IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2125 OF 2023

Leela Trade Link Pvt Ltd ..Petitioner

Versus

Punjab National Bank & Ors ..Respondents

Mr.Venkatesh Dhond, Senior Advocate*, with Mr.Shyam Kapadia, Dhruva Gandhi, Prashant Ashar, Naishad Bhatia, Rajendra Bothre, Saakshat Relekar, Siddharth Manek i/b Crawford Bayley & Co, Advocates for the Petitioner*

Mr.Siddharth Samantaray, *with Ms.H. Desai i/b Singhvi & Co, Advocates for Respondent No.1.*

Mr.Ziyad Madon *i/b Kruti Bhawsar, Advocates for Respondent No.2.*

Mr. R. A. Shaikh *with Hasan Sayed, Deepak Jamsandekar, Advocates for Respondent No.3.*

CORAM : B. P. COLABAWALLA, J &
M. M. SATHAYE, JJ.
DATE : SEPTEMBER 7, 2023

P.C.

1. This Writ Petition is filed by Leela Trade Link Pvt. Ltd., seeking a Writ of Mandamus against Respondent No.1 to handover peaceful and uninterrupted possession of the property which has been described in paragraph 2 of the

Petition, and to take all necessary steps including the removal of all encroachments, trespassers and obstructionists, before doing so. This property has been described in the Petition as the "***subject property***".

2. Mr.Dhond, the learned Senior Counsel appearing on behalf of the Petitioner, has submitted that pursuant to an auction notice dated 5th December 2022, the Petitioner emerged as the successful auction purchaser in an auction conducted under the provisions of the SARFAESI Act, 2002. This auction was conducted on 28th December 2022, and the Petitioner paid the entire sale consideration in various tranches by 23rd March 2023. He has further submitted that as on the date of the auction, Respondent No.1 Bank did not have physical possession of the subject property. Thereafter, the Bank addressed at least three different emails to the Petitioner on 12th January 2023, 24th March 2023 and 15th April 2023 stating that a date for taking over physical possession had been scheduled. On each occasion, the Petitioner was asked to keep their representatives present at site to take over physical possession. However, each one of these attempts failed.

3. Mr. Dhond thereafter submitted that on 12th June 2023, the Respondent No.1 Bank addressed an email to the Petitioner asking the Petitioner to visit its office on the next day for handling over the keys of the subject property. On this occasion, the Petitioner was not asked to visit the subject property to take physical possession. However, he submitted that when the Petitioner visited the subject property, the Petitioner found that it had been encroached upon by several individuals who appeared to have political connections and/or influences. In this regard, Mr. Dhond drew our attention to the photographs annexed at page 86 of the Writ Petition. He submitted that in light of these photographs, it is apparent that it is nearly impossible to take peaceful physical possession of the subject property. It is impossible, he submitted, to even enter upon the subject property.

4. Mr. Dhond submitted that further correspondence was exchanged between the Petitioner and the Respondent No.1 Bank as regards these encroachments and trespassers. However, the 1st Respondent Bank failed to take any steps to evict these trespassers and to remove the encroachments

from the subject property. Hence, the Petitioner had to file this Writ Petition.

5. We must mention that when this matter first came up before us on 24th July 2023, Respondent No.3, who is claimed to be the primary encroacher/trespasser, had not appeared. Therefore, the Registry was directed to issue notice to Respondent No.3, returnable on 7th August, 2023. Respondent No.3 entered appearance on 7th August 2023, and filed an Affidavit in Reply on 19th August 2023. Mr. Dhond took us through various averments in this Affidavit and submitted that it appears that Respondent No.3 has outstanding dues to the tune of Rs.1,90,08,500/- from Respondent No.2 (the borrower of the 1st Respondent Bank) for the supply of certain raw materials, and that Respondent No.2 apparently issued certain post dated cheques to Respondent No.3 towards these dues. However, when one sees the cheques annexed at page 216 of the Affidavit in Reply, they are undated, and not post-dated.

6. Mr. Dhond also drew our attention to a document styled as a Memorandum of Understanding, which is annexed at page

218 of Respondent No.3's Affidavit in Reply. It was Mr. Dhond's submission that this document arouses suspicion, to say the least. When one sees the first paragraph at page 218A, it appears that Respondent No. 2 had allotted three rooms in the subject property to Respondent No.3 for a sum of Rs. 60,00,000/-. Interestingly, this allotment increased the dues outstanding from Respondent No.2 to a sum of Rs. 2,50,00,000/-. Not only that, under this document, the possession of the entire building was handed over to Respondent No.3, and Respondent No.3 was entitled to retain possession thereof till the alleged sum of Rs. 2,50,00,000/- was paid by Respondent No.2 to Respondent No.3. An entity who was allegedly allotted three rooms was thus said to have been given possession of the entire hotel. It is Mr. Dhond's submission that Respondent Nos.2 & 3 are either colluding with one another, or that Respondent No.3 has, without any basis, claimed an encumbrance in its favour.

