

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

MONDAY, THE 10TH DAY OF AUGUST 2015/19TH SRAVANA, 1937

OP(C).No. 1538 of 2015 (O)

O.S.NO.846 OF 2011 OF III ADDITIONAL SUB COURT, ERNAKULAM

PETITIONER(S) :

**THE FEDERAL BANK LTD.,
REGISTERED OFFICE AND HEAD OFFICE, ALUVA-683 101, KERALA,
REPRESENTED BY ITS CHAIRMAN & MANAGING DIRECTOR.`**

**BY SRI.K.K.CHANDRAN PILLAI (SENIOR ADVOCATE)
ADVS. SRI.ARUN ANTONY
SMT.S.AMBILY**

RESPONDENT(S) :

**DR.VARGHESE MUNDACKAL,
FROM MUNDACKAL HOUSE, KARINGAZHA, KOTHAMANGALAM,
PERMANENTLY RESIDING AT SWITZERLAND, P.B.NO.176,
ENSISHERIRMER STYR.21, 4012BASEL (SWITZERLAND).**

**BY ADV. DR.VINCENT PANIKULANGARA
BY DR.VARGHESE MUNDACKAL (PARTY-IN-PERSON)**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 10-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

APPENDIX

PETITIONER(S)' EXHIBITS :

- P1: COPY OF I.A.NO.998/14 IN O.S.NO.846/11 OF THE SUB COURT, ERNAKULAM.**
- P2: COPY OF OBJECTIONS FILED TO EXT.P1 DATED 25.03.2014.**
- P3: COPY OF REPLY STATEMENT FILED JOINTLY BY DEFENDANTS 1 TO 4 IN O.A.NO.46/99 BEFORE THE DRT,ERNAKULAM.**
- P4: COPY OF FINAL ORDER DATED 15.11.2001 IN O.S.NO.46/99 OF THE DRT, ERNAKULAM.**
- P5: COPY OF THE DOCUMENT SHOWING SENDING OF MAIL MESSAGE TO THE PLAINTIFF IN O.S.NO.846/11.**
- P6: COPY OF RELEVANT PORTION OF THE PUBLICATION OF NOTICE IN INDIAN EXPRESS DAILY DATED 15.12.2006.**
- P7: COPY OF THE NOTICE PREPARED FOR PUBLICATION IN MATHRUBHUMI DAILY DATED 16.01.2007.**
- P8: COPY OF RELEVANT PORTION OF THE PUBLICATION IN THE DEEPIKA DAILY DATED 20.01.2007.**
- P8(A): COPY OF THE RELEVANT PORTION OF THE PUBLICATION IN THE HINDU DAILY DATED 20.01.2007.**
- P9: COPY OF DIRECTION ISSUED BY THE DISTRICT COLLECTOR, ERNAKULAM DATED 06.03.2008.**
- P10: COPY OF DIRECTION ISSUED BY THE DISTRICT COLLECTOR ERNAKULAM DATED 06.03.2008.**
- P11: COPY OF THE MAHAZAR PREPARED BY THE REVENUE OFFICIALS AT THE TIME OF TAKING POSSESSION OF THE SECURED ASSET DATED 20.09.2008.**
- P12: COPY OF THE JUDGMENT IN W.P(C).NO.34915/08 DATED 30.01.2009 OF THIS HON'BLE COURT.**
- P13: COPY OF THE JUDGMENT IN WRIT APPEAL NO.405/09 DATED 24.02.2009 OF THIS HON'BLE COURT.**
- P14: COPY OF THE ORDER DATED 31.03.2009 IN O.S.NO.353/2009 THE MUNSIFF'S COURT, ERNAKULAM.**
- P15: COPY OF I.A.NO.8873/2014 IN O.S.NO.353/2009 FILED BY THE RESPONDENT HEREIN BEFORE THE MUNSIFF'S COURT ERNAKULAM.**

