IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

MONDAY, THE 29TH DAY OF JUNE 2015/8TH ASHADHA, 1937

WP(C).No.9789 of 2010 (W)

PETITIONER:

MUHAMMED ANWAR.K.H.,S/O.HAMSA,
AGED 35 YEARS,AL MUBARAK,KODAMTHURUTHU,
KUTHIATHODE,CHERTHALA,ALAPUZHA.

BY ADVS.SRI.NIDHI BALACHANDRAN
SRI.SABU GEORGE

RESPONDENT'S:
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1. THE AUTHORIZED OFFICER,
STATE BANK OF INDIA,
REGIONAL BUSINESS OFFICE,
BEACH ROAD,ALAPPUZHA.

2. THE MANAGER,STATE BANK OF INDIA,
SOUTH KUTHIATHODU BRANCH,
CHERTHALA,ALAPPUZHA.

3. SOJA PRINCE,KACHAPPILLY HOUSE,
OMALLOOR P.O.,CHALUMMOODU,ALAPPUZHA.

R1 & R2 BY SRI.K.K.CHANDRAN PILLAI (SENIOR S.C)
ADV.SMT.S.AMBILY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 29-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

pk

WP(C).No.9789 of 2010 (W)

APPENDIX

PETITIONER'S EXHIBIT:

EXT.P1:TRUE COPY OF THE NOTICE DATED 20.2.2008 PUBLISHED BY THE 1ST RESPONDENT.

EXT.P2:TRUE COPY OF THE BANKERS CHEQUE DATED 24.3.2008.

EXT.P3:THE TRUE COPY OF THE MINUTES OF THE AUCTION PROCEEDINGS DATED 26.3.2008.

EXT.P4:THE TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN W.P(C) NO.4812/2008.

EXT.P5:THE TRUE COPY OF THE INTERIM ORDER IN W.P(C) NO.4812/2008.

EXT.P6:THE TRUE COPY OF THE LETTER DATED 2.4.2008 ISSUED BY THE 2ND RESPONDENT.

EXT.P7:THE TRUE COPY OF THE ORDER DATED 25.4.2008 IN W.A. NO.954/2008.

EXT.P8:THE TRUE COPY OF THE JUDGMENT IN W.P(C) NO.16431/2008.

EXT.P9:THE TRUE COPY OF THE REPRESENTATION DATED 16.7.2009 FILED BY THE PETITIONER.

EXT.P10:THE TRUE COPY OF THE LETTER DATED 27.8.2009.

EXT.P11:THE TRUE COPY OF THE AFFIDAVIT FILED BY THE 2ND RESPONDENT IN CONT.CASE © NO.76/2010.

EXT.P12:THE TRUE COPY OF THE LETTER DATED 25.8.2009 ISSUED BY THE 1ST RESPONDENT.

EXT.P13:THE TRUE COPY OF THE MINUTES OF THE PERSONAL HEARING CONDUCTED ON 15.9.2009.

EXT.P14:THE TRUE COPY OF THE JUDGMENT IN CONT.CASE © NO.76/2010.

EXT.P15:THE TRUE COPY OF THE LETTER DATED 12.3.2010 ISSUED BY THE 2ND RESPONDENT.

RESPONDENT'S EXHIBITS: NIL

//TRUE COPY//

P.S. TO JUDGE

pk

K. VINOD CHANDRAN, J.

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W.P.(C) No.9789 of 2010 - W

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Dated this the 29th day of June, 2015

J U D G M E N T

The petitioner is aggrieved with Ext.P15 communication issued to the petitioner granting him Rs.25,450/- by way of demand draft, out of the EMD deposit made of Rs.75,000/-. The entire controversy arose with respect to the sale of a property owned by the 3rd respondent, which the 3rd respondent had mortgaged to the 2nd respondent Bank for availing a loan. Default was committed and proceedings were initiated under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act). A sale notice is said to have been issued on 20.02.2008 and an auction conducted as on 26.03.2008, as is evident in Ext.P12, a communication issued by the 2nd respondent Bank. The petitioner participated in the auction on payment of EMD of Rs.75,000/-.