7. We have then heard Mr. Samantaray, the learned Counsel appearing for the Respondent No.1 Bank. He submitted that while various attempts were made by the Bank to obtain

physical possession of the subject property, the Bank faced resistance from local strongmen who would not permit the officers concerned to enter upon the subject property. He thereafter stated that Respondent No.1 Bank eventually obtained physical possession of the subject property on 8th June 2023, and that the photographs which are annexed to the Writ Petition only evidence encroachments / obstructions outside the property. They do not establish that Respondent No.1 Bank was not in physical possession of the subject property. As far as the contents of the Affidavit in Reply filed by the Respondent No.3 are concerned, the learned Counsel submitted that a mortgage has been created in favour of the Bank as far back as 21.07.2016, and that no valid encumbrance could therefore have been created by the alleged Memorandum of Understanding annexed at Exhibit “B” to the Affidavit in Reply of Respondent No.3.

8. We have thereafter heard Mr. Shaikh, the learned Counsel appearing on behalf of Respondent No.3. He has submitted that Respondent No.3 has supplied various raw materials for the construction of the hotel which has now been purchased by the Petitioner in the SARFAESI Auction.

However, Respondent No.2 has not cleared its dues. A sum of nearly Rs. 1,90,00,000/- is due and payable by Respondent No.2 to Respondent No.3. He submits that since these dues have not been paid, Respondent No.3 has prevented access to the subject property. He also submitted that several of Respondent No.3's machinery are lying inside the subject property, and that Respondent No.3 must be entitled to remove the same. When we inquired from the learned Counsel as to how an encumbrance could be created over the subject property only because some operational dues were outstanding, he fairly stated that as long as its rights and contentions with respect to the recovery of sums payable to it by Respondent No.2 were left open, and as long as Respondent No.3 would be allowed to remove the machinery from the subject property, it would not prevent the Petitioner's access to the subject property and would create no hindrance.

9. Lastly, Mr. Madon, the learned Counsel appearing on behalf of Respondent No.2, i.e. the Borrower, tried to feebly argue that we must hold our hands in this Writ Petition because an Application has been filed against the borrower under

Sections 94 & 95 of the Insolvency & Bankruptcy Code, 2016 against one of the partners of the Respondent No.2 Firm, and thus, there is an interim moratorium in force.

10. In response to this contention by Respondent No.2, Mr. Samantaray, appearing on behalf of Respondent No.1, has drawn our attention to Writ Petition (L) No. 15154 of 2023. He submits that the ground urged by Respondent No.2 in that Writ Petition was identical. Even in that Writ Petition, Respondent No.2 had argued that a moratorium as contemplated under Sections 95 and 96 of the IBC, 2016 had kicked in, and that Respondent No.1 Bank ought to be restrained from taking physical possession of the subject property. When that Writ Petition came up before this Court on 8th June 2023, and was heard for some time, the advocates appearing for Respondent No.2 sought leave to withdraw the same. Respondent No.2 therefore cannot now canvass the same submission in this Writ Petition.

11. We have heard the learned Counsel appearing on behalf of the parties and have perused the papers. Certain facts in this matter are undisputed. It is not in dispute that the

Petitioner emerged as the successful auction purchaser in the auction conducted on 28th December 2022 under the provisions of the SARFAESI Act, 2002. It is also not in dispute that the Petitioner has deposited the entire sale consideration of Rs. 22,39,00,000/- with the Respondent No.1 Bank. In light of these facts, we are of the view that it only follows, as a matter of sequitur, that the Petitioner is entitled to peaceful and vacant possession of the subject property.

12. From the photographs annexed to the Writ Petition, it does appear to us that certain temporary structures / sheds have been erected outside the subject property, and that certain individuals have been stationed outside the subject property to block access, and to prevent a peaceful enjoyment of the property. We are not impressed with the submission made by the learned Counsel appearing on behalf of the Respondent No.1 Bank that while the Bank has obtained physical possession of the subject property, the encroachments, if any, are only outside the premises of that property. This submission cannot be entertained for the simple reason that an auction purchaser cannot be told that

he must take the keys to the property he has purchased, irrespective of whether or not he can actually access that property. This is all the more so when physical possession of the auctioned property has been obtained by the bank itself after the completion of the auction. This would be most unfair, and would defeat the entire purpose of purchasing a property in a SARFAESI auction. Matters would have been different if the encroachments/obstructions existed even before the auction was conducted, and if therefore, the auction purchaser had full and complete notice of the obstructions / trespass /encroachments.