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- P16: COPY OF I.A.NO.5335/2014 IN A.S.NO.189/2009 FILED BY THE RESPONDENT HEREIN BEFORE THE DISTRICT COURT, ERNAKULAM.**
- P17: COPY OF THE INTERIM ORDER IN W.P(C).NO.7698/09 DATED 17.03.2009 OF THIS HON'BLE COURT.**
- P18: COPY OF THE INTERIM ORDER DATED 31.03.2011 PASSED BY THE DRT ERNAKULAM.**
- P19: COPY OF THE COUNTER AFFIDAVIT FILED BY THE BANK IN I.A.NO.830/11 IN THE UNREGISTERED S.A.**
- P20: COPY OF THE RELIEF PORTION OF S.A.NO.109/2015 FILED BY THE RESPONDENT HEREIN BEFORE THE DRT ERNAKULAM.**
- P21: COPY OF THE RELIEF PORTION OF THE SUIT O.S.NO.846/2011 FILED BY THE RESPONDENT HEREIN BEFORE THE SUB COURT, ERNAKULAM.**
- P22: COPY OF THE WRITTEN STATEMENT FILED BY DEFENDANTS IN O.S.NO.846/2011.**
- P23: COPY OF I.A.NO.5130/2013 FILED IN O.S.NO.846/2011 DATED 04.11.2013.**
- P24: COPY OF COUNTER AFFIDAVIT FILED BY THE RESPONDENT TO EXT.P23 DATED 20.11.2013.**
- P25: COPY OF THE COUNTER AFFIDAVIT FILED BY THE 9TH DEFENDANT TO EXT.P23, DATED 27.01.2014.**
- P26: COPY OF I.A.NO.1741/2013 FILED BY THE PLAINTIFF IN O.S.NO.846/2011 DATED 12.03.2015.**
- P27: COPY OF THE COUNTER AFFIDAVIT FILED BY THE BANK TO EXT.P26 DATED 22.06.2013.**
- P28: COPY OF I.A.NO.4083/2014 FILED IN EXT.P26 PETITION BY THE PLAINTIFF.**
- P29: COPY OF THE ORDER DATED 27.02.2015 IN I.A.NO.998/2014 PASSED BY THE SUB COURT ERNAKULAM.**

RESPONDENT(S)' EXHIBITS :

- EXHIBIT R1(A): TRUE COPY OF THE ORDER DATED 27.02.2015 IN I.A.NO.998/2014 IN O.S.NO.846/2011 BEFORE THE SUB COURT, ERNAKULAM (EXT.P29).**
- EXHIBIT R1(B); TRUE COPY OF THE AFFIDAVIT OF SARASWATHI AND PETITION DATED 22.2013 IN I.A.NO.5130/2013 IN O.S.NO.846/2011 BEFORE THE 3RD ALL.SUB COURT, ERNAKULAM RAISING QUESTION MAINTAINABILITY AND JURISDICTION (EXT.P29).**

- EXHIBIT R1(C): TRUE COPY OF THE PLAINT IN O.S.NO.846/2011 OF DR.VARGHESE MUNDACKAL (PLAINTIFF)BEFORE THE SUB COURT, ERNAKULAM.
- EXHIBIT R1(D): TRUE COPY OF THE ORDER DATED 07.10.2011 IN THE “UNNUMBERED CASE” (WHICH WAS LATER NUMBERED AS AS O.S.NO.846/2011 BEFORE THE SUB COURT, ERNAKULAM.
- EXHIBIT R1(E): TRUE COPY OF THE “STATEMENT” FILED BY THE COUNSEL FOR THE 1ST DEFENDANT IN O.S.NO.846/2011 BEFORE THE SUB COURT, ERNAKULAM INSTEAD OF WRITTEN STATEMENT AND WITHOUT OBTAINING ANY SIGNATURE AND VERIFICATION OF THE 1ST DEFENDANT.
- EXHIBIT R1(F): TRUE COPY OF THE OBJECTION DATED 14.06.2012 AGAINST THE “STATEMENT” FILED BY THE PLAINTIFF IN O.S.NO.846/2011.
- EXHIBIT R1(G): TRUE COPY OF THE COUNTER AFFIDAVIT DATED 24.01.2014 OF THE PLAINTIFF (RESPONDENT HEREIN) IN I.A.NO.5130/2013 IN O.S.NO.846/2011 BEFORE THE SUB COURT, ERNAKULAM.

//TRUE COPY//

PA.TO JUDGE.

Msd.

B. KEMAL PASHA, J.

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O.P.(C) No.1538 of 2015
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Dated this the 10th day of August, 2015

J U D G M E N T

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Ext.P29 order passed by the court below on Ext.P1 IA is under challenge. Ext.P1 IA has been filed by the plaintiff in the suit as petitioner, seeking the production of a series of documents allegedly relating to the proceedings under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act') initiated by the petitioner herein, the Federal Bank Limited. It seems that SARFAESI proceedings were initiated by the Bank through notice dated 15.12.2006 allegedly issued by the Bank under Section 13(2) of the SARFAESI Act. According

to the Bank, as the said notice could not be served properly, it was published as notice dated 16.01.2007, in newspaper dated 20.01.2007. Copies of such notice dated 16.01.2007 are Ext.P8 as well as Ext.P8(a).

2. According to the plaintiff, there was no valid notice as contemplated under Section 13(2) of the SARFAESI Act as notice dated 15.12.2006 was not properly served and over and above it, the other notice dated 16.01.2007 cannot be treated as the publication of notice dated 15.12.2006. According to the petitioner, the notice was served on the plaintiff through e-mail on 15.12.2006 itself. Ext.P5 shows the delivery status of the said notice, which reveals that the same was delivered in the said e-mail address.

