressed letters dated 8 September 2016 and 1 October 2016 informing the Respondent No.1 Bank of the supplemental agreement dated 31 July 2013. On 5 June 2017 Respondent No.2 Borrower had also addressed written a letter to the Respondent No 1 Bank submitting therewith copy of supplemental agreement dated 31 July 2013.

v) It appears that on 23 March 2013 Respondent No.2 Borrower had sought financial assistance from Respondent No.1 Bank of Rs.14,34,00,000/-. Respondent No.2 Borrower *defaulted in repayment of financial assistance and his bank account was classified as "Non Performing Asset", and notice under section 13(2) of the SARFAESI Act was issued on 26 June 2015. Thereupon, Respondent No.1 Bank moved the Additional Chief Metropolitan Magistrate, Mumbai.*

vi) On 16 December 2017, the Additional Chief Metropolitan Magistrate has passed impugned order and ordered to take possession of secured assets of Respondent No.2 Borrower. Despite Respondent Nos.2 Borrower and Respondent No 3 Builder clearly intimating Respondent No.1 Bank about the supplementary agreement dated 31 July 2013, pursuant to which Respondent No.2 Borrower purchased the third floor of the Rasal Plaza in lieu of the fourth floor of Rasal Plaza (subject premises), Respondent No.1 Bank appears to have suppressed these facts from the learned Additional CMM. Pursuant to the impugned order dated 6 February 2018, Respondent No.1 Bank without any prior notice to the Petitioners sealed the subject premises by force. Hence, this Petition.

3. Learned Senior Counsel for the Petitioners submitted that the Petitioners are neither Borrowers nor Guarantors. He submitted that Respondent No 4 Bank was well aware that the Petitioners are in occupation and are the owners of Office Premises 401 and that the Respondent No 3 Borrower is the owner of Office Premises 301. He pointed out that the Respondent No. 4 Bank was informed accordingly by the Respondent No 2 Borrower as well as Respondent No. 3 Builder by various communications. He submitted that though the Respondent No.1 Bank was aware that the Petitioners are in occupation of Office Premises 401, without disclosing this aspect before the Addl. CMM and without issuing any notice to the Petitioners, the Petitioners were all of a sudden, on 6 February, forcibly dispossessed from Office Premises 401 by the Court Commissioner appointed under the impugned order. The learned Senior Counsel submitted that the Petitioners are husband and wife and are reputed Doctors. He submitted that Petitioner No 1 is a Nephrologist (kidney specialist) and Petitioner No. 2 is a diabetes specialist. Both the Petitioners have a busy practice at the subject Premises where numerous patients with serious and urgent medical conditions come for treatment. He submitted that on 6 February 2018 the Petitioners were dispossessed to *their great embarrassment and all the appointments of their patients, some of which are in critical condition, had to be cancelled and the Petitioners and their patients have and would suffer grave prejudice and damage and the entire records of the patients are lying in the subject premises.*

4 Learned Counsel for Respondent no.1 Bank submitted that the Petitioners have an alternate remedy of approaching DRT and the Writ Petition ought not to be entertained. He submitted that what was mortgage to the Respondent No.1 Bank was Office Premises 401 and the action of the Respondent No.1 Bank cannot be faulted.

5 We must state that the approach of Respondent No.2 Borrower has been very fair and reasonable. The Learned Counsel on behalf of Respondent No.2 Borrower conceded that the Respondent No.2 Borrower has no right, title or interest in respect of Office Premises 401 which belongs to the Petitioners alone and that as a matter of fact Respondent No.2 Borrower is the owner of Office Premises No.301. The learned Counsel for Respondent No.2 Borrower stated that he has instructions from Respondent No.2 Borrower to state that Respondent No.2 is ready to give necessary writings and undertakings to the effect that:
(1) Respondent No.2 Borrower has no right, title or interest in respect of Office Premises 401.
(2) Respondent No.2 have ownership rights only in respect of Office Premises 301 which is in possession of Respondent No.3 Builder and the Respondent No.2 has not been able to take possession of the said Office Premises No.301 for want of payment of the last instalment to the Respondent No.3 Builder.
(3) The Respondent No.2 Borrower has no objection to the Court Receiver, High Court taking over possession of the Office Premises No. 301 from Respondent No.3 Builder and for sale of the same by public auction and payment of the sale proceeds to be appropriated towards the dues of the Respondent No.1 Bank as well as the payment of the last installment to the Respondent No.3 Builder.
(4) The Respondent No.2 Borrower shall handover over the registered original Supplemental Agreement dated 31 July 2013 in respect of Office Premises No. 301 to the Respondent No.1 Bank by 20 February 2018 and shall sign and execute all necessary writings/documents including Deed of

Rectification, if necessary, as desired by the Respondent No.1 Bank for creating mortgage of Office Premises No.301 in favour of the Respondent No.1 Bank and make the same as a secured asset.