13. Given the scheme of SARFAESI, it is certainly the responsibility of the bank concerned to ensure that all obstructionists who were preventing access to the auctioned property are removed / evicted before physical possession is handed over to an auction purchaser. It is only then that vacant, peaceful and unhindered possession can be handed over. Needless to state, the bank's duty only extends to such obstructionists / trespassers who present themselves during such time when the Bank is in constructive / physical possession of the auctioned property. We must not be

understood to have said that the bank has a never-ending duty.

14. In the present case, it appears to us that Respondent No.3 and his employees/agents have either trespassed on to the subject property, or have prevented peaceful access to that property after the Petitioner purchased the subject property but before physical possession was handed over to it by the 1st Respondent Bank. While Respondent No.3 has relied upon a document styled as a Memorandum of Understanding (annexed at Exhibit B to its Affidavit in Reply), in light of the fair stand taken by the learned Counsel appearing on behalf of Respondent No.3, at the present juncture, we do not deem it necessary to comment on the validity of this document.

15. As far as opposition of Respondent No.2 is concerned, the submission made by the learned counsel appearing on behalf of Respondent No.1 are indeed meritorious. From the record it appears that the argument of Respondent No.2 that no possession ought to be taken or no SARFAESI action could be initiated or proceeded with, was canvassed by

Respondent No.2 herein before the DRT in TSA No.512 of 2022. The DRT by its order dated 1st February, 2023 read with the order dated 27th March, 2023 rejected the aforesaid contention. This was thereafter challenged by filing Writ Petition No.5341 of 2023 in this Court. That Writ Petition was disposed of as withdrawn by order dated 17th April, 2023. We must mention that, it was withdrawn keeping all contentions of parties open. Thereafter, the DRT by its order dated 17th April, 2023 [in TSA No.512 of 2022] once again considered the arguments regarding moratorium and rejected the same. That also was inter alia subjected to a challenge by filing Writ Petition (L) No.15154 of 2023. This Writ Petition, after being heard for some time, was permitted to be withdrawn by Respondent No.2 with liberty to adopt appropriate proceedings. In any event, we are informed that as on date the orders of the DRT rejecting Respondent No.2's argument regarding the existence of a moratorium have been challenged before the DRAT. Those orders are yet not set aside. In these circumstances, we cannot today consider Respondent No.2's submission regarding the existence of a moratorium. Needless to state that no opinion has been expressed in this order as to the merits of this argument which may be considered by DRAT in the Appeals pending before it, if any.

16. In these circumstances, we hereby direct Respondent No.1 and Respondent No.3 to remove every single structure and/or shed and/or poster and/or banner and/or obstacle which may prevent access to the subject property (as defined in paragraph 2 of the Writ Petition) within a period of 7 days from today. Respondent No.3 must ensure that no employee /agent /contractor of Respondent No. 3 must obstruct / prevent the Petitioner and/or its representatives from accessing the subject property. Respondent No. 1 is thereafter directed to hand over physical possession of the subject property to the Petitioner. If for any reason, Respondent No.3 does not comply with the directions given hereinabove, the 1st Respondent Bank shall ensure that Respondent No.3 shall remove every single structure and/or shed, and/or poster, and/or banner and/or obstacle which may prevent access to the subject property, and for this purpose, shall seek assistance from the local Police Station in Lonavala. If the said Police Station is approached by the bank for ensuring compliance of this order, the Senior

Police Inspector of the said local Police Station shall give all necessary assistance to the 1st Respondent bank [including deputing adequate number of Police personnel] for ensuring compliance of this order, failing which the said Senior Police Inspector shall be liable for contempt of this order. The said local Police Station shall act immediately, once it is approached by the 1st Respondent bank seeking compliance of this order.

17. Lastly, we are in agreement with the submission made by Mr. Shaikh, the learned Counsel appearing on behalf of Respondent No.3 regarding removal of his machinery. We accordingly direct that Respondent No.3 must be allowed to remove its machinery, which is currently lying inside the subject property, within a period of three days from the date of quiet, vacant and peaceful possession of the subject property being handed over to the Petitioner. At this juncture, we are informed by the learned Counsel appearing on behalf of Respondent No. 1 Bank that the bank has prepared a panchnama dated 08.06.2023, while taking possession. We direct that Respondent No.3 must be permitted to remove such of its machinery as has been

identified in this panchnama on an "as is where is basis" and "as is what is" basis. Furthermore, the rights and contentions of Respondent No.3 with regards to his claim against Respondent No. 2 is concerned, the same is expressly kept open and he shall be at liberty to adopt appropriate legal proceedings (against Respondent No.2) available to him in accordance with law. We clarify that we have not opined one way or the other on the merits of the said claim.

18. The Writ Petition is disposed of in the above terms. However, there shall be no order as to costs.

19. Though we have disposed of the above Writ Petition, we place in on board on 21st September, 2023 for reporting compliance.

20. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[M. M. SATHAYE, J.] **[B. P. COLABAWALLA, J].**