3. The suit is filed by Dr.Varghese Mundackal, who is the sole respondent herein, as plaintiff. It has been filed by the plaintiff in his personal capacity as is shown in his address in the plaint. It was in that capacity he has filed

Ext.P1 IA also before the court below. Relief 'A' sought for in the suit is the following:-

“A decree declaring that all the measures initiated by defendants 1 to 4 (Federal Bank) under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act - for short) and all or any of the actions taken by defendants 1 to 5 to recover the loan amount claimed in O.A.No.46/1999, before the Hon'ble Debt Recovery Tribunal, Ernakulam, are illegal by misapplication of SARFAESI Act and hence null and void, non est and also not binding on the Plaintiff as well as the 9th defendant M/s.Emtex International Ltd., its directors, its guarantors or any other person in any manner and on the strength of SARFAESI Act or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and to grant a consequential injunction restraining defendants 1 to 8 and their men from doing any acts or acts; if any, in the pretext of any proceedings under SARFAESI Act, 2002 & Rules or DRT Act, to recover any amount as debt from the Plaintiff or from the 9th defendant or its assets or from the guarantors or any of their assets including from the

plaint schedule properties.”

Essentially, on going through the reliefs sought for, it seems that what has been sought for is a decree declaring the SARFAESI proceedings initiated as one null and void, etc.

4. Petitioner has filed Ext.P23 IA No.5130/2013 before the court below challenging the maintainability of the suit before the court below as well as the jurisdiction of the court below to try the said suit. Through Ext.P23, the petitioner has prayed for the framing of issues of maintainability as well as jurisdiction as preliminary issues and for getting the same decided as preliminary issues. Ext.P24 counter has been filed by the plaintiff as against Ext.P23. Even then, the court below has not cared to pass an order on Ext.P23 IA.

5. Heard Sri.K.K.Chandran Pillai, learned Senior Counsel for the petitioner and Dr.Varghese Mundackal, who is the party in person, and his learned counsel Sri. Vincent Panikulangara.

6. According to the learned Senior Counsel for the petitioner, the court below ought to have disposed of Ext.P23 IA at first when the written statement has been filed by challenging the question of maintainability and also the jurisdiction of the court below to decide the said suit. According to the learned Senior Counsel, such a contention was specifically taken up by the petitioner before the court below and has requested the court below to raise those questions as preliminary issues for having a decision on it at the earliest. It has been pointed out that in case the court below decides that the suit is hit by Section 34 of the SARFAESI Act and on other grounds and the suit is not maintainable, the other IAs need not be considered at all and in such case, the court below ought to have decided the matters requested for in Ext.P23 IA at first before entering a decision on any of the other IAs filed in the suit.

7. It seems that without adverting to any of those aspects as requested for in Ext.P23 IA, the court below has

passed Ext.P29 order. Further, it seems that in Ext.P29, the court below has made an observation that no counter was filed by the petitioner as against Ext.P1 IA. The said observation is incorrect as the petitioner had filed Ext.P2 objections dated 25.03.2014. It has been pointed out that the same was filed before the court below and the court below has entered the filing of Ext.P2 in the concerned registers. It seems that Ext.P29 has been passed by the court below by considering as if no objection was filed by the petitioner as against Ext.P1.

8. When the maintainability of the suit as well as the jurisdiction of the court below to entertain the suit are seriously in question on the basis of Section 34 of the SARFAESI Act and on other matters, the court below ought to have decided the said question. The records, on which the plaintiff is claiming that the suit is maintainable, are available before court. The plaintiff is relying on notice dated 15.12.2006 as well as the other notice dated 16.01.2007.

Those facts are not denied also. The court below ought to have raised the question of maintainability of the suit as well as the jurisdiction of the court below to entertain the suit as preliminary issues and ought to have heard and decided those issues prior to the passing of Ext.P29. Apart from that, for passing Ext.P29, the court below has not adverted to the contentions resorted to in Ext.P2 objections filed by the petitioner herein. Matters being so, Ext.P29 is liable to be set aside.

In the result, this O.P.(Civil) is allowed and the court below is directed to raise issues with regard to the maintainability of the suit as well as the jurisdiction of the court below to entertain the suit, as preliminary issues and enter a finding on those issues after hearing both sides. If the suit is found to be maintainable and it is found that the court below has jurisdiction to entertain the suit, then, the court below has to proceed to pass an order on Ext.P1 by considering Ext.P2 objections also and by giving an

opportunity of being heard to both sides. It is made clear that this Court has not expressed any opinion with regard to the maintainability of the suit or jurisdiction of the court below.

Sd/-
(B.KEMAL PASHA, JUDGE)

aks/11/08

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PA to Judge