(5) The Respondent No. 2 Borrower is ready and willing to cooperate in all respects so as to ensure that the rights of the Petitioners in Office Premises No.401 are not affected and at the same time secure the interest of the Respondent No.1 Bank by creating mortgage of Office Premises No.301 belonging to Respondent No.2 Borrower in lieu of Office Premises No.401.

6 Learned Counsel for the Respondent No.3 Builder, on instructions from its proprietor who is present in Court, fairly stated that Respondent No 3 Builder has no objection in handing over possession of Office Premises No 301 to the Court Receiver as desired by the Respondent No.2 Borrower. He however submitted that there is an amount of Rs. 19,31,569/- due and payable by the Respondent No.2 Borrower in respect of Office Premises No. 301. He submitted that the work in the Office Premises No.301 is virtually complete, however, if there is any works remaining, the Respondent No.3 is ready and willing to complete the same.

7 Having heard the learned Counsel for the parties, in view of the fair stand taken by the Respondent No.2 Borrower and Respondent No.3 Builder, we are of the prima facie opinion that appropriate orders can be passed whereby the interest of all the parties including the Respondent No.1 Bank can be secured and protected. In our prima facie view, the Petitioners are unfortunate victims and cannot be faulted for the failure on part of the Respondent No.2 Borrower in disclosing the subsequent registered Supplemental Agreement dated 31 July 2013 to the Respondent No.1 Bank and taking necessary corrective steps to mortgage the Office Premises No.301 in stead of Office Premises No.401.

8. In our view the availability of alternate remedy in the facts and circumstances of the present case is not sufficient to refuse to entertain the petition filed by Petitioners. The nature of order we propose to pass cannot be passed by DRT and that remedy would not be efficacious in the fact situation of the case in hand. It is a settled position in law that rule of exclusion of writ jurisdiction by availability of alternative remedy is rule of discretion and not one of compulsion. As

noticed the Petitioners are neither the borrower nor guarantors of loan advanced by Respondent No.1-Bank. Although, they are lawful owners of subject premises, they have been dispossessed due to arbitrary and high handed action on the part of Respondent No.1–Bank despite the Respondent No.1-Bank being aware that the Petitioners were in occupation of Office Premises No.401 and being aware of the Supplementary Agreement dated 31 July 2013. The property in question is not the secured asset owned by Respondent No.2– Borrower. The action on the part of Respondent No.1-Bank has led to serious prejudice to Petitioners who are practicing Doctors and deprived of their right to carry on their profession. Prima facie the action on the part of Respondent No.1-Bank is not only against the principles of natural justice but also in violation the fundamental rights of Petitioners. In our view, a case of exceptional circumstances is made out to invoke writ jurisdiction under Article 226 of Constitution of India. In this context, we may refer to the decision of Apex Court in the case of **Harbansalal Sahania and another v. Indian Oil Corpn. Ltd., and others reported in AIR 2003 Supreme Court 2120**, *wherein in paragraph 7 the Apex Court has observed as under :-*

> *"7. So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, inspite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the Fundamental Rights; (ii) where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged. (See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 11). The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners dealership,*

> *which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High court itself instead of driving them to the need of initiating arbitration proceedings."*

9. In the peculiar facts and circumstances of the case and in the interest of justice and subject to further orders, presently, we pass the following order:

O R D E R

(1) The Court Receiver, High Court, Bombay is appointed as Receiver in respect of Office premises No. 401, 4th floor and Office premises 301, 3rd floor, Rasal Plaza, Andheri-Ghatkopar Link Road, Andheri (E), Mumbai - 400 059.

(2) The Respondent No.1 Bank shall hand over possession of the Office Premises No. 401 to the Court Receiver and the Court Receiver shall take over possession of the Office Premises No.401. The Court Receiver shall after taking possession of Office Premises No.401 forthwith handover possession of the same to the Petitioners as his agent without any security or royalty. The undertaking of the Petitioners is recorded that they shall enter into the usual agency agreement as required by the Court Receiver before the next date.

