IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 6TH DAY OF MARCH 2015/15TH PHALGUNA, 1936

WP(C).No. 2564 of 2015 (U)

PETITIONER :

RAJESH R.R. AGED 20 YEARS
S/O.RAJAN, 20, RAJ NIVAS
KOLLAMKAVU, VELLARIKONAM, PAZHAKUTTY P.O.
THIRUVANANTHAPURAM-695561.

BY ADVS.SRI.H.HAMZA ROWTHER
SRI.V.K.PEERMOHAMED KHAN
SRI.H.SUNIL

RESPONDENT :

INDIAN OVERSEAS BANK
REPRESENTED BY ITS AUTHORISED OFFICER,
VATTIYOORKAVU BRANCH, THIRUVANANTHAPURAM-695013.

R1 BY ADV. SRI.LEO GEORGE,SC,INDIAN OVERSEAS BANK

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION ON 06-03-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

bp

WP(C).No. 2564 of 2015 (U)

APPENDIX

PETITIONER'S EXHIBITS :

P1: COPY OF THE TREATMENT CERTIFICATE ISSUED FROM SREE GOKULAM MEDICAL COLLEGE, THIRUTRIVANDRUM.

P2: COPY OF THE APPLICATION FILED BEFORE THE CJM COURT, THIRUVANANTHAPURAM.

P3: COPY OF THE ORDER PASSED BY THE CJM COURT, THIRUTRIVANDRUM.

RESPONDENT'S EXHIBITS & ANNEXURES :

ANNEXURE R1(a): POSTAL RECEIPT DT 3/9/2014 EVIDENCING DESPATCH OF DEMAND NOTICE DT 30/8/2014 TO THE PETITIONER.

ANNEXURE R1(b): COMMUNICATION ISSUED BY THE SUPERINTENDENT OF POST, OFFICE OF THE SUPERINTENDENT OF POST OFFICES, THIRUTRIVANDRUM SOUTH DIVISION DT 26/2/2015.

ANNEXURE R1(c): PROOF OF DELIVERY COMMUNICATED TO THE RESPONDENT ALONG WITH ANNEXURE R1(b): DATED NIL.

//TRUE COPY//

P.A. TO JUDGE

bp

A.K.JAYASANKARAN NAMBIAR, J.

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W.P.(C).No.2564 of 2015

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Dated this the 6th day of March, 2015

J U D G M E N T

The petitioner who had availed of a loan from the respondent bank and had defaulted in repayment of the loan amounts, is aggrieved by the steps taken by the respondent bank under the Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as the 'SARFAESI Act', for recovery of the loan amounts. In the writ petition, the petitioner impugns Ext.P3 order passed by the Court of Chief Judicial Magistrate, Thiruvananthapuram, whereby the Chief Judicial Magistrate has, acting in accordance with Section 14 of the SARFAESI Act, appointed an Advocate Commissioner to take possession of the secured asset and hand it over to the respondent bank, at whose instance the application under Section 14 was preferred before the said Magistrate. In the writ petition, the grievance of the petitioner is that the respondent bank had not, in the application filed before the Magistrate, disclosed the correct factual position with regard to service of notice under Section 13(2) of the SARFAESI Act to the petitioner. It is pointed out that while under the Act and Rules, it was incumbent upon the respondent bank to serve the notice on the petitioner in the manner contemplated therein, the respondent bank had, in its application before the Chief Judicial Magistrate, stated that the notice under Section 13(2) of the SARFAESI Act, that had been sent to the petitioner, was returned unclaimed by the petitioner. Counsel for the petitioner refers to Rule 3 of the Security Interest (Enforcement) Rules, 2002, which clearly states that, even in a situation where the notice that is served on the borrower is returned unclaimed, if the authorised officer had reason to believe that the borrower is avoiding the service of notice, a substituted service in accordance with the provisions of the Act is contemplated. In the instant case, it is not in dispute that there was no substituted service that was resorted to by the respondent bank. It is on the said contention, therefore, that the writ petition has been filed impugning Ext.P3 order of the learned Chief Judicial Magistrate.

2. I have heard Sri.H.Hamsa Rawther, the learned counsel for the petitioner and Sri.Leo George, the learned Standing counsel on behalf of the respondent bank.

3. The learned counsel for the respondent bank would submit that the averments in the application filed before the Chief Judicial Magistrate Court, Thiruvananthapuram, that is relied upon by the

petitioner, was a mistaken one and the respondent bank had in fact served the notice under Section 13 (2) of the Act, on the petitioner borrower. While the said aspect would have to be determined on a factual investigation done by the authorities under the Act, I am of the view that, in the present case, inasmuch as Ext.P3 order of the Chief Judicial Magistrate was based on an affidavit filed by the respondent bank, which contained an incorrect averment in respect of the service of notice under Section 13 (2) to the petitioner, the said order of the Chief Judicial Magistrate, authorising the appointment of an Advocate Commissioner to take possession of the secured assets, cannot be legally sustained.

Resultantly, I quash Ext.P3 order and direct the petitioner to file a fresh affidavit and an application, before the Chief Judicial Magistrate Court, Thiruvananthapuram, if the respondent is desirous of resorting to the provisions of Section 14 for obtaining possession of the secured assets. The writ petition is allowed by quashing Ext.P3 order of the Chief Judicial Magistrate, Thiruvananthapuram.

A.K.JAYASANKARAN NAMBIAR
JUDGE

mns