2. Subsequently the petitioner came to know that there was an order obtained by the 3rd respondent from this Court produced at Ext.P4, wherein that respondent, the original borrower was allowed to satisfy the loan in instalments. The petitioner contends that on such order having been obtained by the 3rd respondent, the petitioner did not pay the balance amounts and the petitioner requested the Bank to refund the EMD deposit. The Bank did not refund the EMD deposit. Though further proceedings were taken by the 3rd respondent on default being committed, in the instalments granted at Ext.P4, the 3rd respondent was not successful in his attempt to satisfy the loan amount. The Bank hence again issued sale notice and auctioned the properties.

3. The petitioner was before this Court claiming refund of the amounts remitted as EMD. The same was directed

to be considered by the Bank as per Ext.P8. It was in consideration of the same that Ext.P12 communication was issued, in which the aforesaid facts were stated and it was also noticed that by letter dated 02.04.2008 (Ext.P6), the petitioner was directed to make payment of 25% of the tender amounts on or before 10.04.2008 and on default of which, the Bank would be forced to take further sale proceedings. Hence, the Bank by Ext.P12 expressed its willingness to refund the balance amounts after adjusting the amounts additionally expended by the Bank in the second sale. It has to be found that, by Ext.P12 itself the Bank had resiled from its earlier decision to forfeit the amounts deposited as EMD. What remains now is only the consideration whether the Bank could defray the expenses for the second sale from the petitioner's EMD.

4. Ext.P4 is a judgment in a writ petition filed by the 3rd respondent, wherein he was granted time to pay off the instalments. The judgment was passed on 26.02.2008 and the

borrower who was the petitioner therein was granted three weeks to deposit Rs.3,00,000/- and the balance in six monthly instalments. The proceedings for sale was also deferred. The Bank had appeared through Counsel and was aware of the said judgment. The Bank presumably conducted the auction on 25.03.2008, since the borrower did not make the deposit as directed in Ext.P4 and the time granted too had expired. The specific contention in Ext.P12 by the respondent Bank is that they had granted time up to 10.04.2008 to the petitioner, for paying the balance amounts as per his bid. However it is to be noticed that the proceedings initiated by the the 3rd respondent continued even subsequently, before this Court.

5. A further extension was granted by Ext.P5 to the 3rd respondent on 27.03.2008. The extension granted as per Ext.P5, was also not complied with and the 3rd respondent filed an appeal from Ext.P4, which is indicated at Ext.P7. The first instalment of Rs.3,00,000/- as per Ext.P4, was subsequently paid

by the 3rd respondent. By Ext.P7 order passed on 25.04.2008, the 3rd respondent was granted further time, after noticing the payment of Rs.3,00,000/-.

6. The contention of the Bank that the petitioner was granted time upto 10.04.2008 to pay off the balance amounts hence cannot be countenanced. No prudent man would pay the balance amounts in circumstances in which the original borrower had obtained orders extending the time for payment of the amounts. The sale proceedings were kept in abeyance and there was absolute uncertainty in the confirmation being effected. Due to the uncertainty in getting the bid confirmed in his name, the petitioner's prayer for return of the EMD was only proper. The Bank's decision at Ext.P12 to defray the expenses for the second sale from the EMD made by the petitioner, cannot be sustained. Especially since the second sale was necessitated by the conduct essentially of the original borrower, who had challenged the sale before this Court and had obtained orders

keeping the sale in abeyance, on promise of payment of the dues, which were never complied with.

7. It is also to be noticed that the respondent Bank has not filed any counter affidavit in the above writ petition. The learned Senior Counsel appearing for the respondent Bank alleges that there was collusion between the petitioner and the original borrower. However nothing is produced to prove the same nor are the averment in the writ petition controverted with a counter affidavit.

8. The circumstance which led to the second sale being necessitated, was due to the default of the 3rd respondent in complying with the conditions on which the conclusion of sale proceedings were adjourned. The Bank also, at no time informed the petitioner about the proceedings taken by the original borrower. If at all, the Bank could defray the expenses from the borrower. Exts.P12 and P15 shall hence stand set aside. The petitioner shall be entitled to be refunded the entire EMD

amount of Rs.75,000/- with 6% interest from the date of deposit and the interest shall run only for the balance amounts from the date of payment of Rs.25,450/-. The same shall be done within a period of two months from the date of production of the certified copy of this judgment.

The writ petition hence would stand allowed.

Sd/-
K. VINOD CHANDRAN,
JUDGE

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// true copy //

P.A to Judge.