(3) The Respondent No.3 Builder shall handover physical possession of Office No.301 to the Court Receiver and the Court Receiver shall take over possession of Office No.301. In the event the Court Receiver finds that any works are still remaining to be completed in Office Premises No.301, he shall issue necessary directions to the Respondent No.3 Builder to complete the balance works within a time-frame before the Office Premises No.301 is eventually put to public auction. We accept the statement of the learned Counsel appearing for Respondent No.3 Builder, who has taken instructions from the proprietor of Respondent No.3 that the Respondent No.3 shall handover possession of Office Premises No.301 to the Court Receiver and that all incomplete works, if any, shall be completed by Respondent No.3 expeditiously and to the satisfaction of the Court

Receiver within the time-frame as directed by the Court Receiver.
(4) An Undertaking of Respondent No.2 Borrower (through its Managing Director) in terms stated in paragraph 5 hereinabove shall be filed by the Respondent No.2 Borrower in this Court by 20 February 2018.

(5) Upon possession of the Office No.301, being taken over by the Court Receiver and filing of report in that behalf, in order to safeguard the interest of the Respondent No.1 Bank, on the next date, we propose to issue appropriate directions for sale of the Office Premises No.301 owned by Respondent No.2-Borrower by public auction either by the Court Receiver, High Court or Court Receiver, DRT or the Respondent No.1 Bank as the case may be after hearing all the parties including Respondent No.1-Bank. Appropriate directions can also be issued in due course for the payment of balance amount of installment in respect of Office No.301 to the Respondent No.3 Builder from the sale proceeds of Office No.301.

(6) The Authorized Officer/Representative of the Respondent No.1 Bank, the representative of the Respondent No 2 Borrower, the proprietor of Respondent No.3 Builder and the Petitioners shall remain present at the site in question on Wednesday, 21 February 2018 at 3 p.m. and shall cooperate with the Court Receiver in all respects in the handing over/taking over possession of the Office premises Nos.401 and 301 to/by the Court Receiver. We make it clear that if any of the parties do not cooperate or fail to remain present on the aforesaid date and time, the Court would treat the same as disobedience of this order and the concerned persons would be liable for appropriate action.

(7) Necessary Report shall be submitted by the Court Receiver, High Court, Bombay in respect of taking over possession of Office Premises Nos.401 and 301, and the directions contained in this order by the next date i.e. 23 February 2018.

10. List the Petition on 23 February 2018, High on Board.

11. Learned Counsel for the Respondent No.1 Bank seeks stay of the operation of this order. Since the the Office

> *Premises No.401 would be in custodia legis and the interest of the Respondent No.1 Bank is being taken care of, we are not inclined to grant stay. Request for stay is refused.*
>
> *12. All concerned to act on authenticated copy of this order."*

3. This order was impugned by respondent no.1 - bank before the Apex Court by filing Special Leave Petition, which came to be dismissed by an order dated 21st February, 2018. Therefore, this order of 9th February, 2018 has attained finality.

4. In view of the above, the petition is disposed off with following observations that in the operative part of the order dated 16th December, 2017 "Office Premises at 401, 4th floor" be substituted to be read as "Office Premises at 301, 3rd floor". Rest of the order impugned remains unaltered.

5. Petition disposed.

6. Consequently, all Interim Applications / Notices of Motion pending in this petition stand disposed off.

7. Mr. Tungare, appearing for Resolution Professional of respondent no.2 states that if any documents are required to be executed or corrective steps are required to be taken to secure the interest of respondent no.1 – bank in Office Premises No.301, the Resolution Professional shall execute all such documents / take corrective steps. Submission accepted as an undertaking to this Court.

8. In view of the above, Mr. Bamne states that respondent no.1 have no right, title and interest or charge in Office Premises No.401. Mr. Ankhad states that petitioners also have no right, title and interest or charge in Office Premises No.301. Statements accepted.

9. As regards Office Premise No.301 which is in the possession of the Court Receiver of this Court, Mr. Joshi, states that respondent no.3 has claim against the premises and he has terminated the agreement with respondent no.2. Mr. Tungare, appearing for Resolution Professional of respondent no.2 disagrees. Respondent no.3 is at liberty to take such proceedings as advised in accordance with law before the appropriate forum. The Court Receiver shall handover possession of Office Premises No.301 based on the orders passed by the appropriate forum. All rights and contentions are kept open.

(PRITHVIRAJ K. CHAVAN, J.) **(K.R. SHRIRAM, J.)**